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/PET/10/2017
BETWEEN:
THELMA EKPENYONG EYAMBA.....PETITIONER
VS
XAVIER EKPENYONG EYAMBA.....RESPONDENT

JUDGMENT

This Petition for dissolution of marriage was filed on 25/5/2017 by Thelma Ekpenyong Eyamba (hereinafter called the Petitioner for the reliefs set out in Paragraph 10 of the Petition as;

a. AnOrder of this court for a decree of dissolution of marriage betweenthe Petitioner and the Respondent on the ground that the marriage has broken down irretrievably.

b. An Order of this court directing the Petitioner to maintain full custody of the only child of the marriage by name Javier Eteka Eyamba until he attains the age of maturity as provided by law.

c. An Order of this court directing the Respondent to forthwith be financially responsible for the upkeep, maintenance, necessaries,

school fees and medical bills of the only child of the marriage by name Javier Eteka Eyamba.

d. An Order of this court for Perpetual Injunction restraining the Respondent from interferring with the private and personal life of the Petitioner.

The facts which the Petitioner rely on for court to dissolve the marriage as gleaned from the pleadings and evidence of the Petitioner are those facts contained in Section 15(2) (e) of the Matrimonial Cause Act.

The Petition was served on the Respondent on 6/6/2017, but failed to file his Answer to the Petition, he was not represented by counsel of his choice throughout hearing of the Petition, but present on 3/7/18, when the case came up for hearing.

Petitioner testified as PW1 and informed court that the marriage was celebrated at Abuja MunicipalArea Council Registry Garki in 2007 and that the parties co-habited at No.13 Danube Maitama. PW1 also stated that the marriage was blessed with a child.

PW1 further told the court that the parties have lived apart for 8 years now, that the Respondent had filed a Petition for dissolution of marriage in 2011 but same was struck out in 2012. That the child of the marriage has been living with the Petitioner who has been responsible for the child's upkeep.

PW1 wants the court to dissolve the marriage.

In the course of the Examination–in–Chief of PW1, the following documents were tendered and admitted in evidence;

1. The Marriage Certificate No. 185, evidence marriage celebrated on 13/10/2007 between the Petitioner and Respondent at the Abuja MunicipalArea Council Registry admitted as Exhibit "A"

2. A Certified True Copy of judgment of court delivered by Hon. Justice V.V.M Vender on 13/12/2012 in respect of the Respondent herein as Respondent admitted as Exhibit "B".

At the close of the Petitioner's evidence on 3/7/18, the Respondent declined to Cross-examine PW1 – the Petitioner, informing the court that is not opposed to the dissolution of the marriage. The court accordingly adjourned for filing of Final Address by the Petitioner's Counsel.

Addressing the court on 16/10/18 Fauzyat A. Ajibade Esq adopted the Petitioner's Final Written Address dated 16/7/18 and filed same day, which address was settled by Sekop Zumka Esq. In the said Final Written Address, Petitioner's Counsel formulated a sole issue for determination, that is;

> "Whether having regard to the facts in the Petition and evidence led in this case, the Petitioner has proved her case to entitle her to the grant of the reliefs sought".

He urges the court to grant the entire claims of the Petitioner.

Having considered the pleadings and evidence of the Petitioner, which remained unchallenged as well as the submission of counsel for the

Petitioner and the judicial authorities cited, I find that only 1 (one) issue calls for determination;

> "Whether the Petitioner has proved the ground alleged in seeking the decree of dissolution of marriage and therefore entitled to the reliefs sought?"

Firstly, it is in the record of court that the Respondent was served the Petition and all other processes of court but failed to file an Answer to the Petition and informed the court that he is not opposed to the dissolution of the marriage. The implication of this is that the evidence of the Petitioner in proof of her case remains unchallenged and uncontroverted. The court have held that where evidence is neither challenged nor controverted , the court should deem that evidence as admitted, correct and act on it. See the case of CBN Vs Igwilo (2007) 14 NWLR (PT. 10.54) 393 @ 406. In the case of Afribank Ltd Vs Moslad Enterprise Ltd (2008) All FWLR (PT. 421) 879 Paras E – F Akaahs JCA (as he then was) had this to say;

> "Whether a Defendant does not produce evidence or testify or call witness in support of defence slight or minimum evidence, which can discharge the onus of proof, would be required to ground the Plaintiff's claim.

However, the burden of proof imposed on the Petitioner by Sections 131 – 134 of the Evidence Act and Section 15(1), 15(2) a – h of the Matrimonial Causes Act must be discharged for the Petition to succeed.

In the determination of a Petition for dissolution of marriage under Section 15(1) of the Matrimonial Causes Act, it is competent for a marriage to be

dissolved once a court is satisfied that the marriage has broken down irretrievably. And to come to that conclusion, the Petitioner must satisfy the court of any of the facts laid down in Section 15 (2) of the Matrimonial Causes Act categorized under sub-section a-h.

In the instant case, the Petitioner in seeking the power of court to dissolve the marriage placed reliance on the facts contained in Section 15(2) (e) of the Matrimonial Causes Act Which reads;

> "That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the Petition and the Respondent does not object to a decree being granted."

In proof of this grant, Petitioner testifying as PW1 stated;

> We have been living apart for 8 years now and the Respondent has in 2011 filed for dissolution of the marriage and the case was struck out in 2012 and have been living apart ever since then I now came to court to file for dissolution of the marriage.

In the case of Nnana Vs Nnana (2006) 3 NWLR (PT. 960) 1 @ 10 the court held;

> It is not enough to show that the parties have lived apart for continuous period of two years immediately preceding the presentation of the Petition but that the desertion within Section 15 (2) (e) and (f) must be one where any of the parties have been abandoned and forsaken without justification thereby renouncing his or her responsibilities and evading its duties.

In any case the Respondent himself who decline to Cross – examine PW1- the Petitioner told the court that he is not opposed to the dissolution of the marriage thus satisfying the court that he is not opposed to a decree being granted as prescribed by Section 15(2) (e) of the Matrimonial Causes Act.

From all of these, the Petitioner having shown to the reasonable satisfaction of this court that the parties have lived apart from more than 2 years, before the presentation of the Petition, the Respondent having told the court that he is not opposed to a decree being granted, this court therefore holds that the Petitioner has proven the grounds relied upon for the court to dissolve the marriage. And holds that the marriage between the parties have broken down irretrievably.

On the Petitioner's claim for custody of the only child of the marriage, it is a cardinal principle of law that it is the interest of the child of the marriage that should be of paramount consideration See Section 71 of the Matrimonial Causes Act which reads;

> In proceedings with respect to the custody guardianship, welfare, advancement or education of children of a marriage, the court regard the interest of these children as the paramount consideration and subject thereto, the court may make such order in respect these matter as it thinks proper.

See also the case of Nnana Vs Nnana (Supra) @ 13. In the instant case the PW1 – the Petitioner told the court that;

> "The child has been living with me and responsible for the child"

The Section 71 of the Matrimonial Causes Act cited above places a wide discretion on the court in the consideration of custody of children of a marriage. And in exercising that discretion, the court must act on facts before it and not on sentiments. I have considered the facts and evidence before me and finds that the interest and welfare of the children of the marriage would be better served if they remain in the custody of the Petitioner. I so hold.

I shall make an order as to maintenance of the child of the marriage before drawing the curtain on this judgment.

On the order of this court for Perpetual Injunction, Injunction is never granted as a matter of course, but upon disclosing cogent grounds for the court to exercise its discretion in favour of the party who seek the order of injunction. In the instant case, the parties have decided to go their separate ways, however the court can only grant a Decree Nisi at this stage, and can therefore not grant an order for Perpetual Injunction.

Accordingly this relief must fail.

From all of these, this Petition succeeds in parts and judgment is hereby entered as follows;

1. The marriage celebrated between Thelma Ekpanyong Eyamba, the Petitioner and Xavier Ekpanyong Eyamba – the Respondent at Abuja Municipal Area Council Marriage Registry Abuja on 13/10/2007 under the Marriage Act has broken down irretrievably and I hereby pronounce a Decree Nisi dissolving the

marriagebetween the parties. The said order shall become absolute after a period of three 3 months from today.

2. The custody of the child of the marriage Javier Eteka Eyamba male born on 21/2/2008 is hereby granted to the Petitioner with reasonable access to the Respondent to see the said child of the marriage.
3. The Respondent shall pay the sum of ₦30,000.00 monthly for maintenance of the only child of the marriage and shall be responsible for the education of the said child.
4. The relief for order of Perpetual Injunction against the Respondent fails and is hereby refused.

Signed
HON. JUSTICE O. C. AGBAZA
Presiding Judge
15/1/2019

SEKOP ZUMKA FOR THE PETITIONER

NO APPEARANCE FOR THE RESPONDENT.