

**IN THE CIRCUIT COURT ONE HELD AT ACCRA ON TUESDAY, 16<sup>TH</sup>  
DAY OF JUNE, 2023 BEFORE HER HONOUR, AFIA OWUSUAA APPIAH  
(MRS) THE CIRCUIT COURT JUDGE.**

**SUIT NO: C5/241/2021**

**DR THOMAS ANNING DORSON  
THE ZONE BUILDING  
AMANFROM-KASOA**

**PETITIONER**

**V**

**DORCAS AFUA ASAAM  
RACE COURSE  
LAPAZ**

**RESPONDENT**

### **JUDGMENT**

Petitioner herein on the 26/2/2021 instituted the instant petition against Respondent herein praying the court for the relief below;

- i. That the marriage celebrated between the parties on the 23/12/2011 be dissolved
- ii. That the Repondent be granted custody of the two children Sheridan Anning Dorson and Jaiden Anning DOrson with reasonable access being granted the Petitioner to the children; and
- iii. That parcel of land situate at Assorko Essaman in the Western Region of Ghana be settled in favour of the Respondent.

per the petition, parties got married under the ordinance on the 23/12/2011 at the Registry of the Ahanta West District Assembly, Agona Ahanta in the Western Region. They thereafter cohabited in Accra and are blessed with two children as named in the reliefs above aged 8 years and 4 years at the time of filing this petition. Petitioner cites irreconcilable differences between the parties as his ground for seeking the dissolution of the marriage.

Upon service of the petition on the Respondent she entered appearance and duly filed her answer to the petition admitting that efforts to reconcile their differences has been thwarted by Petitioner. She contented that Petitioner had declared to her that he had lost interest in the marriage and refused sexual intimacy with her, has had two children outside the marriage and abandoned her and the two children to live in South Africa for years without any consideration whatsoever for her and the children. She prayed the court for reconciliation of attempts to be made to salvage the marriage but crossed petitioned in the event of the marriage being dissolved.

1. That the marriage be dissolved on the grounds of adultery, desertion and unreasonable conduct.
2. That custody of the two children be granted to the Respondent with reasonable access to the Petitioner.
3. That the landed property at Bortianor, Accra known as Plot no F/13B in the name if the parties herein be vested in the Respondent and the two children.
4. That the Petitioner be made to pay maintenance of GHC4,000 a month to support the upkeep of the children
5. That the Petitioner be made to pay school fees and medical bills as and when same is due.
6. That the Petitioner be made to pay permanent financial settlement of GHC75,000 and legal fees of GHc25,000.

Terms of settlement executed by parties and their respective counsel was however filed at the registry of the court on the 27/6/22 where they both agreed that the marriage between them be dissolved and other ancillary

reliefs determined. The court after several adjournments and services of hearing notices on the Petitioner and his counsel and their failure to appear struck out the Petition of Petitioner leaving the cross-petition of the Respondent pending before the court for determination.

Neither Petitioner nor his counsel ever made an appearance in court for the conduct of the matter. It is trite learning that where a court has taken a decision without due regard to a party who was absent at a trial because he was unaware of the hearing date that decision is a nullity for lack of jurisdiction on the part of the court. See **Barclays Bank v Ghana Cable Co. [2002-03] SCGLR 1** and **Vasque v Quarshie [1968] GLR 62**. However, where the party affected was sufficiently aware of the hearing date or was sufficiently offered the opportunity to appear but he refused or failed to avail himself (as evident in this case) the court was entitled to proceed and to determine the case on the basis of the evidence adduced at the trial. See *In re West Coast Dyeing Ind. Ltd; Adams v Tandoh [1987-88] 2 GLR 561*.

The challenged evidence on oath of Respondent per her witness statement filed 24/2/23 and adopted by the court is that parties herein got married under the ordinance on the 23/12/2011 and blessed with two children now aged 9 years and 5 years respectively. Respondent stated that she is currently unemployed whilst Petitioner currently lectures at a university in South Africa. According to her, there had been communication problems between her and the Petitioner and all efforts she made to reconcile their differences were rebuffed by the Petitioner. She stated that ever since Petitioner declared that he had lost interest in the marriage, he had refused intimacy with her to prevent her from getting pregnant to the dissatisfaction of his paramours outside of the marriage and also because he had had two children outside the marriage and did not want any more children. Respondent further stated that it been four years since Petitioner moved to live in south Africa where he lectures and hardly stays in the matrimonial home even when he is in Ghana. She continued that Petitioner refused to eat any food she cooks and does not

allow her was his clothing. She contended that the behaviour of Petitioner has caused her anxiety and emotional stress due to his abandonment of her and the children and his continued stay in South Africa. She contended that although it had been her wish that the marriage would not be dissolved, Petitioner was not ready for reconciliation and therefore prayed the court to adopt the terms of settlement executed by the parties and filed at the registry of the court.

It is to be noted that, the failure of the Respondent to appear at trial to cross-examine the Petitioner on the evidence or challenge same either in cross-examination or by contrary evidence does not exonerate the Petitioner from satisfying the court that the marriage has broken down beyond reconciliation.

The Standard of proof in civil cases such as the present action is proof on the preponderance of probabilities. This is Statutory and has received countless blessings from the Courts of this land in plethora of authorities. See sections 11(4) and 12 of the Evidence Act, 1975, NRCD 323. Section 12(2) of NRDC 323 defines preponderance of probabilities as *“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.* In the case of **ADWUBENG V DOMFEH (1997-98) 1 GLR 282** it was held per holding 3 as follows: *“...And sections 11(4) and 12 of NRCD 323 clearly provided that the standard of proof in all civil actions, without exception, was proof by a preponderance of probabilities”.*

I have also taken note of the principle that, the failure of a party to deny a material averment constitutes an admission of same and such implied admitted fact requires no further proof. As the Supreme Court in the case of **FORI v. AYIREBI AND OTHER [1966] GLR 627** held “when a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given

evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact”.

Section 2(1) of Act 367 requires that a petitioner must satisfy the court of one or more of the instances listed therein as proof that the marriage has broken down beyond reconciliation.

Respondent alleges desertion and adultery on the part of Petitioner.

Section 2(1 a) of Act 367 stipulates that where the respondent has committed adultery and that by reason of the adultery the petitioner finds it intolerable to live with the respondent same suffice as prove of break down of marriage.

Adultery is defined in **THE LAW DICTIONARY Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. as follows** " Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."

In the case of **ADJETEY & ANOR V ADJETEY [1973] 1GLR 216**, at holding one it was held that "adultery must be proved to the satisfaction of the court and even though the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability. Direct evidence of adultery was rare. In nearly every case the fact of adultery was inferred from circumstances which by fair and necessary inference would lead to that conclusion. There must be proof of disposition and opportunity for committing adultery, but the conjunction of strong inclination with evidence of opportunity would not lead to an irrebuttable presumption that adultery

had been committed, and likewise the court was not bound to infer adultery from evidence of opportunity alone.”

Respondent in her evidence contends that Petitioner has fathered two children outside the marriage. This evidence has not been challenged or denied by Petitioner. In the English case of **HUME v HUME [1965] TIMES, FEB 25** a finding of adultery was made against a wife on the evidence that she had given birth to a child of whom blood tests established that the husband could not be the father. Petitioner having fathered a child outside the marriage, it can be safely inferred that he had committed adultery. Per the definition of adultery as stated in the Law dictionary as well as the authorities cited supra, it is immaterial whether or not parties are together or separated. So long as the marriage is subsisting and same not dissolved, voluntary sexual intercourse with any other person other than your marriage partner is considered adultery.

Section 3(b) of Act 367 provides that for a petition for dissolution of a marriage to succeed on adultery if the length of period or of those periods parties have lived together should be six months or less, in determining whether for the purposes of section 2 (1) (a) the petitioner finds it intolerable to live with the respondent.

Respondent herein despite contending that Petitioner committed adultery in her answer and cross petition as well as her evidence on oath failed to give the court details of when she found out about the adultery and also did not make any averment of finding it intolerable to live with Petitioner but rather prayed the court for reconciliation. The court although finding that Petitioner has committed adultery is unable to find that the marriage of the parties has

broken down beyond reconciliation due to the adultery committed by the Petitioner .

Respondent further alleges desertion by Petitioner. **Section 2 (1) (c) of Act 367** provides that where the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition same suffice as proof of breakdown of marriage.

**Sarkodee J in the case of HUGHES V HUGHES [1973] 2 GLR 342-348**

held that for the conduct of the spouse to amount to desertion, the court must be satisfied that it is an unjustifiable withdrawal from cohabitation without the consent of the petitioner and that he/she has the intention of remaining separated permanently from 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."*

Per the evidence on record four years preceding the Petition, Petitioner had moved to south Africa without recourse to her and the two children and does not live in the matrimonial home when he comes to Ghana. Respondent

stated further that Petitioner had refused to eat her food and does not allow her to do his laundry.

By refusing to return to Ghana and failing to communicate and or maintain the Petitioner, Respondent unjustifiably withdrew from cohabitation without Petitioner's consent. Respondent per the record expressly communicated his intentions of remaining separated from Petitioner and the children confirmed same with his refusal to communicate or maintain Petitioner. It has been 4 years now since Respondent deserted Petitioner. Court therefore finds that Respondent has deserted Petitioner for about 4 years now.

**Whether or not after diligent effort parties are unable to reconcile their differences/Whether or not the marriage has broken down beyond reconciliation.**

In the case of **KOTEI V KOTEI [1974] 2 GLR 172, Sarkodee J** held as follows,

*“The sole ground for granting a petition for divorce is that the marriage has broken down beyond reconciliation. But the petitioner is also obliged to comply with section 2 (1) of the Matrimonial Causes Act, 1971 (Act 367), which requires him to establish at least one of the grounds set out in that section... Subsection (3) contains an important provision which brings into focus the general scheme of the Act, which is to encourage reconciliation as far as may be practicable. Thus section 8 enjoins the petitioner or his counsel to inform the court of all attempts made to effect a reconciliation and gives the court power to adjourn the proceedings at any stage to enable attempts at reconciliation to be made if there is a reasonable possibility of reconciliation. It is, however, wrong, in my view, to*



*say that proof of total breakdown of the marriage and the possibility of reconciliation should be taken "disjunctively." This, counsel for the respondent explained, meant that there is a burden to prove separately that the marriage has broken down and even when it is proved that it has broken down that there should be the further proof that it is beyond reconciliation. It is accepted that proof of one or more of the facts set out in section 2 (1) is essential and that proof of one of them shows the marriage has broken down beyond reconciliation. It is also conceded that notwithstanding proof the court can refuse to grant the decree of dissolution on the ground that the marriage has not broken down beyond reconciliation. It will be noted that the discretion given to the court is not a discretion to grant but to refuse a decree of dissolution. This means that once facts are proved bringing the case within any of the facts set out in section 2 (1) of Act 367 a decree of dissolution should be pronounced unless the court thinks otherwise. In other words, the burden is not on the petitioner to show that special grounds exist justifying the exercise of the court's power."*

The court has found supra the behavior of the Petitioner has deserted Respondent. **Section 2 (1) (c) of Act 367** provides that where the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition same suffice as proof of breakdown of marriage.

In this instant case, it is rather the Petitioner who has deserted Respondent per the findings of the court. Petitioner being the one who has deserted Respondent, he cannot rely on same for the grant of the dissolution of the marriage when Respondent through cross-petitioned paramourly seeks reconciliation.

It is therefore decreed that the marriage celebrated between the parties herein at the Ahanta West District Assembly, Agona Ahanta in the Western Region be and same is dissolved today the 16<sup>th</sup> day of June, 2023.

As stated supra, parties prior to the hearing of the case executed terms of agreement together with their respective counsel and filed same at the registry of the court on 27/06/2022. Petitioner prays the court for adoption of the said terms in respect of her ancillary reliefs. The court has perused the said filed terms of agreement which bears the signatures of parties and their respect counsel and finds same properly executed agreement. The court accordingly adopts the said filed terms of agreement filed on 27/06/2022 as consent judgment of the parties in respect of the ancillary relief claimed by Petitioner in her petition and they are as follows:

1. That the marriage celebrated between the parties be dissolved on the conditions that it has broken down beyond reconciliation.

2. The custody of the two children be given to the Respondent with reasonable access to the petitioner.
3. That the Petitioner pays GH3,000.00 as maintenance to the Respondent and the two children.
4. That the Petitioner will provide all necessities of life including paying school fees and medical bills of the children
5. That the Petitioner pay to the Respondent permanent financial provision of GH50,000 and legal fees of GH12,000.00
6. That the uncompleted house on Plot No. F/138, situate at Bortianor, Accra be vested in the Respondent in trust for the two minor children of the marriage.
7. The Petitioner shall pay off all outstanding amount on the house owed and due to SSNIT when the dispute between SSNIT and the chiefs of Bortianor has been determined by the court.
8. The Petitioner shall endeavour to gradually complete the house and make same habitable within two to three years.

**PETITIONER PRESENT**

**RESPONDENT ABSENT**

**MR WISDOM LARWEH FOR PETITIONER ABSENT**

**(SGD)**

**H/H AFIA OWUSUAA APPIAH (MRS)  
(CIRCUIT COURT JUDGE)**