IN THE HIGH COURT OF JUSTICE HELD AT KUMASI IN THE ASHANTI REGION THIS WEDNESDAY THE 11TH DAY OF OCTOBER 2023.
BY HIS LORDSHIP JUSTICE FREDERICK TETTEH

SUIT NO.C5/09/23

MAD. EMMANUELLA SERWAA GYAWU

VRS

MR. SAMSON MANYONI

JUDGEMENT:

The parties got married under the Marriage Ordinance CAP 127 on the 29th of August, 2016 at the Kumasi Metropolitan Assembly. After the marriage, the parties co-habited in Kumasi. The parties have one issue known as Samuella Akua Manyoni, aged 7 years. On the 7th June, 2023, the petitioner filed the instant petition in this court, claiming the following reliefs:

a. That the marriage celebrated between the parties be dissolved.

b. That the court grants custody of the child to the Petitioner.

c. Such further or other reliefs as the Honourable Court may deem fit.

The Petitioner averred in her petition that, shortly after the child of the marriage was born on March 3rd, 2016, the Respondent deserted the matrimonial home in November, 2016 without informing the Petitioner and that all efforts to trace the whereabouts of the Respondent proved futile. The Petitioner gave the following particulars;

a. That the Respondent left the matrimonial home without the consent of the Petitioner;

b. That the Respondent has failed and/or refused to make contact with the Petitioner.

According to the Petitioner, pursuant to Section 2(c) of the Matrimonial Causes Act 1971, Act 367, the Petitioner and the Respondent have not lived as Husband and wife for a continuous period of at least 2 years preceding the commencement of this petition.

Prior to the determination of the instant petition, it is important to state that, the Respondent was served with all the processes filed in the instant suit out of the Jurisdiction. There is a proof of service to that effect in the case docket. The Respondent failed to file any process and also failed to make an appearance in court.

In the case of **Linda Edzidor, Joshua Edzidor vs. Republic [2014] 70 GMJ pages 87 to 114,** it was held that, **'undeniably, a trial judge would not be in error to require a case to proceed in the absence of counsel who has had notice of the trial date and yet does not show up in court on the said date'.** I am of the considered view that, this authority is applicable in the instant case, where the Respondent failed to appear in court and also failed to file any process, after he had been duly served with all processes filed in the instant case. As a result, this court proceeded to hear this case and determine same.

Further, in the case of **Republic vs. High Court (Human Right Division), Accra, Ex Parte Alerta (Mancell Egala & Attorney General, Interested Parties [2010] SCGLR 374 @ 383 -384,** the Supreme Court speaking through Brobbey JSC (as he then was) stated the law as follows:

> **"A person who had an opportunity to be heard but deliberately spurned it to satisfy his or her decision to boycott proceedings, cannot later complain of any procedural irregularity as the party would be deemed to have waived any irregularity thereof".** See also the case of **In Re Krah (deceased) and others vrs. Osei Tutu & anor [1989-90] 1 GLR 638".**

In the instant case, I am of the considered view that, the Defendant was given the opportunity to be heard, but he, in my view deliberately spurned the opportunity. This court has no other alternative than to determine the instant petition to a finality in his absence and relying on the available evidence on the record.

It is trite law that the Evidence Act places the burden on a party who is asserting a claim to prove it by a preponderance of the probabilities. The burden of persuasion in a civil case is provided in the Evidence Act as the establishment of the existence or non-existence of a fact by a preponderance of the probabilities. Section

10 of the Evidence Act, which deals with the burden of persuasion on parties to actions states specifically as follows:

> (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 to raise a reasonable doubt concerning the existence or non-existence of a fact, or; to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

With respect to the burden of providing evidence, section 11(1) of the Evidence Act provides as follows:

> **"For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party".**

Section 12 of the Evidence Act restates the general rule that the degree of proof usually required to satisfy the burden of persuasion in civil actions is proof by the preponderance of the probabilities.

Sophia Adinyira JSC (as she then was) in **Don Ackah v Pergah Transport [2010] SCGLR 728** held that the party with the burden to produce evidence, must produce evidence with the **'quality of credibility, short of which his claim may fail.'** She further held thus;

> **"It is a basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of a fact is more probable than its non-existence".**

Finally, under section 14 of the Evidence Act, the burden of persuasion is normally on the party to whose case the fact is essential. The section provides specifically that;

"Except as otherwise provided by law, unless and until 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 he is asserting".

From the above, when the Petitioner discharged her burden with the documentary and other evidence she proffered, the evidentiary burden shifted to Respondent, to establish his answer if any by the same evidentiary standards set by sections 10, 11, 12 and 14 of the Evidence Act. Furthermore, it is also necessary if any allegation or averment pleaded is to be proved by documents or some other evidence, the court should ensure that the proper evidence is accepted as proof of that averment.

As stated in **Zabrama** vrs **Segbedzi** supra, a person who makes an averment or assertion, which is denied by the opponent, has the burden to establish that the averment or assertion is true. And this burden is not discharged unless that person leads admissible and credible evidence from which the facts asserted can properly and safely be inferred.

In the instant case, the Petitioner adduced evidence to the effect that the marriage has broken down beyond reconciliation and that the parties have not lived as husband and wife for at least two (2) years after the Respondent deserted the Petitioner. I have already stated above that, by Respondent's failure to respond to the processes served on him coupled with his obvious refusal to make an appearance in court, he has deliberately spurned the opportunity to be heard. Having spurned the opportunity to be heard, it can be inferred reasonably that, the Respondent has no answer to the instant petition. Further, it can also be inferred that, the Respondent has admitted the assertions made by the Petitioner, since he failed to also have the Petitioner cross-examined in my considered view.

Regarding the conduct of the Respondent during the pendency of the marriage, I am of the further view that, the available evidence has satisfied section 2(1) (c) and (d) of the Matrimonial Causes Act, 1971, (Act 367). The sections read as follows:

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

(d) that the parties to the marriage have not lived as man and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce; provided that such consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so withheld, the Court may grant a petition for divorce under this paragraph notwithstanding the refusal; or

Having regard to the evidence on record, I am of the considered view that, the marriage has irretrievably broken down beyond reconciliation. On the evidence, the parties have not lived as a husband and wife for at least 7 years. There is no hope of reconciliation in my view bearing in mind the evidence on record. In the circumstances, I hereby order that the ordinance marriage celebrated on the 29th August, 2016 between the parties herein, is dissolved and its accompanying certificate accordingly cancelled. I hereby further grant custody of the only child of the marriage to the Petitioner herein. No order as to cost.

SGD
H/L JUSTICE FREDERICK TETTEH
JUSTICE OF THE HIGH COURT

AGYEI NUAMAH ESQ FOR PETITIONER

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