CORAM: HER WORSHIP MRS. ANNETTE SOPHIA ESSEL, SITTING AS DISTRICT MAGISTRATE, AMASAMAN DISTRICT COURT "B" ON THE 28th DAY OF OCTOBER, 2023.

SUIT NUMBER: A4/96/23

ALFRED OTENG DAPAAH **PETITIONER**

VRS

VERONICA INKOOM **RESPONDENT**

JUDGMENT

INTRODUCTION:

In the wise words of Nathan R. Sobel J. in the case of Jeffreys v. Jeffreys and Smith 58 Misc. 2d 1045 (N.Y. Sup. Ct. 1968):

> *"The wife has a right to the comfort and support of the husband's society, the security of his home and name, and the first protection of his presence, so far as his position and avocations will admit. Whoever falls short in this regard, if not the author of his own misfortune, is not wholly blameless in the issue; and though he may not have justified his wife, he has so far compromised himself as to forfeit his claim for a divorce."*

This action was commenced with a petition dated 4th January, 2023 at the Registry of this Court. The petitioner prayed for an order for the dissolution of the marriage between parties herein since same had broken down beyond reconciliation.

The petitioner is a teacher by profession. And is resident at Fise in the Ga-West District of the Greater-Accra Region of the Republic of Ghana. The Petitioner is unemployed and resident at Ofankor Hills in the Ga-East District of the Greater Accra Region of the Republic of Ghana. Parties were customary joined in marriage on 9th April, 2005 at Adjumako Besease in the Central Region of Ghana and subsequently converted same to a civil monogamous marriage under the

Marriages Act, 1884 - 1985 (Cap 127 on 10th April 2005 at the Living Light Chapel, Nyamekye – Accra. Parties cohabited at Nyamekye-Lapaz and Fise all suburbs in Accra during the pendency of their union. This marriage though a childless union has parties with three and one child respectively from previous relationships with other persons.

CASE OF THE PETITIONER:

The petitioner has commenced this suit and is praying to this honorable court for a dissolution of their ordinance marriage on grounds of desertion. He claimed that the respondent left their matrimonial home on 18th December, 2020 for a funeral in their hometown; Adjumako Besease in the Central Region of Ghana and had since failed, refused and willfully elected not to return to their matrimonial home without just cause. He stated that since that date all conjugal rights between parties had ceased to date.

CASE OF THE RESPONDENT:

In her response to the petition dated 22nd February, 2023, the respondent stated that she lived in her matrimonial home with the petitioner and her children. Over the period of seventeen (17) years of their marriage, she claimed that the petitioner together with his children behaved very badly towards her. Whenever she reported the conduct of the children to the petitioner in seeking redress, he simply ignored her. She narrated further that the petitioner also refused to impregnate her with explanation that he married her to take care of his children and not to increase/bear more children.

With respect to her desertion of the petitioner she stated that she attended the funeral of a close relative in their hometown where she was suddenly taken ill. Although the petitioner was informed of her ill-health, he took no step to act till her daughter arranged for her to be transported to Accra for medical care.

In seeking medical treatment for her recovery, she narrated that she visited several health facilities and was eventually admitted into hospital for a period of three months (December, 2020 – February, 2021) at the 37 Military Hospital and a further two months (February to March, 2021) for plastic surgery and post recovery treatment. She stated that although the petitioner was regularly updated with her condition, with respect to his support towards her recovery, he left much to be desired. Upon her discharge from hospital, she narrated that she still had follow up hospital visits for over one year and required support. In this regard she opted to stay at Tantra Hills where she could be supported by her daughter and another relative towards her recovery.

She further narrated that when she felt much better and returned to her matrimonial home, she went in the company of her sister and was met with a disappointing arrival. She recounted that the petitioner together with his children verbally assaulted her and poured all sorts of invectives on her, she noticed that her personal belongings had been moved out of the master bedroom which she shared with the petitioner and same dumped in the hall and covered with curtain fabric. The petitioner together with his children then threatened her to leave the house and not return as they could not guarantee her safety if she did not heed to their caution. She stated that she reported this state of affairs to her Head of Family who invited the petitioner to a meeting which same he never heeded.

The respondent stated that during her marriage to the petitioner, they jointly built their four-bedroom matrimonial home at Amasaman in the Ga-West District of the Greater-Accra Region of the Republic of Ghana. She concluded that she was not opposed to the dissolution of their union and counter-claimed for the following:

i. A dissolution of their marriage on grounds of the unreasonable conduct of the petitioner.
ii. An equitable distribution of their matrimonial home at Amasaman.

iii. An alimony of One Hundred Thousand Ghana Cedis (GHC 100,000.00)

iv. Cost.

JURISDICTION:

The court ensured that it had jurisdiction to entertain this matter before allowing parties to lead evidence. **Section 31 and 32 of the Matrimonial Causes Act, 1971 (Act 367**) stipulates that:

31. "The court shall have jurisdiction in any proceedings under this Act where either party to the marriage –

a. Is a citizen of Ghana; or

b. Is domiciled in Ghana; or

c. Has been ordinarily resident in Ghana for at least three years immediately preceding the commencement of the proceedings.

32. For the sole purpose of determining jurisdiction under this Act, the domicile of a married woman shall be determined as if the woman was above the age of twenty-one and not married."

In the case of **Happee v Happee and Another [1974] 2 GLR 186-192**Edusei J. held that

"The court shall have jurisdiction in any proceedings under this Act whether either party to the marriage

(a) is a citizen of Ghana; or

(b) is domiciled in Ghana; or

(c) has been ordinarily resident in Ghana for at least three years immediately preceding the commencement of the proceedings."

PROCEDURE OF TRIAL:

Petitioner was self-represented and the respondent was represented by Counsel. Parties were referred to Court-connected A.D.R to attempt settlement with respect to the ancillary reliefs however same broke down. At the close of

pleadings, the court ordered parties to file their witness statements for purposes of expediency of Hearing. Parties complied with the orders of the court and went through full Hearing. Parties testified by themselves and called no witness in support of their respective cases.

In accordance with **Section 2(2) and 2(3) of the Matrimonial Causes Act, 1971 (Act 367)** on a petition for divorce, the court ought to inquire so far as is reasonable, into the facts alleged by Petitioner and Respondent to satisfy itself on all the evidence that the marriage between the parties has indeed broken down beyond reconciliation. **Section 2(2) and Section 2(3) of the Matrimonial Causes Act, 1971 (Act 367)** provides as follows:

> 2 *(2) On a petition for divorce the Court shall inquire, so far as is reasonable, into the facts alleged by the petitioner and the respondent.*
>
> *(3) Although the Court finds the existence of one or more of the facts specified in subsection (1), the Court shall not grant a petition for divorce unless it is satisfied, on all the evidence, that the marriage has broken down beyond reconciliation."*

In the case of **Mariam Partey v Williams Partey [2014] 71 GMJ 98 C.A at pages 119 – 120** the sapient words of Kusi Appiah JA. was that:

> *"The only procedure prescribed by law for the dissolution of marriages by the court is provided by Section 2(2) and (3) of Act 367, that the court must inquire into and satisfied on all the evidence led before it that indeed the marriage has broken down beyond reconciliation."*

In the case of **Ansah v Ansah [1982 – 83] GLR 1127 – 1133** Owusu Addo J. held that:

> *"I must first of all emphasize that the standard of proof required by law in proof of breakdown of a marriage beyond reconciliation, is the same whether the marriage was solemnized in a church or not."*

ISSUES FOR DETERMINATION:

At the close of Hearing, the issues set for determination by the Court were as follows:

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

b. Whether or not the respondent was entitled to her ancillary reliefs as indorsed in her Answer to the Petition.

BURDEN OF PROOF:

This being a civil suit, the standard of proof required by a party who makes assertions, which are denied, is one on a balance of probabilities.

Section 12 of the Evidence Act 1975 (NRCD 323) which stipulates as follows:

Proof by a Preponderance of Probabilities

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.

It is also trite law that for every case there is a burden of proof to be discharged and the party who bears the burden will be determined by the nature and circumstances of the case as provided in Sections **10, 11(1) and (4), 14 and 17 of the Evidence Act, 1975 (NRCD 323)** which provides that:

"10. Burden of Persuasion Defined

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.

(2) The burden of persuasion may require a party

(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or

(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

11. Burden of Producing Evidence Defined.

(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

14 Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.

17. *Allocation of burden of producing evidence*

(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof

(2) The burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.

In the case of **Essoun v Boham, Civil Appeal No. J4/1/2014 [2014] GHASC156 dated 21st May 2014,** the Supreme Court, speaking through Anin-Yeboah JSC. stated as follows:

"It is a cardinal rule of evidence that he who bears the burden of proof must prove his case by producing the required evidence of the facts in issue."

EVIDENCE ADDUCED BY THE PETITIONER:

The petitioner testified under oath that he had been married to the respondent since 2005. He stated that the respondent informed him on 18th of December, 2022 that she was attending a funeral in their hometown in the Central Region. He claimed that he later received a phone call from her daughter that she had fallen ill and had been admitted to the 37 Military Hospital where he paid her a visit and supported her financially in the settlement of her medical bills. He further averred that, when the respondent was discharged home following treatment at the hospital, she went to live with her sister with explanation that it would be convenient for her since she had not fully recovered. He stated that the respondent subsequently refused to return to their matrimonial home to date even long after she had fully recovered. He stated that in the last two years, the respondent had denied him sex and refused to perform any of her wifely duties.

With respect to their matrimonial home, he admitted that although he bought the land on which the home was built, the respondent had contributed immensely to the acquisition of same. In support of his averment, he tendered without objection an indenture of the land marked as Exhibit A.

During trial, he however prayed the Court to withdraw the suit as he only commenced the action with an intention of compelling his wife to return to their matrimonial home.

EVIDENCE ADDUCED BY THE RESPONDENT:

The respondent testified that she was aged thirty-three years old as at the time of her marriage to the petitioner. She stated that during the subsistence of their marriage, the petitioner had been abusive, domineering and quarrelsome and as if that was not enough, he together with his three children also abused her verbally.

She stated that the petitioner had deliberately refused to impregnate her and told other persons that he only got married to respondent so that she would take care of his children.

She stated that sometime in November 2020 she travelled to her hometown to attend a funeral. She fell ill and was admitted to the 37 Military Hospital where she underwent surgery. She narrated that she spent close to five months on admission at the hospital during which period the petitioner visited her only thrice. When she was discharged, she decided to live with her sister as she needed support towards her recovery and there was nobody in their matrimonial home to take care of her. Additionally, she had follow-up/review visits on a weekly, bi-weekly, monthly and quarterly basis thus for purposes of commuting to the hospital and back home too it was only ideal for her to stay with her sister at Tantra Hills.

She stated that after a while; June 2022, whilst still on the mend, the petitioner stopped calling on phone to check up on her nor visiting her. He also refused to answer her phone calls and had also stopped maintaining her as his wife.

She recounted that she returned to her matrimonial home when she felt much better in the company of her sister only to receive a terrible reception from the petitioner and his children who further threatened her that her safety could be jeopardized if she returned to her home. She further recounted that she realized that her personal effects had been moved out of her bedroom and placed in a corner in their sitting room. When she enquired from the petitioner the reason for this state of affairs, he responded that he needed the room for his children. She narrated that she reported the situation to her Head of Family who invited the petitioner to a meeting which same he failed to attend.

She averred that they jointly constructed a four-bedroom house together during their marriage. She recounted that she contributed to the purchase of the land by securing a loan facility from her previous employment and also assisted in the

construction of the building. She claimed that sometimes she worked on site by carrying water, blocks, concrete, cement etc. and also running errands for the workmen and also the arrangement of logistics for the works which same was not challenged by the petitioner.

She consequently counterclaimed for a dissolution of their marriage on grounds of unreasonable behaviour on the part of the petitioner, payment of alimony and a settlement of their matrimonial home on her.

ANALYSIS:

The sole ground for the granting a petition for divorce in this jurisdiction, shall be that the marriage has broken down beyond reconciliation. This is provided for in **Section 1(2) of the Matrimonial Causes Act, 1971 (Act 367)**. The facts required to prove that the marriage has broken down beyond reconciliation are set out in **Section 2(1) of the Matrimonial Causes Act, 1971 (Act 367)** as follows;

Proof of breakdown of marriage

2 (1) *For the purpose of showing that the marriage has broken down beyond reconciliation the petitioner shall satisfy the Court of one or more of the following facts;*

(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 respondent has behaved in such a way that 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 husband 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 the 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 despite the refusal; or

(e) *That the parties to the marriage have not lived as husband 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."*

To be able to arrive at this conclusion that the marriage has broken down beyond reconciliation, Petitioner is enjoined to establish that one or more of the facts stated in **Section 2(1) of the Matrimonial Causes Act, 1971, (Act 367)** has occurred. Petitioner in this instant suit has set out to prove the relevant portions of Section 2(1)(c) as applies to her case; namely **Section 2(1)(c) of the Matrimonial Causes Act, 1971, Act 367** which provides that:

Proof of breakdown of marriage

2.(1) *For the purpose of showing that the marriage has broken down beyond reconciliation the petitioner shall satisfy the Court of one or more of the following facts;*

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*

Petitioner averred under oath that Respondent had deserted him for over two years; since November, 2020 under the pretext of convalescing at her sister's home at Tantra Hills. It is settled that in law the evidential and the persuasive burden was on Plaintiff to lead positive evidence to this assertion. These are matters capable of proof. How did Plaintiff discharge this duty? In **Duah V Yorkwa [1993-1994]** 1GLR page 217 at page 224 per Brobbey J. (as he then was):

"In our Jurisprudence, if two parties go to Court to seek redress to a dispute, it is the plaintiff who initiates the litigation and literally drags the defendant into Court. If both parties decide to lead no evidence, the order which will be given

will necessarily go against the plaintiff. Therefore, it is the plaintiff who will lose first, who has the duty or obligation to lead evidence in order to forestall a ruling being made against him."

In support of his averment, the Petitioner stated that during the pendency of their marriage, the Respondent fell ill and required medical treatment. He narrated that for an extended period of time she was admitted at 37 Military Hospital and upon discharge was lodging at Tantra Hill with her relatives where she received support and assistance to attend follow up reviews.

He narrated that he was also sick at home and nursing himself to recovery. Details of medical diagnosis and treatment, he did not provide but he stated that he was lonely and living alone in the matrimonial home with his children needing the presence and support of Respondent which was not forthcoming as she was living elsewhere.

In this regard he followed up by visiting her regularly and supporting her with funds till he observed that she was fully recovered yet refused to return to her matrimonial home. He commenced this action when all attempts to get Respondent to return to her matrimonial home had failed but later sought to withdraw the suit. He stated that all his attempts at reconciliation had proven futile.

Desertion in marriage may be defined as an actual abandonment or breaking off of matrimonial cohabitation, by either of the parties, and a renouncing or refusal of the duties and obligations of the relation, with intent to abandon or forsake entirely and not to return to or resume marital relations, occurring without legal justification. **Rayden in his book; Divorce 10th edition at page 194** defines desertion as follows:

"Desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing 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."

Desertion can exist even if parties live under the same roof provided, they can no longer be regarded as sharing one household but have in effect set up two households. Each case will have to be decided on its merits. The learned jurist **William Cornelius Ekow Daniels in his book "The Law on Family Relations in Ghana, 2019 @ page 310** states that:

"There can be no desertion unless there is complete cessation of cohabitation which should include the forsaking of each other's bed, avoidance of each other's society, seclusion of one spouse from the other, and absence of cooking for the whole family. In short there can be no desertion in such a case unless the common love and the common life have altogether ceased."

In the case of **Rex V Creamer [1919] 1 KB 564** Darling J. held that:

> *"In determining whether a husband and wife are living together the law has to have regard to what is called consortium of the husband and wife. A husband and wife are living together, not only when they are residing together in the same house, but also when they are living in different places, even if they are separated by the high seas, provided the consortium has not been determined."*

It is settled in law that the expression "have not lived together as husband and wife" does not mean that the parties must be living apart in different households. They could be living in the same household and yet in the real sense not be living as husband and wife. The learned jurist **William Cornelius Ekow Daniels in his book "The Law on Family Relations in Ghana,** 2019 @ page 312 states that:

> *"it is required of the petitioner to prove not only the factum of separation for two years, but also that he or she has ceased to recognize the marriage as subsisting and never intended to return to the other spouse, albeit that the petitioner's state of mind need not be communicated to the other spouse.*

Section 7 of the Matrimonial Causes Act, 1971, (Act 367) provides that;

> *"For the purposes of section 2 (1) (d) and (e), in determining whether the period for which the parties to a marriage have not lived as man and wife has been continuous, the court shall disregard any period or periods not exceeding six months in the aggregate during which the parties resumed living as man and wife.*

In the wise words of the learned jurist **William Cornelius Ekow Daniels in his book "The Law on Family Relations in Ghana,** 2019 @ page312:

> *"The test to determine whether or not the parties are not living as husband and wife has no relation to the physical state of things such as houses or households, but rather it is to be considered from the point of view of whether there is absence of consortium or cessation of cohabitation".*

In order for a party to prove willful desertion or abandonment he or she must prove that:

i. The deserting spouse intended to end the marriage,
ii. Secondly that the deserted spouse did nothing to justify the desertion; and
iii. Thirdly that the desertion was against the wishes of the deserted spouse.

In sum, there must be an absence of just cause. In the case of **Williams v Williams [1939] p 365 at 368** Lord Greene M.R. said:

> *"The act of desertion requires two elements on the side of the deserting spouse, namely the factum of separation and the animus deserendi; and on the side of the deserted spouse one element namely the absence of consent."*

As the subsection prescribes, the desertion must exist for a continuous period of two years preceding the presentation of the petition. **Section 5(1) of the Matrimonial Causes Act, 1971 (Act 367)** provides that:

Desertion of Respondent

"For the purposes of section 2 (1) (c), in determining whether the period for which the respondent has deserted the petitioner has been continuous, the court shall disregard any period or periods not exceeding six months in the aggregate during which the parties have resumed living as man and wife."

Respondent did not deny that she was not living with the petitioner as man and wife under the same roof. In fact, she stated that she lived at Tantra Hills. Hence, the initial decision for her to stay away from the matrimonial home was mutual. I do not attach much importance to the time when she returned, because the petitioner admitted that she returned home but not to settle. Thus, however long that lasted; it did not amount to an abandonment of the marriage, especially when no steps were taken in that direction.

Desertion by its nature may be of two kinds; it may be actual and can also be constructive. The practical difference between the two is in the proof of the surrounding circumstances. Whilst in the case of actual desertion there is abandonment by the deserting spouse caused through no fault of the deserted spouse, in the case of constructive desertion there is an exhibition of act(s) or conduct which are expulsive by its nature on the part of one party which causes the other party to bring consortium and cohabitation to an end. Thus it is not to be tested by merely ascertaining which party left the matrimonial home first. In **Frowd v Frowd [1904] p 177** Jeune P. defined desertion as follows:

"Desertion means the cessation of cohabitation brought about by the fault or act of the parties. Therefore, the conduct of the parties must be considered. If there is good cause or reasonable excuse, it seems to me there is no desertion in law."

In the case of **Frank E. Bartholomew v Pauline Bartholomew [1952] 2 All E.R. 1035** C.A. the wife was a dirty woman. There was no evidence that she wished to bring consortium to an end. The husband left the matrimonial home. The court held that the husband was in desertion. In the case of **Dickenson v Dickinson [1889] 62 L.T 330** the facts of the case were that the husband brought his mistress

to live in the matrimonial home and the wife left the home. The court held that the husband was in constructive desertion.

Respondent had a burden to contend the averment of Petitioner. How did Respondent discharge this burden? The dictum of Brobbey JSC in the case of **In Re Ashalley Botwe Lands; Adjetey Agbosu & Others v Kotey & Others [2003-2004] 1 SCGLR 420** eloquently captures my thought and I convert same as mine. He notes that:

> *"The effect of sections 11(1) and 14 and similar sections in the Evidence Decree 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything. The plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time if the court has to make a determination of a fact or of an issue, and that determination depends on the evaluation of facts and evidence the defendant must realize that the determination cannot be made on nothing. If the defendant desires a determination to be made in his favour, then he has a duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour…"*

However, she stated that it was not her intention to abandon the petitioner but rather the unreasonable behaviour of the petitioner caused her to vacate their home to live a separate life elsewhere. **Halsbury's Laws of England (3rd ed.), Vol. 12, p. 246, para. 459** defines the doctrine of constructive desertion as follows:

> *"Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of a man who compels his wife by his conduct, with the same intention, to leave him."*

Rayden on Divorce (9th ed.), p. 165, para. 120, desertion is explained as follows:

> *"The Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. But in its essence desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing 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. Desertion is not a withdrawal from a place, but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state."*

In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to driving the other spouse away. Halsbury states further that the conduct relied upon may be the conduct of the offending party with a third person. What is the respondent's story? As can be gleaned from the facts the respondent was away from the matrimonial home seeking recovery of health and did return home to a very cold welcome. Clearly the petitioner did intend to bring consortium and co-habitation to an end. There is evidence to prove that the respondent's personal belongings were taken out of their room where it had been kept by the petitioner and left in the hall under the pretext of seeking living space for his dependents. By these acts alone I find that the petitioner did exhibit a willingness for cohabitation to come to an end.

Section 11 of the Matrimonial Causes Act, 1971 (Act 367) provides that:

> *Respondent entitled to divorce with cross-petition*
>
> *"If in any proceedings for divorce Respondent alleges against Petitioner and proves the facts required by sections 1 (2) and 2 (1), the court may in those proceedings give to Respondent the relief to which Respondent would have been entitled if Respondent had presented a separate petition seeking that relief."*

Upon the facts, according to the respondent although the petitioner was not adequately maintaining her nor supported her much financially during her period of ill health, she still returned home (with another person to support her to fully recover) to the matrimonial home which she helped to build and to her husband only to be met with invectives and threat of harm if she stayed in the

house. She further narrated that she sought the assistance of her Head of Family to reconcile with the petitioner which same he did not reciprocate nor accord any respect to her family representative. In these circumstances, are these not a clear and unmistakable expression of his intention to bring their matrimonial life to an end by malicious constructive desertion? I find that the respondent did not desert the petitioner without reasonable cause, or without his consent. In my view he clearly wanted to bring their matrimonial life to an end. Since that day, he has never expressed any desire to have the respondent back in his home and in his life as he has not maintained her nor communicated with her as a wife.

I therefore find that it is the petitioner who by his constructive acts deserted the respondent. In this case by his conduct calculated to estrange and drive away this woman who has cared for his children who have not reciprocated her sacrifice with any respect or love, the petitioner gradually and progressively made life unbearable for her to live in her matrimonial home. If at length he has succeeded in driving her away, I do not think I should confirm and sanction his plans by giving him a pat on the back.

In view of his conduct, the respondent would be justified in her vacation of the matrimonial home to live elsewhere waiting for him to return at his pleasure without compromising her status as a person married to the petitioner. In the case of **Church v. Church ([1939] 3 All E.R. 448)** Lord Macmillan is reported as having said this:

> *'In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not,' in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion'."*

<u>Section 8(1) of the Matrimonial Causes Act, 1971, (Act 367) provides that;</u>

> *"On the hearing of a petition for divorce, the petitioner or his counsel shall inform the court of all efforts made by or on behalf of the petitioner, both before and after the commencement of the proceedings, to effect a reconciliation."*

Although the petitioner prayed for a return of the respondent to her home and marriage, the respondent prayed for a dissolution of the marriage, The court is of the considered opinion that she must not be forced into a relationship she is not interested in fostering, more so when no conducive environment has been created for her safety and peace and it is clear that the motive of the petitioner is to secure the free services of a beautiful and matured female cook, child-minder, housekeeper and butler. I have carefully examined the demeanour of parties during trial and I am not in doubt that the marriage celebrated between parties has irretrievably broken down beyond reconciliation. The court will proceed to dissolve same. Accordingly, the marriage celebrated between parties herein on 10th April, 2005 is hereby dissolved. The marriage certificate issued in respect of this marriage is cancelled. Divorce decree granted.

With respect to the matrimonial home which is the property jointly acquired by parties during the pendency of their marriage, the current position of the law on ownership of property during the subsistence of a marriage is that, prima facie any property acquired during the subsistence of marriage is joint property, however a party to a marriage may establish that he or she acquired the property under his or her inherent right under Article 18(1) of the 1992 Constitution of the Republic of Ghana to establish that the property acquired is an individual property. **<u>Article 18(1) of the 1992 Constitution of the Republic of Ghana</u>** stipulates as follows:

> *"18. Protection of privacy of home and other property*
>
> 1. *Every person has the right to own property either alone or in association with others."*

Furthermore, once a property falls within a jointly acquired property then each party is entitled to deal with the property equally. However, upon the dissolution of the marriage there is a rebuttable presumption that each party has an equal share of ownership within the property, unless a party can establish that it would be unfair and unjust to apply the 50/50 ratio. Upon proof to the satisfaction of the court; then the court would then act in a manner which is just, conscionable, and equitable to apportion the right ownership ratio to each party.

This position of the law has recently been further clarified in the celebrated case of **Peter Adjei v Margaret Adjei Civil Appeal No. J4/06/2021** where the Supreme Court simply held that the erroneous impression that has been created that the principles enunciated in the celebrated case of **Mensah v Mensah [2012] S.C.G.L.R 391** that equality is equity is a blanket principle in the distribution of spousal property was to be studied and applied on a case by case basis as the circumstances of each case may determine. In the wise words of Appau JSC.:

> *"… it is not every property acquired single-handedly by any of the spouses during the subsistence of a marriage that can be termed jointly acquired property to be distributed at all cost on this equality is equity principle. Rather it is property that has been shown from the evidence adduced during trial, to have been jointly acquired, irrespective of whether or not there was a direct, pecuniary, or substantial contribution from both spouses in the acquisition. The operative term or phrase is;* ***"property jointly acquired during the subsistence of the marriage"****. So where a spouse is able to lead evidence in rebuttal or to the contrary, as was in the case of Fynn v Fynn (supra), the presumption theory of joint acquisition collapses."*

The petitioner admitted that although he acquired the land, the support of respondent in the development same was immeasurable. During trial he enumerated the support she gave towards the realization of same. On the totality of evidence before the Court, I find that as the property was acquired in the course of the marriage with the support of the respondent, she can claim a

share in it. In the case of **Peter Adjei v Margaret Adjei Civil Appeal No. J4/06/2021** supra the apex Court espouse the principle that the duties performed by the wife in the home like cooking for the family, cleaning and nurturing the children of the marriage, etc. which go a long way to create an enabling atmosphere for the other souse to work in peace to towards he acquisition of the properties concerned, was enough contribution that should merit the wife a share in the said properties upon dissolution of the marriage. In the circumstances I find it just and equitable that the four-bedroom matrimonial home of parties at Amasaman in the Ga-West Municipal District of the Greater-Accra Region of the Republic of Ghana is shared by parties in the ration of 50:50 or in the alternative same is to be valued and sold for proceeds of same to be shared in the ratio as aforementioned.

The next issue for determination is whether or not the Petitioner is entitled to her claim of alimony. The respondent prayed for an alimony of One Hundred Thousand Cedis (GHC 100,000.00) only to be paid by the petitioner to her. In granting financial settlement orders in matrimonial matters the courts apply **Section 19 and 20 of the Matrimonial Causes Act,1971 (Act 367)**which provides as follows:

19. *"The court may whenever it thinks just and equitable award maintenance pending suit or financial provision to either party to the marriage, but no order for maintenance pending suit or financial provision shall be made until the court has considered the standard of living of the parties and their circumstances"*

20 *"The Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party moveable or immoveable property as settlement of property rights or in lieu thereof or as part of financial provision that the court thinks just and equitable.*

It is trite learning that the grant of alimony is not an automatic right afforded to a wife in a divorce petition neither is it a form of punishment to the husband. In

the case of **Re marriage of Fleener 247 N.W 2d 219 (Nov 17 1976)** the court held that:

> *"Payment of alimony is not an absolute right. It depends upon the circumstances of each particular case."*

In determining whether or not to make a property or financial settlement to a party within the context of t**he Matrimonial Causes Act, 1971 (Act 367)**, the Court is enjoined to be just and equitable and in determining what is just and equitable, the court is to take due regard of all the circumstances of the case. What is just and equitable is explained in the case of **Boafo v Boafo [2005 – 2006] S.C.G.L.R 705 at 714** where the Supreme Court speaking through Dr. Date-Bah JSC. held as follows:

> *"the question of what is "equitable" , in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case".*

The income, future earning capacities of the parties, property and resources of the parties, their standard of living, ages of the parties and duration of the marriage, and contribution of each of the parties are some of the factors which are taken into consideration in determining what is just and equitable. In the English case of **Stayton v Stayton 211 KAN 560 p2d 1172** the court held that:

> *"in determining the amount in each case the trial court may among other things, take into consideration the conduct of the parties, their financial situation, needs and earning capacities of the parties and make such an order as will be just and reasonable under all the circumstances."*

Thus, failure to make a proper enquiry into the earning capacity of the parties and proceeding to make orders would result in injustice as in **Abubakari v Abubakari (H1/152/2005) [2005] GHACA 7 (18th May, 2005)** where J. Dotse JA. (as he then was) noted that:

> *"In this case no evidence whatsoever has been led to give an inkling of the income levels of the parties save what is contained in the Social Enquiry Report about the*

Defendant that she earns c 150,000 net on her bread sales. The report is however silent as to whether this amount is daily weekly or monthly. Under the circumstances that part of the report is of no use in determining the issues germane to this case. There clearly does not appear to be any sound and acceptable basis for the District Magistrate's award of c 1,200,000.00 compensation to the Defendant."

In situations where the dissolution of the marriage was occasioned by the bad conduct of the party seeking the relief of financial settlement, this will reduce significantly the financial settlement order. In the case of **Stubb v Stubbe 376 N W 2d 807 No. 14753** the court in refusing the grant of alimony for the wife stated as follows:

> *"before discoursing on why this particular ex-wife is not entitled to alimony, I wish to point out that I am not opposed to rehabilitative alimony... Appellant ought not to pay alimony because Appellee did not keep up the home and showed disdain for homemaking; she refused to show any interest in family social outings …….. It strikes me that she does not deserve an award of alimony and in as much as she is fully capable of supporting herself with a comparable earning capacity to that of her ex-husband, she ought not to be awarded with alimony. Is it not true that an award of alimony must have at its root the conscious regard for equity and the circumstances of the parties?"*

In view of the fact that the dissolution of the marriage was caused by the gross misconduct of the petitioner through his unreasonable conduct coupled with his malicious acts of constructive desertion and thereby abruptly ending their relationship at his will. It is also apparent that the respondent has been left in dire financial straits. In all this the Respondent has been left worse off through no fault of hers apart from her dutifully performing her duties as is expected of a wife. I am of the firm conviction that alimony of Forty Thousand Cedis (GHC 40,000) only payable by the petitioner to the respondent is condign. Accordingly, it is ordered that petitioner pays alimony of Forty Thousand Cedis (GHc 40,000.00) only to respondent.

The parties are to bear their respective cost of litigation.

H/W ANNETTE SOPHIA ESSEL (MRS.)

MAGISTRATE