

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O.C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPower EBAHOR

COURT NO: 12

SUIT NO: FCT/HC/CV/BW/03/2017

BETWEEN:

HAPPINESS MBAJIUGU.....PETITIONER

VS

OBINNA MBAJIUGU.....RESPONDENT

JUDGMENT

This Petition for Decree of Nullity of Marriage was filed by Happiness Mbajiogu (hereinafter called the Petitioner) for the relief set out in the face of the Petition as;

- (a) A Decree of Nullity of Dissolution of Marriage celebrated on 22/6/2015 between Petitioner and Respondent.

The ground upon which the Petitioner rely on for the relief of nullity of marriage as can be gleaned from the pleadings and evidence of the Petition is the fact contained in Section 5 (a) of the Matrimonial Causes Act. That is;

“Either party to the marriage is incapable of consummating the marriage”.

The Petition along with other processes of court were served on the Respondent by substituted means to wit: by courier Red Star Express at Federal Medical Center (FMC) Abakiliki, Ebonyi State. On the other hand, Respondent did not file an Answer to the Petition, and was not represented by counsel and was also absent throughout trial despite repeated service of Hearing Notices. The Petition thus proceeded as Undefended.

Petitioner testified as PW1 as called no other witness. PW1 adopted her depositions in her Witness Statement on Oath deposed to on 30/1/17 as her oral testimony in support of the Petition. In the course of the Examination-in-Chief of PW1, the marriage certificate issued by the Marriage Registry OBALGA of Rivers State evidencing marriage between the Petitioner and Respondent contracted on 22/6/2015 was tendered and admitted as Exhibit "A".

At the close of the evidence of the Petitioner the case was adjourned for the Respondent to cross-examine PW1 – the Petitioner, on the date the case came up, the Respondent was absent in court and was not Represented by Counsel, upon the application of Petitioner's Counsel, the court ordered the foreclosure of the right of the Respondent from defending the Petitions and adjourned for Adopted of Final Address.

On 26/9/18, O. Onuigbo Esq Petitioner's Counsel adopted their Final Written Address, dated 18/9/18 and which was re-adopted on 20/2/2019 as oral argument in support of the Petition. In the said Final Written Address Petitioner Counsel formulated a sole issue for determination that is;

“Whether the Petitioner has proved a marriage under the Act, which has broken down irretrievably thus entitling her to the Order of Dissolution being sought in the circumstance”.

He urge court to grant the prayers of the Petitioner.

Having carefully considered the unchallenged evidence of PW1 – the Petitioner, the submission of counsel and the judicial authorities cited, the court finds that only one (1) issue calls for determination that is;

“Whether the Petitioner has successfully made out a case to warrant the grant of the relief sought”.

Firstly, Respondent did not file an Answer to the Petition and did not challenged the evidence of the Petitioner, the implication of this is that the court will deem the unchallenged and uncontroverted evidence of the Petitioner as true, correct and act on it. See the case of CBN Vs Igwilo (2007) 14 NWLR (PT. 1054) 393 @ 406. In the case of Afribank (Nig) Ltd Vs Moslad Enterprises, Ltd (2007) All FWLR (PT. 421) 819 @ 894 Para E – F. Akaahs JCA (as he then was had this to say);

“Where a Defendant does not produce evidence or testify, slight or minimum evidence, which can discharge the onus of proof would be required to ground the Plaintiff’s Claim”.

I am, however, quick to add that, minimum evidence must be credible enough for court to grant the claim of the Petitioner. See Zenegal Ltd Vs Jagal Pharm Ltd (2007) All FWLR (PT. 387) 950 Para F – G.

In the instant case, Petitioner pleaded the relief of both nullity of marriage decree of dissolution of marriage but in her evidence told the court that she seeks a decree of nullity of marriage. Petitioner led evidence in support of the prayer for nullity of marriage, without providing evidence for the ground upon which she seeks dissolution of marriage that is on the facts of Section 15 (2) (a) of the Matrimonial Causes Act. Which reads "that the Respondent has willfully and persistently refused to consummate the marriage. I say so because the evidence of the Petitioner is that the Respondent is incapable of consummating the marriage, and a Respondent who is incapacitated cannot be said to refuse consummation. The implication of this is that the Petitioner has abandoned the relief for dissolution of marriage having failed to lead evidence on the ground relied on. I shall therefore consider the Petitioner's prayer for decree of nullity of marriage.

By the Provision of Section 5 (1) of the Marriage Act categorized in sub-Sections (a) – (d), a marriage is voidable under any of the circumstances contained therein. In the instant case, the Petitioner places reliance on the ground contained in Section 5 (1) (a) of the Matrimonial Causes Act which reads;

- (1) Subject to this Act a marriage that takes place after the commencement of this Act not being a marriage that is void shall be voidable in the following cases but not otherwise, that is to say, where at time of marriage.

- (a) Either party to the marriage is incapable of consummating the marriage.

To succeed under this ground, the Petitioner must establish that the Respondent is incapable of having normal sexual relations. And to consummate a marriage there must be ordinary and complete sexual intercourse, where sexual relations are partial or imperfect, there will be no consummation. See Family Law in Nigeria E. I Nwogugu HEBN Publishers Ibadan, 1990. Pg. 140.

In proof of this ground, PW1 stated when the Petitioner and the Respondent married (Sic) they proceeded to a hotel in Port-Harcourt, Rivers State for Honeymoon

“Petitioner aver that the degree of shock, agony irritating ovulation and trauma experienced by the Petitioner upon discovering that the Respondent lacks the capacity to achieve erection, cannot be easily erased, forgotten or wiped out in a haste”

PW1 further stated in Paragraph 10 (o) of her Statement on Oath.

“The Petitioner avers that when Respondent could not achieve erection to consummate the marriage, she made several efforts to consult gynecologist for and on behalf of the Respondent, but Respondent will on each occasion give reasons why he failed to keep appointment with the gynecologist”

PW1 told the court further that she sought further medical advice and had to travel to Jos Plateau State to consult with a notable gynecologist who asked her to come with the Respondent, but Respondent failed severally.

The summary of the unchallenged evidence of PW1 – the Petitioner is that the Respondent has challenged with maintaining erection to consummate the marriage, and this condition has been with the Respondent prior to the marriage and as the time of filing this Petition. And that the Respondent has failed to bring himself for medical assistance. These pieces of evidence thus satisfied the Provisions of Section 36 (b) (c) of the Matrimonial Causes Act. It has been held that where a marriage is not consummated after a reasonable period and the Respondent refused to submit to medical examination, there may be presumption that the Respondent is incapable. See Akpan Vs Akpan Suit No WD/12/67 (Unreported) High Court Lagos 27/7/1968 cited in Family Law in Nigeria Nwogugu (Supra) 141. The court finds the unchallenged and uncontroverted evidence of the Petitioner credible; supportive of the ground relied on for the relief soughtI so hold.

From all of these and having found the evidence of the Petitioner in proof of the ground relied for court to hold that the marriage between the Petitioner and the Respondent is voidable having found same satisfactory and in conformity with the law, hereby holds that the Petition has merit and should be allowed accordingly, Judgment is entered as follows;

- (1) The marriage celebrated at the Marriage Registry Obalga Rivers State under the Marriage Act on 22/6/2015 between Happiness Mbajiogu – the Petitioner and Obinna Mbajiogu – the

Respondent is voidable and I hereby pronounce a Decree Nisi of Nullity on the marriage between them.

- (2) This order shall become absolute after three (3) months from the date of judgment.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

26/2/2019

ONYEMAECHI ONUIGBO ESQ FOR THE PETITIONER

NO APPEARANCE FOR THE RESPONDENT.