

CORAM: HER WORSHIP MRS. ANNETTE SOPHIA ESSEL, SITTING AS MAGISTRATE, AMASAMAN DISTRICT COURT "B" ON THE 26<sup>th</sup> DAY OF OCTOBER, 2023.

---

SUIT NUMBER: A4/296/21

JOSPEH KOFI OWUSU

PETITIONER

VRS

JANET YAA SARPOMAH

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 21<sup>st</sup> July, 2021 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 parties herein contracted a customary marriage at Nkawkaw in the Eastern Region of Ghana sometime in or about 1983 and subsequently converted same to an ordinance marriage on 31<sup>st</sup> December, 2000 at the Church of Christ, Alajo in the Greater-Accra Region of the Republic of Ghana. There are two issues in this marriage namely Linda Owusu Adoma aged thirty-two years and Frank Owusu Frimpong aged twenty-nine years. Parties cohabited at Nkawkaw and

### **CASE OF THE PETITIONER:**

The petitioner averred that the respondent had deserted him since the year 2015 when she travelled to the United States of America. He claimed that for over eleven years all communication between them had ceased. He further averred that whenever the respondent visited Ghana, she refused to see him. He claimed that he had made several attempts to resolve the issues between them but was unsuccessful. In his view. The marriage had broken down beyond reconciliation and that subsequently same had been dissolved customarily.

### **CASE OF THE RESPONDENT:**

In her answer to the petition, the respondent denied in to the averments of the petitioner. She stated that she was a trader at the time of their customary marriage and was currently a home care-giver in the United States of America. She stated that with the consent of the Petitioner she travelled to the United States of America for work purposes.

The respondent continued that she had often been visiting Ghana in the year 2014 and 2015 when she lived under the same roof with the petitioner, with her latest visit being in the year 2020 when she had to spend some days attending to her ailing mother. According to the Respondent, she within the period of her sojourn, was in regular communication with the Petitioner and remitted him funds on a monthly basis through a financial network system known as Family Link which same the petitioner always collected at the Ghana Commercial Bank. She was not opposed to the petition filed by the petitioner. She averred that the petitioner had behaved in such an unreasonable manner during the pendency of their marriage that she could not be expected to live with him as man and wife. She asserted as follows:

- i. That the petitioner had committed adultery during the pendency of their union in the year 2019. In this regard she had received a phone call from another person claiming ownership of the petitioner as her husband. This was at a period when she was feverishly making arrangements for the petitioner to join her overseas. Thus, her efforts were rendered futile as the petitioner declined to join her in the United States of America.

- ii. That the petitioner had packed all her personal belongings out of their home and deposited same outside on the compound at the mercy of the weather and thieves.
- iii. That in August 2021, she found out that the petitioner was living in their matrimonial home with his newfound lover by name Evelyn Arthur as man and wife thus making it impossible for her to return home to occupy same.
- iv. That the petitioner had been regularly assaulting their daughter; Linda Adomaa Owusu who lived with him in their matrimonial home, which same conduct/act had been lodged as a complaint at the Amasaman Police Station for prosecution. Not to mention his flaunting of his extra marital affairs in the face of their child amid threats and insults that she may report same to respondent if so desirous. That in February 2021, the petitioner together with Evelyn Arthur; his new found lover, threatened to drive away from the matrimonial home their daughter. This conduct had escalated to the extent that, the petitioner and his lover made it impossible for their daughter to reside in their matrimonial home so that she had to live elsewhere. Additionally, by the petitioner's daily repulsive conduct their son had also voluntarily vacated the home to reside elsewhere and his room subsequently given out by the petitioner to his new-found lover's children for occupation.
- v. That on or about 17<sup>th</sup> January, 2021 the petitioner visited the respondent's father and collected back from him the customary drinks he presented for their customary marriage thus signifying the customary dissolution of same.

She consequently prayed for the underlisted reliefs:

- a. *"A declaration that the marriage between the parties has broken down beyond reconciliation and an order for same to be dissolved.*

- b. *An order for the matrimonial home to be shared equally between the parties or in the alternative an order for the judicial sale of the matrimonial home and for the proceeds to be shared equally between the parties.*"

### **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:**

Parties in this suit were not represented by Counsel. Parties were referred to Court-connected ADR to attempt settlement 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.

Petitioner testified by himself and called one witness in support of his case. Respondent testified through her lawful attorney and called no witness.

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 solemnised 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 relief B 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:**

Petitioner stated that he is a driver resident at Amasaman. He asserted that he travelled to the United Kingdom in the year 2000; seven years after his marriage to the respondent. He stated that prior to his travel to London he provided reasonable shelter for the family in a rented facility and also set up a trading venture in second-hand clothing for the respondent and also rented a shop at Taifa from which she operated her business.

He stated that whilst in the United Kingdom, the respondent who was gainfully employed took care of the home as he remitted funds on a fortnightly basis for same. He claimed that he bore all the educational bills of their children throughout basis and secondary school till he lost his job when the respondent held the fort.

He stated that whilst in the United Kingdom where he stayed for three years, he remitted funds through the respondent to his friend: Richmond Amuzu, to buy land for him at Pokuase North Extension, Amasaman which he did. In support of this averment, Petitioner tendered Exhibit A. The land documents were sent to him through DHL courier for his signature and subsequent registration. In support of his averment, he tendered Exhibit B. The petitioner further averred that he remitted funds to the petitioner regularly to construct their matrimonial home and tendered Exhibit C in support of this.

The petitioner returned to Ghana in 2004 by deportation and established an information technology school. The Petitioner stated that he was faced with a lot of financial challenges upon his return so that he had to sell a portion of the land initially purchased for the matrimonial home to enable him to complete the construction works on the building to a three-bedroom with garage stage. In support of his testimony, he tendered Exhibit D Series. The Petitioner stated that in the construction of their matrimonial home the respondent did not lend any financial support with explanation that the title documents covering the land only bore the name of the petitioner. During trial, he asserted that the only support that the respondent gave him during their marriage was that she supported him in the care and raising of their children, facilitating the purchase of the land on which the matrimonial home was built by regular collection of his overseas remittances and ensuring payment for same, supervised workers who constructed their matrimonial home and the arrangement of logistics for same

Petitioner claims that he planned on traveling to the United States of America but he was denied a visa, so he gave the money he intended to travel with to the respondent for safekeeping only to be informed by the respondent later that she had used same to secure a visa and was thus travel-bound. The petitioner narrated that painful as it was, he supported the respondent to embark on her trip.



While away, he stated that the respondent remitted funds home occasionally, but she sent it through their children. He claimed that the parties kept in touch until 2014, when there was a break in communication. He asserted that the respondent informed him that through a contract marriage, she had acquired an American citizenship and returned to Ghana in 2014. She promised to make arrangements for him to join her overseas but same never materialized as the respondent always had a tale to tell in respect of the procedure that she was following and the financial expense involved in doing so, thus he consequently stopped looking forward to this trip.

The Petitioner stated that he gained employment with Edmark International as a marketer and subsequently travelled to Zambia for training purposes. While away, their daughter got married. Although he could not attend, the respondent attended the wedding ceremony which was held in Ghana. The petitioner claimed that on his return, he realised that the respondent had packed all her personal belongings out of their matrimonial home. He narrated that he tried reaching the respondent but to no avail.

He claimed that he was later informed by the petitioner that she had unilaterally acquired land and constructed a building thereon at Amasaman and thus would no longer be returning to their matrimonial home. In support of his averment, he tendered Exhibit E. The Petitioner claimed that he reported the respondent's conduct to her parents in seeking for a resolution only for the respondent's parents to return within a week to dissolve their marriage.

In support of his testimony, the petitioner called Richmond Amuzu (PW 1) who testified that he knew the parties and corroborated the petitioner's claim about the land purchase and the respondent's refusal to support the building of the house. In support of his testimony on oath he tendered Exhibit F. and concluded that all his attempts at resolving the issues between the parties but was unsuccessful.

#### **EVIDENCE ADDUCED BY THE RESPONDENT:**

The respondent testified through her daughter and lawful attorney; Linda Adomaa Owusu. She tendered Exhibit 1 and 1(a) which is a power of attorney permitting her

lawful attorney to represent her in this suit. She further tendered Exhibit 2 which is a copy of the ordinance marriage certificate of parties herein.

The respondent testified that she never deserted the Petitioner as he would want this Honourable Court to believe. She narrated that it was with the consent of the Petitioner that the Respondent that she travelled to the U.S.A. in 2010 in search of work. The Respondent added that although working overseas, she travelled back to Ghana in 2014, 2015, 2020 and now 2021. In support of her averment, she tendered Exhibits 3 series which are copies of her Ghanaian and American passport pages and also Exhibits 4 & 5 which are coloured images of photographs of herself and her son taken in the matrimonial home during the holiday periods. With regards to the petitioner's position that she had deserted him, she denied same in toto. She asserted that whilst overseas she maintained communication between them and also remitted funds to the Petitioner monthly which same, he always collected at the Ghana Commercial Bank. However, she explained that in the course of time during the pendency of the marriage, the petitioner had engaged in several acts of constructive desertion which thus rendered it impossible for her to lie with him as man and wife. She was thus not opposed to the dissolution of their union.

She chronicled as follows that the petitioner had engaged in adultery. She narrated that the petitioner was in Zambia sometime in 2014 and returned to Ghana that same year. He again travelled to Zambia in April, 2015 and returned to Ghana in January, 2016. The petitioner upon his return to Ghana, unilaterally sold a portion of the plot on which stands the matrimonial home which the couple had jointly constructed, kept the proceeds of the sold land to himself, he also disposed of the family car; a Hyundai Excel vehicle and returned to Zambia. During this period, he was engaged in an extra marital relationship with one Montita in Zambia where he together with the said Montita lived in Zambia as man and wife. He finally returned to Ghana in June, 2019.

The Respondent further narrated that parties agreed in the year 2014 for the Respondent to make arrangements for the Petitioner to join her in the United States of America. In this regard, the respondent paid an amount of Six Thousand US Dollars (USD 6,000) only

to one Serwaa to facilitate arrangements to bring the petitioner over to join the respondent overseas. She stated that when the said Serwaa arrived in Ghana for this purpose, the petitioner very much aware of the purpose of Serwaa's visit avoided both Serwaa and her calls so that he could not be reached by any available means of communication. She further narrated that during this period when he could not be reached, Montita; his partner called the respondent and plainly cautioned her that the petitioner was her husband and thus she would not permit the petitioner to join the Respondent. For this reason, the respondent had the travel arrangements aborted. She tendered Exhibit 6 which are copies of some photographs which the petitioner took with the said Serwaa when the later was in Ghana purposely to make arrangements for the petitioner to join the respondent overseas.

Not all, the respondent added that the petitioner was currently engaged in another amorous affair with a certain Evelyn Arthur following the petitioner's return from Zambia in 2019. The respondent contended that the couple jointly put up the matrimonial home but the Petitioner had by this conduct made it impossible for her to live there as he lives in the matrimonial home with his partner; Evelyn Arthur together with her child as man and wife. To buttress her testimony, she tendered Exhibit 7 which is a picture showing the said Evelyn Arthur and her daughter both of whom live in the Respondent's matrimonial home. The respondent further narrated that the petitioner subsequently moved her wardrobe filled with her personal belongings out of their bedroom and deposited same in the compound of their home for the contents therein to be subjected to the vagaries of the weather and same were destroyed. To prove this, the respondent tendered "Exhibit 8" which is a coloured image of the wardrobe when it was positioned in their bedroom and when the petitioner deposited same on their compound.

The respondent asserted that whenever she or their daughter confronted the petitioner on his philandering conduct, they were met with insults and assaults respectively for which reason they were compelled to leave the matrimonial home as they both lived in fear or apprehension of harm whenever they were alone at home with the petitioner. All told she stated that in August 2021 upon her return to Ghana to visit the family, she came to meet the petitioner and his partner living in her matrimonial home, she thus did not

intend to voluntarily vacate her matrimonial home but was driven out by the actions and conduct of the petitioner.

The respondent's testimony under oath is that on or about 17<sup>th</sup> January, 2021 the petitioner went visited her father with a purpose of collecting back from him the customary drinks he presented for their customary marriage thus signifying the customary dissolution of same. As at this date, the respondent had been living with Evelyn Arthur in the matrimonial home as man and wife since December, 2020. The next day being Monday 18<sup>th</sup> January, 2021 the petitioner informed and warned his daughter; the legal attorney of the respondent that parties were no longer married.

**EXHIBITS FILED:**

In addition to their witness statements and viva voce evidence, the parties tendered the following exhibits in support of their respective cases:

- a. Exhibit A: Remittance from the petitioner to the respondent via Unity Link Money Transfer Limited receipt for Twelve Thousand Six Hundred Cedis (GHc 12,600.00) only being payment for the purchase of the matrimonial home land situate and located at Pokuase North Extension.
- b. Exhibit B: Correspondence Letter from PW1 to the petitioner with respect to the land purchased.
- c. Exhibit C series: Receipts of remittances sent to the respondent for the construction of the matrimonial home.
- d. Exhibit D: Colored image of the matrimonial home.
- e. Exhibit E: Colored image of the respondent's house at Amamorley.
- f. F Series: Receipt for the full payment of the matrimonial home land.
- g. Exhibit 1 & 1(a): Power of Attorney of Respondent to her lawful Attorney.
- h. Exhibit 2: Copy of marriage Certificate of parties herein.
- i. Exhibit 3: Copies of the Respondent's passports pages.
- j. Exhibit 4 & 5: Colored photographs of the respondent whilst on holidays in their matrimonial home in Ghana.
- k. Exhibit 6: Colored photographs of the petitioner and Serwa in Ghana.

- l. Exhibit 7: Colored image of Evelyn A and her daughter resident at the matrimonial home.
- m. Exhibit 8: The respondent's wardrobe at differing locations in the matrimonial home.

**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 eleven years; since the year 2010 when she travelled overseas. 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."*

Over this period, he claimed that all communication and conjugal rights had ceased. More so although the respondent travelled to Ghana occasionally, she did not return to the matrimonial home and avoided contact with the petitioner. August, 2018. He stated that his attempts at reconciliation had proven futile and that their marriage had been customarily dissolved at the behest of the respondent.

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 10<sup>th</sup> 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:



- a. the deserting spouse intended to end the marriage,
- b. secondly that the deserted spouse did nothing to justify the desertion; and
- c. 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.”*

As can be gleaned from the facts Petitioner wanted the marriage to thrive and therefore even when she was out of the jurisdiction, he kept the home and urged her to make arrangements for him to join her yet she avoided contact with him and did not return to their home whenever she travelled to Ghana and finally instructed her relatives to dissolve the marriage when the petitioner attempted to reconcile with her. In the considered view of the court, Petitioner has discharged his burden. Clearly Respondent did not want to communicate or live with Petitioner. Respondent did intend to bring consortium and co-habitation to an end.

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..."*

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 overseas for work purposes but regularly visited Ghana. 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 worked overseas as a care-giver. Thus, however long that lasted; it did not amount to an abandonment of the marriage, especially when no steps were taken in that direction.

However, she stated that it was not her intention to abandon the petitioner but rather the various acts of adultery coupled with 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? The respondent stated that she travelled for work and returned to her matrimonial home to meet the petitioner as a philanderer who assaulted her whenever she questioned his conduct. Then again in August, 2020, she returned home to meet another woman (with a child) resident in her home and living with the petitioner as man and wife. 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 to the vagaries of the weather in the compound of their home. By these acts alone I find that the petitioner did exhibit a willingness for cohabitation to come to an end.

Upon the facts, according to the respondent's lawful attorney, due to the aggressive conduct of the petitioner which he visited on the respondent (whenever she was in Ghana) and herself as their daughter, they were constantly living in fear and in apprehension of harm whenever they were home alone with the petitioner. It is this same conduct which also compelled their son to move out of their family home to reside elsewhere. The petitioner finally confirmed his intentions when he went to the respondent's father to customarily request for his customary drinks given for the hand of the respondent in marriage. Not to mention that he categorically told their daughter on 18<sup>th</sup> January, 2021 that he was no longer married to the respondent. In these circumstances, are these not a clear and unmistakable expression of his intention to bring the matrimonial life to an end? 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 the matrimonial life to an end. Since January, 2021 he has never expressed any desire to have the respondent back and he has not maintained her as a wife.

I therefore find that it is the petitioner who by his constructive acts deserted the respondent. In this case by persistent conduct calculated to estrange and drive away this woman

who has borne him two children, the petitioner gradually and progressively made life unbearable for her in order to have for wife his new girlfriend. If at length he has succeeded in driving her away, I do not think I should confirm and sanction his plans by giving it, legal backing. 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'.*"

**Section 8(1) of the Matrimonial Causes Act, 1971, (Act 367) provides that:**

*"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."*

On the totality of evidence before the Court, I am not in doubt that this marriage is now on the rocks and no salvage operations will be of any use to either party. Each party perhaps is anxious to open a new leaf and the respondent may perhaps also find herself a new consort.

**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."*

Both parties have prayed for the exercise of the court's discretion in their favour. I would in the circumstances of this case exercise my discretion in favour of the respondent and grant her prayer on the ground of her husband's constructive desertion. Accordingly, the marriage celebrated between parties herein at the Church of Christ, Alajo on 31<sup>st</sup> December, 2000 is hereby dissolved. The marriage certificate with registration number COC/M/13/2000 is cancelled. Divorce decree granted.

The final issue for resolution by the Court is the equitable distribution of the matrimonial home if so found to be jointly acquired. The petitioner in the instant suit vehemently maintained that the matrimonial home was his self-acquired property and not joint property of parties herein. In support of his averment, he tendered exhibits showing his purchase of the land. Pw 1 and also the respondent testified that title documentation covering this property was solely in the name of the petitioner and he was in possession of same. The law on distribution of property acquired by parties during marriage has been settled by several authorities. The right of spouses to properties acquired jointly during the marriage has been given an implied constitutional approval by **Article 22 of the 1992 Constitution of the Republic of Ghana**, which provides as follows:

- (1) *A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.*
- (2) *Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.*
- (3) *With a view to achieving the full realization of the rights referred to in clause (2) of this article-*
  - (a) *Spouses shall have equal access to property jointly acquired during marriage;*
  - (b) *Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon distribution of the marriage.*

The court in doing justice to all parties in matrimonial matters no more seek to protect only women but equally men. In the case of **Peter Adjei v Margaret Adjei Civil Appeal No. J4/06/2021** the Supreme Court held that:

*“It is trite that no two cases are alike and that every case is fact sensitive for that matter, each case must be determined on its peculiarities.”*

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. **Article 18(1) of the 1992 Constitution of the Republic of Ghana** 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.”*

As per paragraph nine of his witness statement, the petitioner claimed that he remitted funds to the respondent for the construction of the matrimonial home. He further tendered Exhibit C without objection during trial. He was however found to be double-tongued when he stated that as at when he returned to Ghana, only the foundation of their home had been constructed. He swept under the carpet the fact that he had unilaterally disposed off the family car and also sold off a portion of the adjoining land to continue the development of the property. In his testimony under oath, he strongly maintained that the respondent was gainfully employed to support him in keeping the home and caring for the children. Additionally, he stated that the petitioner supervised workers and arranged logistics for the construction of property. He further added that upon deportation to Ghana from the United Kingdom he was financially handicapped and thus the respondent bore the educational bills of the children from secondary school and beyond. In all his testimony before the court, one golden thread runs through – following his travels to the United Kingdom and Zambia, it was the respondent who kept the home in order for the petitioner to amass the wealth, he acquired to develop the property. It is therefore unreasonable for the petitioner to have led the respondent on to support him to acquire landed property and subsequently labelled such a property as solely his and in this direction register only his name for the ownership of same.



Q: *Was the Respondent working at the time?*

A: *Yes.*

Q: *What work was Respondent doing?*

A: *She was a trader.*

Q: *I am suggesting to you that Respondent was gainfully employed and contribute towards the upkeep of the home and the children?*

A: *I agree with Counsel that it was with my support that Respondent was able to take care of the children.*

Q: *In your Exhibit A and Exhibit C3, they were ticked as for family support. I am suggesting to you that Exhibit A and Exhibit C3 were not intend for building purposes.*

A: *It is not so. I have already stated this is not the only monies I remitted. I believe I am responsible for the care of the family I took up every bill. The monies that I even remitted for the shop are not here. The receipts on the record are solely for the remittances for land purchase.*

Q: *Do you want this Honourable Court to believe that Respondent during the period of your indisposition contribute nothing to the care of the children and the home.*

A: *I do not agree, we are a couple and the children were young so Respondent supported in terms of cooking and household chores whilst I paid the rent and supported financially.*

Q: *During that period, it was Respondent who was taking care of children and upkeep of the home.*

A: *That is so because I made adequate provision for her, before I left. I even left Respondent a kiosk for the sale of provisions and rubber bowls.*

Q: *Whilst abroad did you send the Respondent money purposely for the procurement of building materials for your matrimonial home?*

A: *Yes. All the receipts before the Court include monies, I remitted purposely for building our matrimonial home.*

Q: *Did the Respondent inform you that she used the money for that purpose?*

A: *Yes.*

Q: *If the Respondent inform you that she used the money sent to procure building materials, she would have seen to it that the building materials were used in putting up the matrimonial home, not so?*

A: *That is so.*

Q: *I am suggesting to you that you did not put up the matrimonial home alone with only your resources. The Respondent also contributed.*

A: *That is not so in terms of finances.*

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 spouse to work in peace towards the 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 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 ratio 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 afore-mentioned.

There will be no order as to Cost; the parties are to bear their respective cost of litigation.

**H/W ANNETTE SOPHIA ESSEL (MRS.)**

**MAGISTRATE**