IN THE CIRCUIT COURT ONE HELD AT ACCRA ON FRIDAY, 21ST DAY OF APRIL, 2023 BEFORE HER HONOUR, AFIA OWUSUAA APPIAH (MRS) THE CIRCUIT COURT JUDGE.

SUIT NO: C5/126/2021

THEODORA ETHEL N. D HAMMOND-ARYEE H/NO DM-109A
DOME ACCRA **PETITIONER**

V

ISAAC AKOSA AGBU
H/NO 2 TSUIM AKPO DRIVE
NORTH WESR ODORKR,
ACCRA **RESPONDENT**

JUDGMENT

Petitioner herein on the 26/11/2020 instituted the instant petition against Respondent herein praying the court for the relief below;

i. An order for the dissolution of the marriage between the petitioner and Respondent contracted under CAP 127 on the 12th dat of October, 2002.
ii. An order of the custody of the children of the marriage be granted to the Petitioner with access to the Respondent.
iii. An order directed at the Respondent to provide for the maintenance, medical and educational needs of the children of the marriage.
iv. An order directed at the Respondent not to interfere with or trespass with or take possession of the mutually agreed and demarcated portion of the matrimonial home H.No 2 Tsuim Kpakpo Drive, North West Odorkor, Accra – belonging to the Petitioner.
v. An order directing the Respondent to pay the Petitioner alimony in the sum of Fifty Thousand Ghana Cedis
vi. That the Respondent be mulcted with costs of this proceedings.

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Per the petition, petitioner is a Ghanaian domiciled in Ghana whilst Respondent is a Nigerian domiciled in Ghana. Their marriage is blessed with three children aged 17years, 15 years and 12 years as at the time of filing the petition. Parties after celebration of their marriage at the Christ the King Catholic Church, Cantonments, Accra cohabited at Labone and Kokomlemle and Odorkor for cumulatively for 18 years. Petitioner in her Petitioner to the court alleged breakdown of the marriage due to the unreasonable behaviour of Respondent. She contended that the problems of the marriage started 6 months into the marriage and despite diligent efforts have been unable to reconcile their difference. She further alleged unreasonable behaviour of Respondent as a course of the break down of the marriage.

Upon service of the petition on the Respondent he entered appearance and duly filed his answer to the petition denying the breakdown of the marriage and allegations of unreasonable behaviour leveled against him by Petitioner in the petitioner. He prayed the court to refuse the reliefs sought by the Petitioner.

Parties upon the orders of the court filed their respective witness statements for the hearing of the case. After several absenteeism and adjournment, parties executed terms of settlement and caused same be filed at the registry of the court on the 8/12/2022 where they both agreed that the marriage between them be dissolved.

I must point out that per the records Respondent has never appeared before the court although he was at times represented by counsel. The court caused several hearing notices and court notes to be served on him or his counsel for the hearing of the case. Despite the several hearing notices and the recent hearing notice served on his counsel on 18/4/2023, Respondent and or his counsel failed to attend trial. 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 Petitioner per her witness statement filed 28/20/22 and adopted by the court is that petitioner herein a Ghanaian and a nurse instructor got married to Respondent a Nigerian, marketing advertiser domiciled in Ghana at the Christ the King Catholic Church, cantonment, Accra on the 12/10/2002. She stated that although parties after the marriage cohabited at Labone, Kokomlemle, Odorkor but currently she lives with her mother at Dome but Respondent still lives at Odorkor. She testified that the parties have after due diligence been unable to reconcile their differences resulting in the break down of the marriage. According to Petitioner, Respondent has abused her emotionally, physically and verbally and she has suffered emotional and mental instability in the hands of Respondent to the point of seeking medical attention from a clinical psychologist. She stated that in more that 7 years, Respondent has not had any sexual relations with her stated further that her family has since September 2019 returned the customary drinks to the family of the Respondent. She stated for her emotional and mental health, she resolved and moved into her parents' house at Dome in May 2020. Petitioner further stated that parties have entered into terms of settlement and she had caused same to be filed at the registry of the court on 8/12/2022. She therefore prayed the court the divorce based on the terms of agreement filed. A photocopy of the marriage certificate was tendered in evidence as exhibit A.

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 case such as the present action is proof on the preponderance of probabilities. This is Statutory and has received countless blessing 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 constitute 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.

Petitioner in her petitioner made several allegations of unreasonable behaviour of Respondent because of which she cannot be reasonable expected to live with him as husband and wife.

Subsection (1 b) of section 2 of Act 367 provides that where the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent same suffice as proof of the break down of the marriage beyond reconciliation.

Hayfron-Benjamin in the case of **Mensah v Mensah [1972] 2 GLR 198** 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 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 for Act 367 is not a Cassanova's Charter. The test is objective".

In the case of Knudsen v Knudsen [1976] 1GLR 204, Amissah JA stated that "the question therefore is whether the Petitioner established that the Respondent behaved in such a way that he could not reasonably be expected to live with her. Behaviour of a party, which would lead to this conclusion, would range over a wide variety of acts. It may consist of one act if of sufficient gravity or of a persistent course of conduct or of a series of acts of differing kinds none of which by itself may justify a conclusion that the person seeking the divorce cannot reasonably be expected to live with the spouse, but the cumulative effect of all taken together would do so.",

Although Respondent failed to attend trial and or cross-examine Petitioner on her evidence of his unreasonable behaviour, he denied same in his answer and averred that Petitioner would be put to strict proof of same the allegations of unreasonable behaviour. He therefore had put his alleged unreasonable behaviour in issue. It was therefore not sufficient for Petitioner

to merely repeat her allegations without cogent proof. The Supreme Court in the case of **DON ACKAH V PERGAH TRANSPORT LTD [2010] SCGLR 728 at 736,** held as follows "It is a basic principle of the law on 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. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. 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 the fact is more reasonable than its non-existence". Petitioner by merely repeating her assertions without any cogent evidence fails to prove her claim of unreasonable behaviour of Respondent causing the break down of the marriage.

Petitioner further alleged that parties after due diligence are unable to reconcile their differences. Under **section 2(1f)** of Act 367, where parties after diligent efforts are unable to reconcile their differences, same suffices as breakdown of the marriage. Petitioner in her evidence on oath further testified that due to their inability to reconcile their differences, her family has since September 2019 returned the head drinks to the family of Respondent and she has also since May 2020 moved in with her parents at Dome. The act of parties living separately since 2020, the execution of terms of agreement by the parties and their respective counsel on 25/10/2022 where it was agreed at Paragraph 7 that the marriage be dissolved satisfies the court that parties after due diligence are unable to reconcile their differences.

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. … 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) 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. Once he or she comes within any one of the provisions in section 2 (1) (e) and (f), the presumption is in his favour; proving one of the provisions without more is proof of the breakdown of the marriage beyond reconciliation. Proof of five years' continuous separation enables the marriage to be dissolved against the will of a spouse who has committed no matrimonial offence and who cannot be blamed for the breakdown of the marriage."

The court therefore is satisfied per the evidence on record that the parties after diligent efforts are unable to reconcile their differences. Accordingly, the court finds that the marriage celebrated between the parties on 12/10/2002 has broken down beyond reconciliation.

It is therefore decreed that the marriage celebrated between the parties herein at the Christ the King Church Cantonment Accra be and same is dissolved today the 21st day of April, 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 the 8/12/2023. 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 8/12/2023 as consent judgment of the parties in respect of the ancillary relief claimed by Petitioner in her petition. The said agreements are from paragraph 8 to 14 of the filed terms of agreement and they are as follows:

1. That each party maintains title to and possession of the mutually agreed and demarcated portion of the matrimonial home H/No. 2, Tsuim Kpakpo Drive, North West Odorkor, Accra.

2. That the Petitioner and Respondent shall have joint custody of the three children.

3. That the Petitioner and Respondent shall bear equally and mutually the cost of education (school/tuition and user fees) of their children but the Respondent, who is currently unemployed, shall be allowed to reimburse the Petitioner on occasions where he is unable to meet his obligation herein on time and in full.

4. That the Respondent shall provide and monthly amount of One Thousand Ghana Cedis (GH₵1,000) as support for the maintenance of the children of the marriage, but the Respondent, who is currently unemployed shall be allowed to reimburse the Petitioner on occasions where he is unable to meet his obligation herein on time and in full.

5. That these terms agreed upon by the parties shall be final and relieve the Respondent of any compensation owed the Petitioner save that if the Respondent fails to comply with the terms in paragraphs 10 and 11 on the due date and if reminded by the Petitioner to pay and same

fails, same shall be treated as contempt of court and the Petitioner shall reserve the right to revert to court to reclaim any unpaid amount from the Respondent

6. The parties agree that there shall be no order as to cost.

7. That the terms of settlement herein agreed upon the parties to this petition be adopted and entered by this Honourable court as consent judgment.

PETITIONER PRESENT

RESPONDENT ABSENT

MR WISDOM LARWEH FOR PETITIONER ABSENT

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