

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT GUDU, ABUJA**  
**THIS MONDAY, THE 11<sup>TH</sup> DAY OF FEBRUARY, 2019**  
**BEFORE HIS LORDSHIP HON. JUSTICE A. B. MOHAMMED**

**SUIT. NO. FCT/PET/292/17**

**BETWEEN:**

VINCENT ADIKWU ADAH - PETITIONER

**AND**

IGOCHE MARY ANNE ONYI - RESPONDENT

**JUDGMENT**

**DELIVERED BY HON. JUSTICE A. B. MOHAMMED**

The Petitioner herein brought this petition dated and filed on 28<sup>th</sup> June, 2017 seeking for the following reliefs against the Respondent:

1. A Decree of Dissolution of the marriage between the Petitioner and the Respondent on the ground that the marriage has broken-down irretrievably based on all or any of the following facts:
  - (i) that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
  - (ii) that the Respondent has deserted the Petitioner for a continuous period of over three (3) years immediately preceding the presentation of this petition.
  - (iii) Cruelty
2. Custody of the children of the marriage.

After efforts to serve the Respondent with the petition proved abortive, the Petitioner obtained the leave of this Court on 2<sup>nd</sup> March, 2018 and served the Respondent the petition and hearing notice by pasting same on the door of the Respondent's last known address. A certificate of service filed in by the Bailiff of the Court showed that on the 16<sup>th</sup> of March, 2018 service of the said originating processes and hearing notice was effected on the Respondent as per the order of Court.

Despite such service the Respondent neither appeared nor was represented by a legal practitioner and did not file any response to the Petition. Thus, on the 21<sup>st</sup> of May, 2018, the Court proceeded to hear the Petitioner in prof of his petition after having been satisfied that the Respondent was placed on notice.

At trial, the Petitioner testified in support of his petition as PW1. He tendered a certified true copy of the marriage certificate which was admitted in evidence as Exhibit PW1A. At the close of the Petitioner's evidence in chief, the Court adjourned the matter to the 14<sup>th</sup> of June, 2018 to afford the Respondent the opportunity to cross examine the Petitioner (PW1) on his evidence. Hearing notice was ordered to be served on the Respondent.

On the 4<sup>th</sup> of October, 2018, the Respondent's right to cross examine the Petitioner was foreclosed and the matter was adjourned to the 31<sup>st</sup> of October, 2018 for defence, with a directive that hearing notice be served on the Respondent. On 3<sup>rd</sup> of December, 2018, the Respondent's right to defend the petition was similarly foreclosed when she failed to attend Court or offer any explanation as to her absence.

As the learned Counsel for the Petitioner, Kenneth Timbee Esq informed the Court that the Petitioner had no wish to address the Court, the case was then adjourned to today, the 11<sup>th</sup> day of February, 2017 for judgment.

I have carefully considered the petition and the oral testimony of the Petitioner in support thereof. The evidence led by the Petitioner in support of this Petition has neither been challenged nor controverted by the Respondent who, despite all opportunities granted her, had neither appeared nor filed any process throughout the proceedings. It is elementary law that unchallenged and uncontroverted evidence is deemed admitted and must be accepted by the Court as establishing the facts which it contains. See: **OKOROCHA v PDP & ORS. (2014) LPELR–22058 (SC), per Ogunbiyi, JSC; and IGHREINIOVO v S.C.C. NIGERIA LIMITED & ORS (2013) LPELR–20336(SC), per Fabiyi, JSC.**

Although the evidence led by the Petitioner in this case is unchallenged and controverted by the Respondent, I need to observe that the principal relief of a decree of dissolution of marriage sought by the Petitioner in this case is in the nature of a declaratory relief. The law is settled that a party seeking a declaratory relief must establish his/her entitlement to such relief with cogent and credible evidence. The Petitioner herein is therefore, required to satisfy the Court with credible evidence of his entitlement to the principal relief of dissolution of marriage which he seeks in this case. In so doing, the Petitioner succeeds only on the strength of his case and not on the weakness of that of the Respondent. In essence, the relief of dissolution of marriage is not granted even on admission by the Respondent. See: Sections 44(3) and 82 of the Matrimonial Causes Act and the cases of **OMOTUNDE v OMOTUNDE (2000)LPELR – 10194(CA); and CONFITRUST (NIG) LTD v EMMAX MOTORS LTD & ORS. (2016)LPELR-4428 (CA);**

From the foregoing, I am of the view that the issues for determination in this case are:

1. Whether the Petitioner has satisfied this Court that his marriage to the Respondent has broken down irretrievably as to be entitled to a decree of dissolution of marriage which he seeks; and
2. Whether the Petitioner is entitled to the ancillary relief of custody of the children of the marriage.

On issue one, the factual grounds relied upon by the Petitioner in seeking for the principal relief of dissolution of marriage are those of intolerable conduct and desertion which are provided in Section 15(2)(c) and (d) of the Matrimonial Causes Act. For the Petitioner to succeed in an allegation of intolerable conduct under Section 15(2)(c) of the Act, the Petitioner must establish a conduct which is grave and weighty as to make cohabitation between the parties virtually impossible. See: **BIBILARI v BIBILARI (2011) LPELR-4443 (CA); and IBRAHIM v IBRAHIM (2007) 1 NWLR (Pt. 1015) 383, per Ariwoola, JCA (as he then was).** In other words, the Petitioner must establish a sickening and detestable behaviour on the part of the Respondent and the fact that the Petitioner had found it intolerable to live with the Respondent. See: **NANNA v NANNA (2005) LPELR – 7485 (CA) or (2006)3 NWLR (Pt. 966) 1, per Abba Aji, at pages 32 – 33, paras. F – E; and DAMULAK v DAMULAK (2004)8 NWLR (Pt. 874) 151.**

In this case, the Petitioner had in his unchallenged and uncontroverted evidence as contained in his adopted witness statement on oath 28<sup>th</sup> June, 2017, told the Court that he married the Respondent on the 28<sup>th</sup> of December,

2012 and as evidence of the marriage he tendered the CTC of the marriage certificate which was admitted in evidence as Exhibit PW1A. He stated that after the marriage they first cohabited at Orokam, Ogbadibo LGA, Benue State, and later at Plot 222, Federal Housing Authority Estate, Lugbe, Abuja. He stated that they have three children from the marriage whose names he gave as:

- (i) Ene Mary Clara Adikwu, born on 27<sup>th</sup> July, 2010;
- (ii) Ehi Isabella Adikwu, born on 2<sup>nd</sup> August, 2012; and
- (iii) Ochanya Enubi Beatrice Adikwu, born on 21<sup>st</sup> November, 2014.

The Petitioner told the Court that the Respondent deserted him for over three years from the 5<sup>th</sup> of April, 2014 up to the date he filed the petition. He explained that the Respondent left him at Plot 222 Federal Housing Authority Estate, Lugbe, Abuja to live with her parents at Chief Anthony A Igoche's Compound, behind Jecoco Petrol Station, Orukpo, Enugu Express Way, Orokam, Ogbadibo LGA, Benue State. He said he tried to persuade the Respondent to stay but she insisted on going as she had already made up her mind to leave the marriage.

The Petitioner stated that in the village at Orokam, Ogbadibo LGA, Benue State, the Respondent with her family members approached his family that they wanted to return the bride price he paid because the Respondent had informed them that she was no longer interested in the marriage. He said that in the process of the return of the bride price however, it was discovered that the Respondent was pregnant with their third child and it was advised that the child be first delivered before the bride price is returned. The Petitioner further stated that a day after that, the Respondent returned the two children of the

marriage to him in his father's house, with their wet clothes that were washed and yet to dry, and said that she was not going to take care of the children. He said he received the children and took them to his mother in Lafia, Nassarawa State and immediately secured school admission for them and ensured that they were well taken care of by his mother. He said that the Respondent later went and forcefully removed the two children and refused him access to them since 2015 and without his consent shared them to her siblings in different locations unknown to him.

The Petitioner also stated that he took care of the Respondent financially before and after the birth of the third child and also to care of the maintenance of the child who was delivered on the 21<sup>st</sup> of November, 2014 and that he named the child Enubi Valerie Beatrice Adikwu. He said that the family of the Respondent eventually returned his bride price on the 6<sup>th</sup> of April, 2015 thus dissolving the traditional marriage between him and the Respondent. He said they gave him the custody of the two children, Ene Mary Clara Adikwu and Ehi Isabela Adikwu and advised him to look for a way of dissolving the statutory marriage.

The Petitioner also deposed that the Respondent had been cruel, dishonest, disloyal and deceitful to him throughout the marriage, and that the Respondent's parents have been interfering in the marriage such that the Respondent preferred to stay away from him. He said he had found it intolerable to live in the marriage with the Respondent who did not desire his presence or that of their children. He explained that the Respondent stopped doing all her marital obligations as a wife. He added that she refused to cook or go to the market to shop or bath the children or even take the children to

school. He stated that he became both the husband and the wife as well as the father and mother to the children. He said whenever he confronted the Respondent on her habit she had told him that she wanted to be detached from the children because she planned to leave the marriage.

The Petitioner had deposed that on the 31<sup>st</sup> of December, 2013, the Respondent attempted to poison the two children, Ene Mary Clara Adikwu and Ehi Isabella Adikwu by using a poisonous substance (Sniper) insecticide on the children and that he noticed and stopped her. He stated that the Respondent is a short tempered person and with any little disagreement, she destroys things. He gave examples of when the Respondent broke the windscreen of his Honda Prelude Car in 2011; when she attempted to poison the children in December, 2013.

The Petitioner insisted that being a violent person, the Respondent cannot give the children training they deserve. He added that he had always harboured the fear that the Respondent can poison the children as she had attempted in 2013, and that the lives of his children are very important to him. He stated that he can take care of his children and they will be very happy and comfortable being with him. He prayed the Court to dissolve the marriage and grant him the custody of the three children of the marriage, Ene Mary Clara Adikwu, Ehi Isabella Adikwu and Ochanya Ebubi Beatrice Valerie Adikwu, and pledged to take good care of them.

From the above unchallenged and uncontroverted oral testimony of the Petitioner, it is clear to me that the Respondent had not only become disinterested in the marriage but had exhibited a violent, cruel and uncaring

attitude both to the Petitioner, her husband and to the children of the marriage.

In elaborating what could constitute cruelty for purposes of dissolution of marriage under Section 15(2)(c) of the Matrimonial Causes Act, the Court of Appeal in **UGBOTOR v UGBOTOR (2007) 35 WRN 147 at 162 - 163, lines 35 - 20**, quoted Collins J in **ATKINS v ATKINS (1942) 2 All ER 637**, where he held that:

It is not necessary, as it is obvious, in order to bring about the state of things that there should be violence. One knows that dropping water wears the stone. Constant nagging will become intolerable, and throughout in the course of married life you may be able to point to no single instance which could possibly be described as, in common parlance, 'a row' yet nagging may be of such a kind, and so constant, that it endangers the health of the spouse on which it is inflicted. 'the conduct of the respondent must be of such a character as is likely to cause or produce reasonable apprehension of, danger to life, limb or health (bodily or mental) on the part of the petitioner.

In the instant case, the conduct of the Respondent in which she had not only exhibited violent behaviour but had even attempted to poison the two children of the marriage I have no hesitation in finding that the Respondent had exhibited behaviours which are grave and weighty. As to whether the Respondent's conduct was intolerable, the Court had held in **BIBILARI v BIBILARI (supra)**, that this calls for an objective test, namely – whether the conduct of the Respondent is such that a reasonable man cannot endure. Clearly from the totality of the evidence given, no reasonable person would

tolerate the conduct of the Respondent as testified to by the Petitioner in this case. I am therefore satisfied that the Petitioner has established her allegation of intolerable conduct against the Respondent under Section 15(2)(c) of the Matrimonial Causes Act. I so find and hold.

With regards to the Petitioner's allegation of desertion under Section 15(2)(d) of the Matrimonial Causes Act, desertion was defined in **BUCHLER v BUCHLER (1947) 1 All ER 1076**, as the intentional forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It was also defined in **PERRY v PERRY (1952) 1 All ER 1076 at 1082**, as a total repudiation of the obligations of marriage. In an allegation of desertion therefore, the Petitioner has the burden of establishing physical separation, manifest intention on the part of the Respondent to remain permanently separated, and the absence of his consent. Upon proof of those facts, the burden would then shift to the Respondent to prove just cause or justification for the separation, otherwise the Court must find for the Petitioner. See: **MRS. HELEN ANIOKE v MR. BEN CHARLES ANIOKE (2011) LPELR-CA/C/126/2008**.

In the instant case, it was the Petitioner's testimony that since the 5<sup>th</sup> of April, 2014 the Respondent left the matrimonial home at Plot 222 Federal Housing Authority Estate, Lugbe Abuja and went to live with her parents at Orokam, Ogbadibo LGA, Benue State and refused all entreaties to return stating that she had made up her mind to leave the marriage. The Petitioner has also testified that the family had later returned his bride price which he paid for the traditional marriage and stated that the Respondent had told them that she was no longer interested in the marriage. He also stated that the Respondent had later returned the children of the marriage to him.

It is clearly evident from the above testimony that the Petitioner had established physical separation from him by the Respondent without his consent and a manifest intention on the part of the Respondent to remain permanently separated. The Respondent, who had neither appeared nor filed any response to the Petition despite all opportunities for her to do so, had not shown any just cause for permanently separating from the Petitioner. From the 5<sup>th</sup> of April, 2014 when the Respondent left the matrimonial home to the 28<sup>th</sup> of June, 2017 when this petition was filed is a period of more than three year. This is more than the one year of continuous desertion required under Section 15(2)(d) of the Matrimonial Causes Act to establish irretrievable breakdown of marriage. Hence, I am satisfied that by his unchallenged evidence the Petitioner has established his allegation of desertion against the Respondent under Section 15(2)(d) of the Matrimonial Causes Act. I so find and hold.

It is settled law that where, as in this case, the Respondent has not led any evidence, the Petitioner's burden is discharged on a minimal proof since there is nothing on the other side of the imaginary scale to be weighed against the evidence of the Petitioner. See: **AJIDAHUN v AJIDAHUN (2000) 4 NWLR (Pt. 498) 181 at 189; and NICON v POWER & INDUSTRIAL ENGINEERING CO. LTD. (1986) 1 NWLR (Pt. 14) 27.**

By Section 15(2) of the Act, the Court hearing a petition for dissolution of marriage shall hold the marriage to have broken down irretrievably if, and only if, the Petitioner has satisfied the Court of any one or more of the factual circumstances listed in paragraphs (a) – (h) of that subsection. Since I have found that the Petitioner has established his allegations of intolerable conduct

and desertion against the Respondent under Section 15(2)(c) and (d) of the Act, I hereby resolve the first issue for determination in the affirmative and hold that the Petitioner has satisfied this Court that his marriage to the Respondent has broken down irretrievably and he is entitled to a decree of dissolution of marriage which she seeks.

Accordingly, this Court hereby decrees that, upon and subject to the decree of the Court becoming absolute, the marriage solemnized on the 28<sup>th</sup> day of December, 2012 at the Abuja Municipal Area Council, AMAC, Marriage Registry, Abuja, between Adikwu Vincent Adah, the Petitioner and Onyi Maryanne Igoche, the Respondent, be dissolved.

On the second issue for determination relating to the ancillary relief of custody of the three children of the marriage sought by the Petitioner, it is settled law is that in proceedings relating to the custody, guardianship, welfare and education of children of a marriage, the paramount consideration is what will best serve the interest of the children. See: Sections 70 and 71 of the Matrimonial Causes Act and the cases of **NANNA v NANNA (2006) 3 NWLR (Pt.966)1 or (2005) LPELR-7485(CA), per Abba Aji, JCA at pages 41 – 42, paras. B – C; ODUCHE v ODUCHE (2005) LPELR-5976(CA), per Rhodes-Vivour, JCA at page 20, paras. C – G; and ALABI v ALABI (2008) All FWLR (Pt. 418) 245 at 258 – 262; 291, paras. E – H; 295 - 297, paras. C – C (CA).**

In the instant case, the Petitioner has testified vide his adopted witness statement on oath, that his marriage to the Respondent had been blessed with three children: Ene Mary Clara Adikwu, a girl of 8 years, born on 27<sup>th</sup> July, 2010; Ehi Isabella Adikwu, a girl of 6 years, born on 2<sup>nd</sup> August, 2012; and

Ochanya Enubi Beatrice Adikwu, a girl of 4 years, born on 21<sup>st</sup> November, 2014. In his evidence, the Petitioner had stated how the Respondent had been uncaring to the children and stating that she wanted to be detached from them because she intended to leave the marriage. He had also testified as to how the Respondent had attempted to poison the first two children in December of 2013.

It is trite that in proceedings for custody of a child where the child is of tender age, it is presumed that the child will be happier with the mother. In the case of **ODOGWU v ODOGWU (1992) LPELR-2229(SC)**, the Supreme Court, per Belgore, JSC (as he then was) held that:

If the parents are separated and the child is of tender age, it is presumed the child will be happier with the mother and no order will be made against this presumption unless it is abundantly clear the contrary is the situation- e.g, immorality of the mother, infectious disease on the mother, insanity, and or her cruelty to the child. These are matters to be tried. Custody proceedings could even be adjourned to judge's chambers where in informal hearing, the children's view could be assessed along with those of the parents.

From the unchallenged and uncontroverted evidence of the Petitioner in this case, which uncontroverted evidence I had found to be established, it is clear to me that given the cruel and violent disposition of the Respondent, the interest of the three children, though still of tender age, will be better served if they are placed in the custody of the Petitioner. The Respondent herein had neither appeared nor filed any response as to challenge or contradict the Petitioner's testimony as to her cruelty and violent and uncaring attitude

towards the children. Cruelty to children is one of the grounds upon which the presumption of custody to mother for tender children would be rebutted. See: **ODOGWU v ODOGWU (supra)**.

It is in view of the above that I hereby grant the custody of the three children to the Petitioner.

On the whole, judgment is hereby entered in favour of the Petitioner against the Respondent as follows:

1. This Court hereby decrees that, upon and subject to the decree of the Court becoming absolute, the marriage solemnized on the 28<sup>th</sup> day of December, 2012 at the Abuja Municipal Area Council, AMAC, Marriage Registry, Abuja, between Adikwu Vincent Adah, the Petitioner and Onyi Maryanne Igoche, the Respondent, be dissolved.
2. The custody of the three children of the marriage: Ene Mary Clara Adikwu, Ehi Isabella Adikwu, and Ochanya Enubi Beatrice Adikwu, is hereby granted to the Petitioner.

**HON. JUSTICE A. B. MOHAMMED**

JUDGE

11<sup>TH</sup> FEBRUARY, 2019

**Appearances:**

O. F. Eche Esq, for the Petitioner.

Respondent absent and unrepresented.