

**CORAM: HER WORSHIP AMA ADOMAKO-KWAKYE (MS.), MAGISTRATE,  
DISTRICT COURT '2', KANESHIE, SITTING AT THE FORMER STOOL LANDS  
BOUNDARIES SETTLEMENT COMMISSION OFFICES NEAR WORKERS'  
COLLEGE, ACCRA ON 22<sup>ND</sup> SEPTEMBER, 2023.**

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**SUIT NO. A8/111/23**

**JOSEPH KOTEY DSANE  
H/NO. 13, OSHIPI STREET  
GA-356-7749**

**BUBUASHIE/KANESHIE**

**::**

**PETITIONER**

**VRS.**

**RITA TANDJAWA  
UNNUMBERED HOUSE  
TOWN COUNCIL LINE**

**NEAR ZONGO JUNCTION, ACCRA**

**::**

**RESPONDENT**

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## **JUDGMENT**

### **INTRODUCTION**

The Petitioner herein instituted this action in this Honourable Court against the Respondent on 19<sup>th</sup> January 2023 praying for the dissolution of the marriage between him and the Respondent. The Respondent responded to the Petition by way of an Answer filed on 27<sup>th</sup> January 2023.

### **PLEADINGS**

According to the Petitioner, the parties, a Trader and Housewife respectively, married on 23<sup>rd</sup> July 2016 at the Principal Registrar of Marriages Office, Accra and cohabited thereafter at Bubuashie, Accra. There are no children of the marriage. It is the Petitioner's case that the marriage between the parties has broken down beyond reconciliation, that the parties have been unable to reconcile their differences and that the Respondent has behaved unreasonably. He averred that the Respondent deserted him in 2017, had denied him conjugal rights since then and they have not stayed as husband and wife since the middle of 2017. The Petitioner averred that reconciliation attempts by relatives, friends and counselors had proved futile and communication between the parties had broken down.

The Respondent also averred that the parties met sometime in the year 2013 and after having courted for about three years, they married. She stated that she performed her wifely duties but the Petitioner's attitude towards her changed a month after marriage. She stated that the Petitioner engaged in extra marital affairs and was disrespectful towards her. She expressed her consent to the dissolution of the marriage.

## **ISSUE**

Whether or not the marriage between the parties has broken down beyond reconciliation.

## **EVALUATION OF EVIDENCE AND LEGAL ANALYSIS**

It is trite that in civil cases, the general rule is that the party who in his/her pleadings or writ raises issues essential to the success of his/her case assumes the onus of proof. The one who alleges, be (s)he a plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when (s)he has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be. Proof lies upon him who affirms or alleges, not upon him who denies since, by the nature of things, he who denies a fact cannot produce any proof. See the following:

**Sections 11(1) & (2), 12(2) and 14 of the Evidence Act, 1975 (NRCD 323)**

**Takoradi Flour Mills vs. Samir Faris [2005-2006] SCGLR 882 @ 900**

**GIHOC Refrigeration & Household vs. Jean Hanna Assi (2005-2006) SCGLR 458**

**Tagoe v. Accra Brewery [2016] 93 GMJ 103 S.C**

**Deliman Oil v. HFC Bank [2016] 92 GMJ 1 C.A.**

**Agbosu v Kotey; In Re Ashalley Botwe Lands [2003 – 2004] SCGLR 420.**

**Section 1(1) of the Matrimonial Causes Act, 1971 (Act 367)** allows either party to a marriage to present a petition to the Court for divorce. **Section 1(2)** of the Act further emphasizes that, the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. In order to prove that a marriage has broken down beyond reconciliation, a Petitioner has the duty of satisfying the Court of the existence of at least one of the six facts specified in section 2(1)(a)-(f) of Act 367. Proof of any one of these facts raises a presumption that the marriage has broken down beyond reconciliation. If any of the facts is made out, the Court must grant the dissolution unless it is satisfied that the marriage has not broken down irretrievably. These facts include the following:

- a. That the respondent has committed adultery and that by reason of such adultery the petitioner finds it intolerable to live with the respondent; or
- b. That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; or
- c. That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or
- d. That the parties to the marriage have not lived as man and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce; provided that such consent shall not be unreasonably withheld, and where the Court is satisfied that

it has been so withheld, the Court may grant a petition for divorce under this paragraph notwithstanding the refusal;

- e. That the parties to the marriage have not lived as man and wife for a continuous period of at least five years immediately preceding the presentation of the petition;  
or
- f. That the parties to the marriage have, after diligent effort, been unable to reconcile their differences.

It is material to point out that although the Court may find the existence of one or more of the facts specified above, the law does not require the Court to decree divorce unless it is satisfied, on all the evidence that the marriage has indeed broken down beyond reconciliation. See the case of **Kotei v. Kotei [1974] 2 GLR 172**.

The parties testified on 25<sup>th</sup> August 2023 by relying on their respective witness statements filed on 13<sup>th</sup> April 2023 and 12<sup>th</sup> April 2023. The Petitioner tendered in evidence the original copy of the parties' marriage to confirm the existence of a marriage relationship between the parties and to also confirm that their marriage was over two years before the presentation of the Petition in line with **Section 9 of Act 367**. It is apparent from Exhibit A1 however that the parties married at the Church of Pentecost and not at the Principal Registrar of Marriages Office as stated by the Petitioner. The law is that documentary evidence ought to be preferred over oral evidence. See the cases of **Adama Seidu & 4 ors v Catholic Graduates [2018] 125 G.M.J. 186 @ 201; Fosua Adu Poku v Dufie (deceased) and Adu Poku Mensah [2009] SCGLR 311** and **Hayfron v Egyir (1984) 1 GLR 682**. I therefore prefer the evidence borne out by the said Exhibit A2.

The Petitioner's evidence was that the Respondent had denied him sex and any conjugal rights and further deserted him since the year 2017. He added that communication between him and the Respondent had broken down and there existed irreconcilable

differences notwithstanding efforts which had been made to assist them settle their disputes. He therefore prayed for the Court to dissolve the marriage.

The Respondent's evidence was also that the Petitioner just a month after marriage, started indulging in extra marital affairs without according her any respect. She testified that the Petitioner made her believe he was working although he was unemployed. She stated that the Petitioner failed to give her money to maintain the home but rather caused a drain on her finances. According to the Respondent, the Petitioner used unprintable words on her at the least provocation and also issued death threats anytime they had disagreements. She stated that there had been unsuccessful reconciliatory attempts made by her relatives and friends.

Desertion has been captured under **section 2(1) (c)** of Act 367. It has been defined under the Act as an unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently. Rayden in the 10<sup>th</sup> Edition of his book, "Divorce" at page 194 has also defined desertion as *"the separation of one spouse from the other with an intention on the part of the deserting spouse to bring cohabitation permanently to an end without reasonable cause and without the consent of the other spouse, but the physical act of departure by one spouse does not necessarily make that spouse the deserting party"*.

Thus, desertion must be looked at from two perspectives, that is, a physical withdrawal from a place and a withdrawal from the state of things. See **Naylor v. Naylor [1961] 2 All.ER 129**. For the Petitioner to establish desertion, he had to prove that there has been an actual separation, an intention to bring cohabitation to an end, lack of consent to the separation by him, want of reasonable excuse on the part of the Respondent and that the separation should have been for a continuous period of at least two years and must exist at the time that the petition was filed. See the case of **Hughes v. Hughes [1973]2 GLR 342**.

It was the case of the Petitioner that the Respondent had deserted him since the middle of the year 2017. From the evidence on record, which evidence is not disputed, the Respondent has left the matrimonial home. There is therefore a factum separation (actual separation) of the parties since sometime in 2017, barely a year after the parties' marriage. The Respondent in leaving had purposed not to return to the matrimonial home and that accounts for why she has not returned since then. Her aim clearly is to end cohabitation (animus deserendi) and it is apparent from the evidence before the Court that this separation was not one with the Respondent's consent.

The Respondent in her evidence however, which stood uncontested, testified that the Petitioner gave her no feeding money but rather depleted her finances, used unsavoury words against her and was fond of threatening to kill her when they had disagreements. None of these assertions were challenged by the Petitioner when his Counsel was cross examining the Respondent. There appears to me therefore reasonable justification for the Respondent vacating the matrimonial home. The Respondent had a duty to herself to protect her life and dignity, hence the step she took to leave the presence of someone who was a threat to her. I find that the Respondent is thus not liable for desertion.

The parties not having lived together since 2017, it does not appear strange that they have had no sexual relationship throughout the period. The parties' marriage has been plagued with irreconcilable differences, and diligent efforts which have been made have not resulted in any positive outcome at reconciling the parties. The Petitioner's evidence that all attempts at reconciling their differences had proven futile was corroborated by the Respondent who testified that reconciliation attempts by her relatives and friends had been unsuccessful.

It is as a result of these differences that they had stayed apart for the about five and a half years prior to the presentation of this Petition. It is not disputed that attempts at reconciliation by family members and friends to salvage the parties' marriage had all been

fruitless. I find that if settlement attempts had been successful and if there were no irreconcilable differences between the parties, they would not have been living apart for about six years now. The Court is satisfied that the marriage between the parties has broken down beyond reconciliation.

## **CONCLUSION**

From the totality of the evidence adduced in the trial by the parties and from all the foregoing, this Court is satisfied that the marriage between the parties has broken down beyond reconciliation. I therefore hold that the marriage celebrated between the parties on 23<sup>rd</sup> July 2016 at the Church of Pentecost, Bethel District is hereby dissolved.

**[SGD]**  
**AMA ADOMAKO-KWAKYE (MS.)**  
**(MAGISTRATE)**

### **Counsel**

**Bliss Nee Amartei, Esq. for the Petitioner.**