CORAM: IN THE AMASAMAN DISTRICT COURT B HELD ON 26th AAUGUST, 2023 BEFORE HER WORSHIP ANNETTE SOPHIA ESSEL (MRS.) SITTING AS MAGISTRATE

SUIT NO. A4/117/23

KADIJATU IBRAHIM **PETITIONER**

V

IBRAHIM JUNAH **RESPONDENT**

JUDGMENT

INTRODUCTON:

This is a wife's petition for the dissolution of her marriage to the respondent in this suit. Petitioner and Respondent are both Ghanaian citizens domiciled in Ghana. Petitioner is a trader by occupation and Respondent is a driver. On 4th April, 2006 parties herein were married under customary law at the Nurses Quarters, Amasaman in the Greater-Accra Region of the Republic of Ghana. After the marriage, parties cohabited at Ablaku and Nurses Quarters, Amasaman. There are four (4) issues in this marriage; Farid Ibrahim aged seventeen (17) years, Muntari Ibrahim aged eight (8) years, Abdul Ibrahim aged six (6) years and Mohammed Ibrahim aged one (1) year. There has been no previous court proceeding in respect of this marriage.

The petitioner prays the court for the dissolution of her marriage to the respondent on grounds of unreasonable behaviour and desertion during the pendency of their marriage and that same has broken down beyond reconciliation.

CASE OF THE PETITIONER:

The petitioner averred that parties had been married since 2006. Particulars of unreasonable behaviour cited by the petitioner include the following:

a. That Respondent did not maintain her during her pregnancy of all issues nor did he bear the medical bills of Petitioner whenever she fell il.
b. That Respondent did not maintain the issues of the marriage.
c. That Respondent assaulted her at the least provocation.
d. That Respondent had abandoned Petitioner and issues of the marriage.
e. That Respondent had sought to drive her together with the issues out of the matrimonial home and when she refused to leave, Respondent had ripped off the roof of their home thus depriving them of reasonable shelter.

She therefore prayed for the following reliefs:

i. An order for the dissolution of the customary marriage between the parties.
ii. An order directed at the respondent to compensate Petitioner with Fifteen Thousand Cedis (GHC 15,000.00) only.
iii. An order for the respondent to name the child with an amount of One Thousand Cedis (GHC 1,000.00) only per month.
iv. An order for the Respondent to pay the school fees, and all other educational expenses of the children whenever it falls due.
v. An order directed at the respondent to pay the medical expenses of the children as and when it falls due.
vi. An order directed at the respondent to settle the matrimonial home (Chamber & Hall) at Nurses Quarters in favour of Petitioner.
vii. Any orders as the Court may deem fit.

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 petitioner was entitled to her reliefs sought?

PROCEDURE OF TRIAL:

The petitioner was self-represented. The respondent who was served with the petition and several other processes in this suit simply spurned the invitation of the Court following several notices to him. The Court satisfied itself that the mode of service on the respondent of all court processes was proper before proceeding to allow the petitioner to lead evidence to prove her case. During trial the petitioner testified by herself and called no witness. Hearing commenced on 10th May, 2023 and ended on 21st June, 2023.

STANDARD/BURDEN OF PROOF:

In this civil suit, each of the parties had a duty to prove their case on the preponderance of probabilities and so no weakness in the case of either can be taken advantage of. The Defendant carries the burden of proving the facts alleged in his defence to the same degree as the burden the Plaintiff carries in proving his claim against the Defendant. This burden of producing evidence by both sides in the suit as well as the burden of persuasion is defined by **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 and 11(1) and (4), 14 and 17 of the Evidence Act, 1975 (NRCD 323)** which provide 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 explaining the principles relating to the duty to produce evidence, the learned jurist **Maxwell Opoku Agyemang states at page 105 of his book Law of Evidence in Ghana** thus;

> *"The general rule is that all facts in issue or relevant to the issue in a given case must be proved, in other words, he who avers must prove. This may be done through testimonial evidence, hearsay statements, documentary evidence, or production of real evidence. … If in a moment of forgetfulness, the claimant or prosecutor fails to prove an essential fact his opponent may well succeed on a submission that there is no case to answer although the evidence was really available."*

In the case of **Essoun v Boham, Civil Appeal No. 54/1/2014 [2014] G.H.A.S.C 156 dated 21st May 2014,** the Supreme Court, speaking through Anin Yeboah JSC. (as he then was) 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 PLAINTIFF:

Plaintiff testified under oath that since she was married to the respondent he had neglected, refused and willfully elected not to maintain her as a wife. Whenever she fell ill and also during her pregnancy, she detailed that the Respondent did not bear the cost of her ante-natal care. Upon birthing the children of the marriage too, she narrated that the respondent did not maintain the issues of the marriage, she continued that the respondent had denied

paternity of the oldest and youngest children and thus physically and verbally assaulted her at the least provocation. She stated that for this reason, she denied him sex.

She claimed that the respondent drove her together with the children out of the matrimonial home and when she refused to move out, he abandoned them in the house to live elsewhere and had thereafter ripped off the roof of their home thus rendering her and the children homeless. In support of her averment, she tendered without objection Exhibit A Series which are colored images of the current state of the home without a roof in which she together with the children continued to occupy.

ANALYSIS:

The sole ground for the dissolution of a marriage in this jurisdiction, shall be that the marriage has broken down beyond reconciliation. This is provided for by 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) 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 the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; or

(c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or

(d) That the parties to the marriage have not lived as 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 notwithstanding 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."

The general position of the law is that, a court ought to inquire so far as is reasonable into all the facts alleged by the petitioner and respondent to satisfy itself on the totality of evidence adduced that indeed the marriage between the parties has broken down beyond reconciliation. This requirement is provided for in **Section 2(2) and Section 2(3) of the Matrimonial Causes Act, 1971 (Act 367)** as follows;

(2) On a petition for divorce it shall be the duty of the court to inquire, so far as is reasonable into the facts alleged by the petitioner and the respondent.

(3) Notwithstanding that 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."

The particulars of breakdown of the marriage which the petitioner stated mostly relate to the conduct or behaviour of the respondent. By virtue of section 2(1)(b) and (c) of the Matrimonial Causes Act, 1971 [Act 367]. Where it is established that the behavior of either party is such that, the other cannot reasonably be expected to live with him or her, the court may proceed to dissolve the marriage.

What amounts to unreasonable behaviour, has been held to depend on the circumstances of each case. It must not be conduct which can be termed as trivial, such conduct as is occasioned by the wear and tear of marriage. The conduct must be grave and weighty, such as to merit a finding that the petitioner cannot be reasonably expected to live with the

respondent. In the case of **Mensah v Mensah [1972] 2 GLR 198** Hayfron Benjamin J. held that:

> *"… in determining whether a husband has behaved in such a way as to make it unreasonable to expect a wife to live with him, the court must consider all the circumstances constituting such behavior including the history of the marriage. It is always a question of fact. The conduct complained of must be grave and weighty and mere trivialities will not suffice…"*

The petitioner is therefore bound to establish how the respondent's behavior affects the marriage as a result of which he cannot reasonably be expected to live with the respondent. In the case of **Hughes v Hughes [1973] 2 GLR 342,** Sarkodee J. in his judgment said:

> "*To succeed the petitioner must show that the respondent's conduct reached a certain degree of severity. It must be such that no reasonable person would tolerate*".

These are matters capable of proof. The petitioner had been able to adduce sufficient evidence that the conduct of the respondent had been unreasonable in his conduct of regular assault both verbal and physical and his willful refusal to maintain the petitioner and children coupled with his abandonment and deprivation of reasonable shelter for the petitioner and their children. In the case of **Mensah v Mensah [1972] 2 GLR 198** where the wife petitioner filed for the dissolution of the marriage on the ground that the marriage had broken down beyond reconciliation, in that case as well only the wife testified. The court held that:

> *"…. Where the evidence of the petitioner stands un-contradicted, an inquest is not necessary unless it is suspected that the evidence is false or the true position is being hidden from the court …."*

In another case of **Appiah v Anane [2017 -2020] 2 SCGLR 828** in Holding 2 @ 831 the Supreme Court held that:

> *"Where evidence was tendered and not objected to, the party who should have objected would be deemed to have admitted it. Again, where evidence was rendered and a party failed to cross-*

examine so as to challenge its veracity, subject to some exceptions the party will be deemed to have admitted the contents of the evidence."

In the absence of evidence to the contrary on the part of the respondent, the court is of the respectful view that all that the petitioner has averred is true and hereby holds that unreasonable behavior has occurred on the part of the respondent against the petitioner.

Petitioner averred that the respondent had deserted her. 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 an intent to abandon or forsake entirely and not to return to or resume marital relations, occurring without legal justification either in the consent or the wrongful conduct of the other party. In order for a party to prove willful desertion or abandonment he/she must prove that:

- the deserting spouse indeed intended to end the marriage
- secondly that the deserted spouse did nothing to justify the desertion;
- and thirdly that the desertion was against the wishes of the deserted spouse.

The learned William Ekow Daniels in his book "**The Law on Family Relations in Ghana, 2019at page312** stated that:

"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."

Also, 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."

These are matters capable of proof. How did the petitioner discharge the evidential and the persuasive burden on her in respect of this issue? This is what the petitioner stated in paragraph nine of her witness statement:

> *"The respondent has not provided any avenue for us to resolve our issues. He instead moved all his belongings out of the matrimonial home to an unknown location. The respondent asked the Petitioner to move out of the house with the issues but petitioner refused."*

The petitioner had been able to adduce sufficient evidence that indeed is living an independent life elsewhere and has thus unilaterally brought all conjugal rights to an abrupt end by his conduct. This testimony of Petitioner was not challenged by the respondent. In the case of **Takoradi Flour Mills v Samir Faris [2005-06] SCGLR 882**, the Supreme Court held that:

> *"The law is well settled, (as held by the trial court and affirmed by the Court of Appeal) that where the evidence led by a party is not challenged by his opponent in cross-examination and the opponent does not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial court".*

Also, in the case of **Francis Asuming & 640 Ors v Divestiture Implementation Committee & Anor [2008] 3 GMJ 35 @ 38**, the court held that an allegation that is not denied or challenged in any way is deemed admitted and proved and so requires no further proof. The respondent in this suit declined to attend the Hearing and therefore did not take advantage of the option to cross-examine the petitioner on any of the evidence she adduced. He also failed to respond to any of her averments despite being served with several notices to be in court. The court therefore accepts everything stated in the evidence of the petitioner as true. It is trite law that a party who fails to appear in court after due notice is taken to have WILFULLY failed to take advantage of the opportunity to be heard. In such a situation, the "Audi Alteram Partem" Rule cannot be said to have been breached. For the foregoing observations, having inquired deeply into all the matters and with all the evidence examined, I am wholly satisfied that the marriage between the parties has broken down

beyond reconciliation. The Court consequently proceeds to dissolve same and to this effect grants a Divorce Decree in respect of same.

The petitioner stated that the children were in her custody and prayed for orders with respect to their care and maintenance. **Section 2(1) of the Children's Act, 1998 (Act 560)** provides that:

"The best interest of the child shall be the primary paramount in a matter concerning a child".

The petitioner and respondent are both gainfully employed as the records reflect. The court is mindful of the fact that the issues must be maintained, put to school and their healthcare and other issues paid for. Under the present circumstances, the Court makes the following orders taking into consideration the cost of living and the circumstances of the issues:

i. Custody of the issues of the marriage is granted to Petitioner. Respondent is granted generous visitation rights. The court further orders that parties have the option to apply for a review of the order for custody of the children after three years if any of the parties believe that the prevailing situation is not helping the welfare of the child.
ii. Respondent is directed to maintain all the children with One Thousand Cedis (GHC 1,000.00) only per month payable by the 1st working day of every month to Petitioner by mobile money transaction to a reliable contact number to be provided by Petitioner.

iii. Additionally, Respondent is to bear the educational and medical bills of all children until they are no longer his dependents.

iv. Petitioner is to lend her support by providing reasonable shelter and clothing for the children.

The petitioner prayed for the matrimonial home of parties to be settled on her. She however failed to lead any evidence on the details of same and what more her reasonable contribution

to the acquisition of same. The Court will consequently restrict itself from making any orders in respect of same.

As incidentals for the filing of this suit Cost of Twenty-Five Thousand Cedis (GHC 25,000.00) only is awarded against Respondent in favour of Petitioner in view of the multiplicity of Hearing Notices and other processes served on Respondent through substituted service. The Court takes the view that the petitioner was put to an extreme expense in her attempt to involve the respondent in the determination of this suit. Court notes and other processes were served on the respondent all through substituted service. This cannot be adequately compensated for. As per the Rules of Court, all these are factors to be considered by the Court in the award of Cost. Being a District Court, this Court is mindful of the Cost to be awarded. However, the Court is of the respectful opinion that the Cost awarded in this suit is reflective of the circumstances of this case.

H/W ANNETTE SOPHIA ESSEL (MRS.)

MAGISTRATE