CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 17TH NOVEMBER, 2022

**SUIT NO. C5/29/22**

**KONOJILEMBEY MISHINE - PETITIONER**

**VRS**

**SERGE DOULGUE BAWOYEU - RESPONDENT**

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**JUDGMENT**

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The parties to this action, although of Chadean nationality met in Ghana and celebrated their union under the ordinance on the 29th day of August, 2009 at the Registrar of Marriages, Assemblies of God, upper room, Mamobi. There are three issues of the marriage who as at the date of presentation of this petition were between the ages of thirteen and ten years.

According to the petitioner, they cohabited in Ghana at different places until 2015 when the respondent left for Chad. That the respondent has deserted the matrimonial home causing her much pain and embarrassment. The particulars are that the respondent left Ghana to work in Chad with the understanding that he would visit the family regularly and also remit funds to maintain the home.

She avers that the respondent returned in December, 2015 and spent two weeks with the family and returned to Chad after which he ceased all communication with her and has since not returned to Ghana. That save for a few remittances sent in 2015 and only one remittance sent in 2016, the respondent has left her burdened with maintaining the home and providing the necessaries of health and life to the children.

She prayed the court for an order dissolving their marriage, an order granting custody of the children to her with periodic access to the respondent, an order that the respondent pays the school fees, medical bills and monthly maintenance of the children of the marriage, an order that the respondent provides accommodation for the petitioner and the children of the marriage and an order that the respondent pays to the petitioner a lump sum as alimony as the court deems just and equitable.

The petitioner issued the petition with leave of the court and was granted further leave to serve notice of it on the respondent in Chad. Respondent was served personally via courier services but failed to enter appearance or file an answer to the petition. Upon the orders of the Court, he was served with every process filed and numerous hearing notices. He did not appear in Court throughout the process.

As it is the duty of a court to give a party to a case before it a hearing, the failure of the respondent to appear in court to be heard is taken to mean that he did not wish for the court to hear him before deciding on the matter. Dotse JSC speaking for the Supreme Court in the case of ***Julius Sylvester Bortey Alabi v. Paresh & 2 Others [2018] 120 GMJ 1 at p. 11*** held: *"We are therefore of the view that, if a party voluntarily and deliberately fails and or refuses to attend a court of competent jurisdiction, (such as the High Court which determined this case) to prosecute a claim against him, he cannot complain that he was not given a fair hearing or that there was a breach of natural justice. The Defendants must be respected for making such a choice, but they must not be allowed to get away with it"*.

The Court of Appeal also in the case of ***Ghana Consolidated Diamonds Ltd. v. Tantuo [2001-2002] 2 GLR 150*** held at holding 4: *"A party who was aware of the hearing of a case but chose to stay away out of his own decision could not, if the judgment went against him complain*

*that he was not given a hearing*"**.** See also the case of ***Accra Hearts of Oak Sporting Club v. Ghana Football Association [1982-83] GLR 111 at page 117.***

***Order 36 rule 2 (a) of C.I.47*** provides in unambiguous terms that the proceedings at a trial where the defendant fails to attend is for the court to strike out the counterclaim if any and allow the plaintiff to prove his claim. As this is a matrimonial matter, and proceedings are to be by enquiry, the Court set the matter down for the petitioner to prover her claim.

The relevant issues for the court to determine are;

1. Whether or not the marriage has broken down beyond reconciliation.
2. Whether or not custody of the three issues of the marriage should be granted to the petitioner with periodic access to the respondent
3. Whether or not the respondent should be ordered to pay the the school fees, medical bills, accommodation and also provide a monthly maintenance for the children of the marriage,
4. Whether or not the respondent should be ordered to pay to the petitioner a lump sum as alimony.

**THE CASE OF THE PETITIONER**

The petitioner repeated most of the averments contained in her petition. She added that whilst the respondent was away in Chad, without any reason, he reduced the frequency of conversation between them particularly on major issues and only contacted her at will on a few occasions to say hi without a care as to the wellbeing of the children.

That even though her salary as a hospital administrator cannot cater for the needs of the children, the respondent has left it all to her since 2016. That when their rent was due in

2015, the respondent left her and the children to their fate without any form of support despite persistent emails and text messages to him to come to their aid. That for the past seven (7) years, she has been solely paying for rent.

Further that all attempts including emails to the respondent in an attempt to convince him to return to the matrimonial home and discuss the way forward has proven futile. That all attempts to get family members including relatives in Chad to intervene on her behalf has failed. That the nonchalance of the respondent to this petition confirms his unwillingness to continue with the marriage.

**CONSIDERATION BY COURT**

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

In divorce just like in all civil cases, the degree of proof required by law is that of a balance or preponderance of probabilities. See ***section 12 (1) and (2) of the Evidence Act, 1975 (Act 323).*** In the case of ***Adwubeng V. Domfeh [1996-97] SCGLR 660, the Supreme Court held that "Sections 11 (4) and 12 of the Evidence Decree, 1975 (NRCD 323)*** have clearly provided that the standard of proof in all civil actions was proof by a preponderance of probabilities – no exceptions were made''. It is he who asserts who bears the burden of proof and so the burden of persuasion lies on him/her to lead cogent and positive evidence to establish the existence of his/her claim in the mind of the court. See the case of ***Abbey & Ors v. Antwi [2010] SCGLR…..***

In Ghana, when a couple decide to marry under the Ordinance, then they can only obtain a divorce through the Courts. The court must enquire as far as is reasonable into the reasons for the divorce and may either grant or refuse to decree a divorce after

hearing. The ground upon which a divorce can be obtained from the Courts is clearly stated under the ***Matrimonial Causes Act, 1971 (Act 367).***

In ***section 1 (2)*** *of* ***Act 367***, the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. In proving that the marriage has broken down beyond reconciliation, a petitioner must establish one of six causes i.e. adultery which the offended party finds intolerable to live with; unreasonable behavior; desertion for a period of two years; consent of both parties where they have not lived together as husband and wife for a period of two years; not having lived together as husband and wife for a period of five years; and finally, inability to reconcile differences after diligent effort.

The contention of petitioner is that the respondent has abandoned the matrimonial home since 2015 and has evinced a clear intention not to return to the marriage. A claim of desertion is one of the grounds upon which a finding can be made that the marriage has broken down beyond reconciliation.

***Section 2 (1) (c) of the Matrimonial Causes Act, 1971 (Act 367) provides that;***

> (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

Desertion in law as explained in ***Rayden on Divorce (9th ed.), p. 165***, para. 120, reads, "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." Djabanor J (as he then was) adopted this definition in the case of ***Arku v. Arku and Abraham [1965] 2 GLR 265***.

Again, **Sarkodee J (as he then was)** in the case of ***Hughes v. Hughes [ 1973] 2 GLR 342*** stated that '*for the conduct [of the wife] to amount to desertion, the court had to be satisfied that it was an unjustifiable withdrawal from cohabitation and that she had the intention of remaining separated permanently from him. But where a spouse had agreed to the other departing, he could not then complain that the other was guilty of desertion as separation was by consent.*''

In order for desertion to lay, the petitioner must prove that the respondent by his actions had led the marriage to a state of the complete breakdown of consortium omnis vitae. That is that they were neither living together as spouses or engaged in any of the rights, duties and obligations which fall under the relationship of a married couple(s).

The evidence of the petitioner is that the respondent has abandoned the matrimonial home since 2015 or 2016. From her evidence, the departure of the respondent from the shores of Ghana was with her consent. He was supposed to go and work and visit the family here in Ghana periodically and also remit the family. Upon that understanding, his initial leaving could not be considered as desertion.

However, when after December, 2015, he stopped coming to visit the family and also failed to remit them and further ceased all meaningful forms of communication with the petitioner and the children, his actions began to appear to be desertion.

That he continued to remain incommunicado with the petitioner, refused to return to Ghana and even decided not to remit the children in any form, including accommodation, is an indication that he had resiled from the matrimonial agreement which he had with the petitioner and was showing a clear intention not to return to the state of marital union. From the petitioner's evidence, from December 2015 till the time of presentation of the petition in December, 2021, there had been a total break in cohabitation and neither of them had performed any of the duties of a married couple to each other or enjoyed any of the rights associated with marriage.

Petitioner indicated that they had not had sexual intercourse for all this period, they had not had any form of companionship and even communication concerning the issues of the marriage was a challenge. That attempts by her family in Chad to intervene on her behalf have proved futile.

If her evidence is to be believed and indeed I found her evidence to be credible, the only conclusion that could be inferred from the behavior of the respondent is that he had abandoned the marriage.

That he did so continuously for almost six years preceding the presentation of the petition is indicative that he had no intention of returning to the state of matrimony with the petitioner. On the basis that the marriage celebrated and solemnized between the parties on the 29th day of August, 2009 at the Registrar of Marriages, Assemblies of God, upper room, Mamobi has broken down beyond reconciliation due to desertion for

more than a period of five (5) years on behalf of the respondent, I hereby issue a decree of dissolution to dissolve the said marriage. The marriage certificate with registration number A/G/UR/M001/2009 is hereby cancelled. The Registrar is to notify the administrator of the church of the cancellation for their records to be amended accordingly.

2. ***Whether or not custody of the three issues of the marriage should be granted to the petitioner with periodic access to the respondent***

On the issue of custody, according to **AZU CRABBE CJ** in the case of ***Braun v. Mallet [1975] 1 GLR 81-95*** "in questions of custody it was well-settled that the welfare and happiness of the infant was the paramount consideration. In considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material''. See also the case of ***Gray v. Gray [1971] 1 GLR 422***.

This provision is referred to as the welfare principle and it has been concretized by Statute in ***Section 2 of the Children's Act, 2008 (Act 560).***

***Section 2—Welfare Principle.***

(1) The best interest of the child shall be paramount in any matter concerning a child.

(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

A court in arriving at decisions as to custody and access of a child is bound to consider the best interest of the child and the importance of a young child being with his mother.

The court must also consider the age of the child; that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents; the views of the child if the views have been independently given; that it is desirable to keep siblings together and the the need for continuity in the care and control of the child.

In the case of ***Barake v. Barake [1993-94] 1 GLR 635 Brobbey J*** (as he then was) held that "the welfare of the child was the primary consideration for the determination of the custody of a child. The welfare of the child however had to be considered in its largest sense. Although some of the factors taken into account in deciding on the welfare of the child were the positions of the parents, the position of the child and the happiness of the child, the first consideration should be who his parents were and whether they were ready to do their duty''.

The children are between the ages of thirteen (13) and ten (10) years old. Since 2015, they have lived with the petitioner alone and she has been both a father and a mother to them. For the past seven (7) years, save for two weeks in December, 2015, it is the petitioner who has been present in their lives as a parent. It is the petitioner who has done and continues to do her duty by them.

The respondent is currently in Chad where he has been for the past seven years. The children were born in and have lived in Ghana all their lives. According to the petitioner they school here in Ghana. It appears to be a matter of course that in ensuring the best interest of the children, they be made to live with the parent whom they are used to and who has provided solely for them for the past six years.

To ensure continuity of care and also that the children grow up together as siblings and in an environment where they are used to, custody of all three issues is hereby granted to the petitioner. Subject to the consent of the petitioner and such consent not to be unreasonably withheld.

3. ***Whether or not the respondent should be ordered to pay the the school fees, medical bills, accommodation and also provide a monthly maintenance for the children of the marriage***

The duty to maintain a child according to ***Section 47 of the Children's Act, 1998 (Act 560)*** falls on the parents of that child. It is settled that it is the duty of parents, where they each earn an income to provide for their children. See ***Section 49 of Act 560*** and the decisi*on of* ***Dotse JA (as he then was) in the case of Donkor v. Ankrah [2003-2005] GLR 125*** where he stated "where both parents of a child are earning an income, it must be the joint responsibility of both parents to maintain the child. The tendency for women to look up to only men for the upkeep of children is gone".

Maintenance of children involves providing them with the necessaries of health and life; shelter by means of accommodation, food, clothing, education and medical care being the basic needs of every child.

The petitioner is a hospital administrator whilst the respondent is a teacher. Since the respondent left the shores of Ghana on the basis that he had a contract of employment in Chad, it is to be taken that he is working and earns an income. In the circumstances, it behoves on not just the petitioner alone who lives with the children, but upon the respondent as well to ensure that their children, to the best of the financial abilities of both parties, are maintained.

Accordingly, on the basis that it is the primary duty of parents to provide the necessaries of health and life of their children, it is hereby ordered that:

a) commencing from January, 2023, the respondent provides accommodation for the children until the youngest attains adulthood and leaves the care of the petitioner or the petitioner remarries; whichever is earliest in time. As the children are three, the accommodation should have at least two bedrooms.

b) The petitioner is to pay for the utility and general maintenance by way of repairs of any broken amenities in the said home in order to keep it in a tenantable condition.

c) The respondent is to provide the sum of two thousand Ghana cedis (Ghs 2,000) as monthly maintenance for the three issues until they each turn eighteen years or complete their education or skill training. The amount is to be reviewed upwards by 20% each year.

d) As these are growing children with in and on the verge of their teenage years, their food consumption is expected to be on the high side and so the petitioner is to top up with an amount of one thousand Ghana cedis (Ghs 1,000) per month towards their maintenance.

e) Respondent is also to pay for the school fees and all other school related bills of the issues.

f) The petitioner is to provide for all the clothing needs as well as the basic medical bills of the issues as at when and if they fall due.

g) Where the medical bills are for serious ailments involving hospitalization and constant treatment, both parties are to bear the costs involved equally.

4. ***Whether or not the respondent should be ordered to pay to the petitioner a lump sum as alimony.***

In the case of ***Oparebea v. Mensah [1993-94] 1 GLR 61,*** the court held that in order to determine a claim made under ***Section 20 (1) of the Matrimonial Causes Act***, the court must examine the needs of the party making the claim and not the contributions of the parties during the marriage.

The case of ***Riberiro v. Ribeiro [1989-1990] 2 GLR 109*** provides a good guidance to a court when making decisions on financial provision. My consideration should not only be based on the need of the respondent but also on the financial strength of the petitioner as well as the standard of living to which the respondent was accustomed to during the marriage.

Any order for financial provision must be based on equitable grounds. Factors to be considered in arriving at an equitable decision include the earning capacities of the parties, property or other financial properties which each of the parties has or is likely to have in the foreseeable future, the financial needs, obligations and responsibilities of each of the parties and the standard of living enjoyed by the family before the breakdown of the marriage.

The petitioner is a hospital administrator who says she has had to provide accommodation, pay the school bills of the children as well as maintain the children on her meagre salary alone since 2016. The respondent on the other hand, has save for one occasion when he sent a remittance, had the use of any moneys he has obtained within this period to himself. It is the duties of a spouse to provide the necessaries of health and life to the other. The respondent has not provided any such sustenance to the petitioner since 2015. Had he provided the petitioner with the necessaries of health and life as well as play an equal role in the maintenance and all other financial needs of the children, it is likely that the petitioner may have been able to make some savings out of her income towards a rainy day.

As it stands now, their marriage has been dissolved and so he no longer owes the petitioner any duty by way of providing her with the necessaries of health and life as his spouse. I find that it would not be just for the respondent to walk away with all the moneys that he has had at his disposal by virtue of not performing his duties towards the petitioner and the children of the marriage whilst the petitioner walks away with nothing. It would be fair and equitable that he be made to settle the petitioner financially with a reasonable amount of money in order to make the equities equal and enable the petitioner to be able to start off her single status with some finances.

On these basis, the respondent is hereby ordered to pay the sum of sixty thousand Ghana cedis (Ghs 60,000) to the petitioner as financial settlement within one hundred and twenty days from the date of judgment. Failure to do so, the amount would attract interest at the commercial bank rate from the date of judgment till the date of final payment.

In arriving at costs, I have taken account the fact that the petitioner had to serve the respondent with all processes via courier services in Chad. In order to ensure that the respondent's right to a fair hearing was not trampled on, the petitioner served him with every process. In the circumstances, any costs awarded must take into account the filing fees as well as the costs involved in serving the respondent in Chad. Consequently, the respondent is also to pay the sum of fifteen thousand Ghana Cedis (Ghs 15,000) towards the legal costs of the petitioner.

(SGD)

**H/H BERTHA ANIAGYEI (MS)**

**(CIRCUIT COURT JUDGE)**

FRANK ARHINFUL FOR THE PETITIONER PRESENT