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

SUIT NO. C5/64/22

ROBERTA HAWA BAWA - PETITIONER

VRS

EVANS YAO AGBESI - RESPONDENT

JUDGMENT

In a petition filed in this court on the 1st day of April, 2022, the petitioner sought the reliefs of

(a) A declaration that the marriage contracted on the 24th day of June, 2012 at the Light House Chapel International, Community 8, Tema be dissolved

(b)Custody of the two children of the marriage be granted to the petitioner.

She averred that she and the respondent celebrated their marriage under the ordinance on the 14th day of June, 2012 at the Lighthouse International Chapel, Community 8, Tema. There are two issues of the marriage who are seven and four years respectively. That the respondent has behaved in such an unreasonable manner that she cannot be expected to continue to live with him.

She particularizes the unreasonable behavior as total neglect by the respondent in his duties towards her as a husband and also towards the children, the respondent abandoning the matrimonial home for the past three years and also administering medication to their then two year old child to put her to sleep just to have his peace of mind when she was away at work.

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The respondent was served with the petition and notice to appear. He failed to enter appearance or file an answer as required by the rules of procedure. He was also served with the notice for trial and setting down for trial as well as with various hearing notices throughout the proceedings. He never appeared in court.

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 two issues of the marriage should be granted to the petitioner.**

THE CASE OF THE PETITIONER

In her evidence in chief, the petitioner said the respondent abandoned the matrimonial home three years ago and she and the children do not know of his whereabouts. That the last time he visited the children in 2019.

That she received information that the respondent had come to a church of one of his friends and so she went there and requested for the friend to speak to respondent. When she called to follow up, the friend informed her that respondent had cut ties with him. She continued that ever since respondent left the matrimonial home, he has shirked all his responsibilities.

That there has been no sexual intimacy between them for the past three years. The respondent has blocked her on all communication mediums and there is a total lack of communication between them. Further that the unreasonable and inconsiderate behavior of the respondent has caused her so much psychological and emotional distress.

That she has been solely responsible for the children and all efforts made at reconciliation by the elders of their church, friends and family members have proved futile. She prayed the court to dissolve the marriage between her and the respondent. She tendered in evidence the marriage certificate as EXHIBIT A.

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CONSIDERATION BY COURT

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.

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

Although the petitioner contended that the reason for the breakdown of the marriage was the unreasonable behavior of the respondent, all her averments point to the fact that the respondent has abandoned her, the children and the matrimonial home for the past three (3) years. Her averments veer more towards desertion than unreasonable behavior.

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*''.

The evidence of the petitioner is that the respondent abandoned the matrimonial home three (3) years ago. That he returned sometime in 2019 to visit the children and since then, neither she nor the children know of his whereabouts. Respondent has also blocked her from accessing him on all mediums of communication.

Cohabitation, communication and sexual intercourse are generally considered as the necessary incidents of marriage. The respondent had by his actions, withdrawn from cohabitation with the petitioner for three (3) years. In the course of that three (3) years, they have not had sex and he has left the responsibility of maintaining the home and the children to the petitioner alone.

The respondent had also prevented any form of communication between him and the petitioner by blocking all mediums of communication. His actions, in the absence of any evidence to the contrary, indicate an unjustifiable and unreasonable withdrawal from cohabitation and an intention to remain separated permanently from the petitioner.

Although the respondent was not in court to cross examine the petitioner and challenge her claims so as to allow the court to test the veracity of her claims, I find that the

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petitioner generally gave a good account of herself to warrant a conclusion that she is a credible witness.

On the basis that for more than two years prior to the presentation of this petition, the respondent had deserted the marriage, I hereby find that same has broken down beyond reconciliation. I hereby issue a decree of dissolution to dissolve the marriage celebrated between the parties on the 24th day of June, 2012 at the Lighthouse Chapel International, Community 8, Tema. The Registrar is to notify the administrator of the church for their records to be amended accordingly.

2. ***Whether or not custody of the two issues of the marriage should be granted to the petitioner***.

On the issue of custody of the two issues, 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.

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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.

The evidence of petitioner is that the last time the children saw the respondent was when he visited the matrimonial home in 2019. The children have for the past three (3) years, had and known her as their only parent. The children are also young and so it is desirable that they live with the petitioner who is their biological mother. The respondent has by his actions shown a complete lack of interest in his own children and so it would not be in the best interest of the children to consider granting any form of custody to the respondent.

On that basis, I hereby grant custody of the children of the marriage to the petitioner.

Although the petitioner did not seek maintenance for the children, I take note that I have jurisdiction to determine such issues suo motu. ***Section 22(2) of Act 367*** provides that "The court may either on its own initiative or on an application by a party to proceedings under this Act, make an order concerning a child of the household which it thinks reasonable for the benefit of the child''. Such orders include provision for the education and maintenance of the child out of the property or income of both parties to the marriage. The two issues of the marriage are both minors and the parties in their capacities as their parents have a statutory duty to provide for the necessaries of health and life of the issues''.

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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".

On the basis that it is the primary duty of parents to provide the necessaries of health and life of their children, I hereby make the following orders;

1. The petitioner is to continue providing accommodation and all other incidental costs including utility for the children
2. Both petitioner and respondent are to provide the clothing needs of the children
3. The respondent is to pay the school fees and all other school related bills of the children
4. The respondent is also to pay for the medical bills of the children.

Upon the orders of the court, the petitioner had to serve all processes and various hearing notices on the respondent. Accordingly, costs of five thousand Ghana cedis (Ghs 5,000) is awarded to the petitioner.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

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