

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
BEFORE HIS LORDSHIP: HON. JUSTICE V.V.M VENDA.
ON FRIDAY 28TH DAY OF JUNE, 2019

SUIT NO FCT/HC/PET/67/2014

BETWEEN:

LOVETH JOHNSON - PETITIONER

AND

PROSPER AYORINDE JOHNSON - RESPONDENT

JUDGMENT

By a petition dated and filed the 3rd day of December, 2014, the Petitioner seeks the following reliefs from this Honourable Court.

- (1) A decree of the dissolution of the marriage between the Petitioner and the Respondent contracted on the 7th day of April, 2007 on the grounds that the marriage has broken down irretrievably.
- (2) An Order granting custody of the children of the marriage to the Petitioner.
- (3) And for such further orders the court may deem fit to make in the circumstances.

The grounds for this petition are as follows:-

- (a) That the marriage has broken down irretrievably.

- (b) That since the marriage, the Respondent has behaved in such a way that the Petitioner cannot be reasonably expected to live with him.
- (c) That the Respondent habitually left Petitioner without any means of support.
- (d) 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.
- (e) That the Petitioner does not trust the Respondent's intentions towards her anymore and does not want to be related to him maritally.
- (f) The Petitioner is convinced that there is no longer love in the marriage.
- (g) The Respondent habitually left Petitioner without reasonable means of emotional and financial support from the moment of conception of the last child up till the presentation of this petition.
- (h) That there is lack of love care and affection between the parties.
- (i) That the Respondent does not contribute financially to the feeding, upkeep and medical needs of the Petitioner and the children.

The evidence on the facts that led to the presentation of this petition are as follows:-

The Petitioner was a spinster when she got married to Respondent who was then a bachelor at Zion Baptist Church, Owa Abbi, Delta State on the 17th of April, 2007 under the ordinance and statute, where a Marriage Certificate was issued. Her maiden name was **Ejije** prior to the marriage, and that the parties have not previously contracted any marriage. She was born in Nigeria on the 24th of September, 1980, while Respondent was born in Nigeria on the 4th of March, 1976. After the marriage, the parties lived at Plot 416, AMAC section, FHA Lugbe and later at No. 180, 1st Avenue, sector F, FHA Lugbe, Abuja. There are two children of the marriage namely **Paris Johnson** and **King David Johnson** born in 2008 and 2012 respectively, who both reside with Petitioner since Respondent deserted the Matrimonial Home.

The parties have lived apart for a continuous period of at least two years, and Respondent does not object to the dissolution. She does not trust Respondent anymore and does not want to remain married to him. There is no more love between them, as the marriage has broken down irretrievably.

The Respondent habitually left her without reasonable means of emotional and financial support despite the fact that she has been

a good wife to him, and was left with the burden of supporting the family alone.

She has been faithful to respondent since the marriage and has not committed adultery with any man since the marriage, Respondent has behaved in such a way that she cannot be reasonably expected to live with him shortly after the birth of their first child, Respondent falsely accused her of bringing bad luck to the marriage simply because he failed to secure an appointment he applied for at NNPC. He would then go for days and weeks without talking to the Petitioner and the children and also stopped conjugal relations with her. Afterwards, she discovered through his telephone conversation in her presence that he was having extra-marital affairs with other women, but the shock of her life hit her when she told him she was pregnant with their second child only for him to accuse her of trying to trap him with children when she knew the marriage was not working.

At a point, he stopped eating her food, calling it poison and that shortly after the birth of their second child, he told her to her face that he hated her and she saw it in his eyes.

She paid all the hospital bills alone after the birth, including further expenses for his food, diapers, clothing and medication.

The situation got worse when he moved out of the Matrimonial Home and got a place for himself. All entreaties at settlement by

their pastor and family members failed as he stuck to his guns and instead asked her for a divorce. She has not condoned or connived at any of the grounds specified above, and she is not guilty of collusion in presenting the petition. They have lived apart for a continuous period of about two years immediately preceding the presentation of the petition, and the Respondent does not object to the decree being granted.

She has been responsible for the upkeep of the family, and Respondent who also worked in the same office with her for fourteen years knows she earns between a N100,000.00 and N150,000.00 from her extra income from home services even before they got married.

He refused to renew the rent and a few months to the expiration, they were given quit notice upon which she intimated him of getting a new apartment but he told her not to include him in her plans, as he was moving to a separate apartment alone.

She therefore sought for funds and moved to a new apartment at No. 180, 1st Avenue, sector F, FHA, Lugbe Abuja at the cost of N550,000.00. She also bought a Toyota Camry Car, 2002 Model, at the sum of N1.5 Million Naira to enable her facilitate movement to her office. Since then, she has been solely responsible for the upkeep and welfare of the children. She is not seeking for maintenance for herself. However, she seeks maintenance from

Respondent for the education of the children up to university level, and shall leave it at the discretion of the court in line with the present economic realities.

In response to the petition, the Respondent filed an Answer and cross petition dated the 19th day of September 2016 and filed the 29th of September, 2016.

He avers that he did not desert the Matrimonial Home, and is not responsible for the circumstances that led to his departure.

At a reconciliation meeting facilitated by one Deacon Sunday and his wife, Petitioner admitted to have sent Respondent packing from the Matrimonial Home. Further to this, she paid and moved to a new apartment without his consent which prompted him to move to a separate apartment to preserve the peace. That he is gainfully employed and has remained responsible for the maintenance and upkeep of the family. That he has always fulfilled his marital role as a husband by showing love, care and affection to Petitioner, and has always willingly contributed to the spiritual upliftment and wellbeing of the Matrimonial Home.

He therefore petitions the court for a decree of dissolution of the marriage between him and Petitioner contracted on the 7th of April, 2007 on the ground that the marriage has broken down irretrievably due to Petitioner's repeated acts of adultery.

The facts relied on by Respondent for bringing the cross petition are as follows:

The Petitioner has committed adultery severally with various men which Respondent finds intolerable. She is not a desirable wife in view of her flirtatious behaviour.

She is a full time hair stylist at Transcorp Hilton Hotel with a salary of N37,000.00 per month which does not justify her flamboyant lifestyle. In 2011, upon the expiration of their previous tenancy, Petitioner paid for and moved to a 2 bedroom Flat worth N500,000.00 (Five Hundred Thousand Naira) a sum beyond her legitimate earnings. Upon his inquiry as to the source of the funds, she failed to give any explanation but instead, asked him to pack out if he is not contented with living in the apartment, which prompted him to move to another apartment to avoid altercation and preserve the peace.

In 2012, she bought a Toyota Camry Car worth 2.5 Million Naira, an amount beyond her determinable meagre earnings, which funds she also failed to disclose the source, despite Respondent's persistent interrogation. That she has failed to disclose the source of the funds till date. She has lived a questionable and scandalous life by returning home very late and never informing him of her whereabouts. She also has a questionable habit of saving phone numbers of male contacts with female names with a view to

deceiving him and abates his suspicions. She meets various men in her place of business which is a hotel and to his knowledge; she has exchanged scandalous and explicitly immoral text messages with these men pursuant to her objective of illicit sexual relations and broader objective of prostitution and adultery. Her call logs and text messages corroborates his allegation of adultery, which gives him reason to believe that she has indeed had sexual relations with other men while still cohabiting with him after the marriage. Further to this, he stated that she lacks the moral virtues and inherent discipline necessary to groom the children and that the act of ejecting him from the matrimonial Home has caused him great trauma and heartbreak.

The Respondent/Cross Petitioner's witness statement on oath is dated and filed on the 27th day of March, 2017. He adopts same as his oral evidence before the court.

He prays the court to grant him sole custody of the children of the marriage, as he has made available the best possible provisions as to their accommodation, healthcare, feeding, education, moral and religious needs.

In reply to the cross petition, the cross Respondent filed an Answer to the cross petition dated the 21st day of October, 2016. She denies each and every allegation of fact contained in the cross petition.

She avers that since the marriage, she has not committed adultery with any man, and has remained faithful to the cross Petitioner. Contrary to his claims, her salary is N41,000.00 monthly, and the nature of her work allows for extra income and allowances. That cross petitioner worked with her in the same office for 14 years and knows this fact. She does not deny moving to a new apartment but was prompted to do so as a result of the quit notice issued to them at their previous apartment and the fact that she was in the early stages of her pregnancy. That she rented the apartment and bought the car out of her personal savings. She did not ask cross Petitioner to pack out of the house but only asked for a divorce. She does not also keep late nights but runs shifts at work to the knowledge of cross Petitioner. That the children of the marriage have been with her since year 2013 when cross Petitioner deserted the Matrimonial Home. She has been a good and supporting wife to cross Petitioner who abandoned her and the children of the marriage at ages 8 and 4 respectively.

Petitioner testified as PW1 on the 6th day of April 2017. She identified the Respondent/Cross Petitioner as her husband and urged the court to adopt as her oral evidence in this case, her written evidence.

She also tendered a Marriage Certificate dated 7th April, 2007 with the names of **Mr. J.P. Ayorinde** and **Miss Loveth A. Ejijie** in evidence and was admitted as exhibit 1.

Under cross examination, she admitted not pleading the fact of adultery committed by Respondent, neither in her petition nor Answer to the cross petition. She however insisted that it is not an afterthought because it was always an issue during the marriage. Upon a question, she reaffirmed that Respondent came home with a long screwdriver which made her fear for her life, but he never threatened her with it.

She also admitted buying a Toyota Camry Car during the subsistence of the marriage but maintained that she did not inform Respondent because at that point, the marriage had broken down.

She states that she currently lives at Brick City, Kubwa Phase II in a two bedroom detached bungalow worth 9.7 Million Naira on Mortgage, out of which she has paid 1.7 Million Naira, and to balance the remaining amount in a 22 years period instalmentally at a cost of N50,000.00 per month. The children live with her, while Respondent visits them once in two or three weeks, but does not support them in any way.

She denied basing her petition on desertion. That she filed the petition while they were living apart. When she was confronted with a portion of her witness statement on oath (paragraph 14), which suggested that they were living together, she conceded, and on that note closed her case.

On the 30th of April, 2018, Respondent opened his defence and testified as DW1. He adopted his written evidence as his oral evidence before the court and urged the court to grant all his prayers.

Under cross examination, he stated that he met his wife in 2005 when he was a Barber at Transcorp Hilton Hotel where she also worked as hairstylist. His clients consisted of senators who on many occasions tipped him heavily with extra money which was far beyond his salary. He denied that he bought two cars while he was still there, but that he bought the cars after he left there.

He admitted that at the time he followed Petitioner to buy a Nissan Sunny car; he had left, while she was still working at Transcorp Hilton. He answered that at the time he followed her to buy the Nissan Sunny car, they were not marriage, but that after their marriage, she became his responsibility, hence his stance on the source of her extra income. On several occasions, her colleagues called her prostitute before his eyes, and when he confronted her, she kept mute. This further heightened his suspicions about her illicit affairs. He specifically mentioned 2 of her men friends she was involved with. The Liberian Ambassador to Nigeria and one Mr. Egol, a 75 years old man.

He stated that he has never seen his wife in a compromising

position with either men. He is educated with a Bachelor of Arts degree in History.

He confirmed that he believes his wife is a prostitute because she comes home as late as 1.00 am some of the times, and upon investigation, he discovered that she was using her office as a channel of prostitution on a commercial level, as deposed in paragraph 15 "0" of his statement. When he was asked if he had any of those messages to prove his suspicion, he answered in the negative. He is aware that the wife travels sometimes but does not tell him where she goes to. On one occasion, she told him she was travelling to Senegal without telling him the purpose, while he told her; he was travelling to America the next day. He admitted that a quit notice was issued to them in their former apartment and that while looking for another apartment, Petitioner unilaterally rented and moved to another apartment without his consent. He currently lives in a self contained apartment and has secured the services of his 20 years old niece to cater for the children of the marriage.

Further to this, if he is granted custody he will be responsible for their education and maintenance as he has always contributed to their education by paying their school fees. When it was put to him that he only paid N45,000.00 on two occasions in 2012 and 2015 respectively, he denied, and stated that he has always paid all their school fees through his wife and one Blessing. He does

not have the receipts because he paid through the Petitioner. He confirms the name of his children's school as Primegate.

He denied battering his wife, and insisted he is not a violent person.

When it was put to him that he was arrested and arraigned in a Kubwa Magistrate Court in 2016 for battering his wife, he denied this fact out rightly.

When he was asked how many jobs he has executed for NNPC as a contractor, he answered in the negative and blamed his wife for settling, the contracts. He also denied portraying his wife as a prostitute simply because he wants the court to grant him custody of the children.

On re-examination, he admitted that his wife told him that she is travelling to Senegal but that she did not tell him that she is going there to buy materials. He re - stated that he has never beaten his wife.

The Respondent/cross Petitioner called one other witness named Sunday Success who opted his witness statement on oath dated 23/4/17 as his oral evidence in this case. He stated that he is a close family friend of the parties.

His evidence is to the effect that he has known the parties since April, 2007 when they all worshipped in the same Church.

Sometimes in 2014, he noticed that Respondent was coming to Church alone without his wife and upon inquiry, he was informed by Respondent that the parties were having marital challenges which had made their relationship deteriorate. As a result of this, he invited the parties to a reconciliation meeting with his wife on three occasions but to no avail. At the meeting, Respondent stated his reasons for suspecting that his wife was involved in extra marital affairs by reason of her flamboyant life style and living beyond her means.

To his dismay, Petitioner did not deny this fact but only insisted that she is no longer interested in the marriage, as she has already filed for divorce in the High Court.

That he reprimanded and admonished her for her stance but she stuck to her guns.

That he counselled the parties on the need for patience, understanding and tolerance in order to make their marriage work, and after a long education and persuasion, Petitioner became remorseful and agreed to settlement, and even went down on her kness to apologise to Respondent. However, Respondent insisted that both families should take part in the process of settlement so that the issues that prompted the disagreement would be resolved holistically. He however dissuaded the parties on this line of settlement in order not to

complicate matters. He sincerely wished and hoped that the dispute was over, but to his greatest shock, Respondent came back to him to inform him that he has just been served with divorce papers from the court.

Respondent closed his case.

Parties filed their final written addresses.

The Respondent/cross-Petitioner's final address is dated the 21st day of May, 2018. He formulated 2 issues for determination Viz:

(1) Whether in view of the evidence led by Respondent at the trial, he is entitled to an order of dissolution of the marriage between the parties on the ground of adultery and intolerability.

(2) Whether having regard to the totality of the evidence before this court, the Respondent is entitled to an order granting him custody of the children of the marriage.

Counsel on behalf of Respondent submits that Respondent has proved the requirements of the law in his Answer and cross petition to entitle him to a grant of an order for the dissolution of the marriage between the parties on the ground of adultery and intolerability.

He refers the court to section 15 (2) a – h of the Matrimonial

Causes Act and the case of **BIBILARI VS BIBILARI (2011) 13 NWLR (pt. 1264)**.

He argues that Respondent in his evidence in chief testified how Petitioner repeatedly committed adultery with several men, which he finds intolerable.

That she did not deny or contradict this piece of evidence. Even when her friends called her a prostitute in his presence, she failed to refute this allegation and kept mute. The law is that unchallenged evidence is deemed admitted. He refers the court to the case of **BAB-IYA VS SIKELI (2006) 3 NWLR (pt. 968) pg 508**.

On issue 2, counsel submits that in view of the contention with respect to issue one above, it will not be proper to award custody to Petitioner who has an adulterous and immoral disposition. He further submits that in granting custody, the interest of the children should be of paramount consideration.

He refers the court to the case of **NANNA VS NANNA (supra)** pages 35 – 36, paragraphs D – B, pgs 37 – 38, paragraphs H – A and D –E. In view of the foregoing submissions, he concludes that Respondent is in the best position to cater for the children.

He finally urged the court to grant custody to the Respondent.

The Petitioner/cross Respondent's final written address is dated and filed the 2nd day of July, 2018. She formulated 3 issues for determination which are:

- (1) Whether taking into consideration the testimony led by the Petitioner/cross-Respondent at the trial, the Petitioner is not entitled to an order of dissolution of the marriage between Petitioner and Respondent.
- (2) Whether in view of the evidence led by Respondent, he has been able to prove cause of adultery as alleged.
- (3) Whether having regard to the evidence led by Petitioner/cross Respondent, the Petitioner is entitled to an order granting her custody of the children of the marriage.

Counsel on behalf of the Petitioner submits that Petitioner has fulfilled one of the requirements listed in section 15 (2) of the Matrimonial Causes Act for a decree of dissolution of a marriage which is: That Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition. PW1 in her testimony stated that she has lived apart from Respondent for a period of two years preceding the presentation of this petition, and that the Respondent does not object to the dissolution of the marriage.

This evidence was not controverted during cross examination. Infact, paragraph 5 of Respondent's statement on oath gives

credence to this fact where he agreed that they have both lived apart for a continuous period of 2 years immediately preceding the presentation of this petition.

Aside of this, Respondent makes it clear in paragraph 16 of his statement on oath that he no longer wishes to continue with the marriage. It is trite law that unchallenged or uncontradicted evidence by opposing party who has opportunity to controvert the said evidence but failed to do so, would be believed. He refers the court the case of **IGBINOVIA & ORS VS AGBOIFO (2002) FWLR (pt. 103) 505 at 514**. He also refers the court to the case of **INTERNATIONAL NIGERBUILD CONSTRUCTION CO. LTD. VS GIEVA (2002) FWLR (pt. 107) 1312 at 1354** where the court held thus:

“Evidence not effectively countered entitles the court to find that a party has proved his case.

On issue 2, counsel submits that Respondent has failed woefully to prove the allegation of adultery on which he based his Answer and cross petition. The requirement of the law is that where a party alleges adultery, he or she must join the person with whom the adultery was committed as a co-Respondent. This Respondent has failed to do. He refers the court to section 32(1) of the Matrimonial Causes Act and Order 1 Rule 3 of the Matrimonial Causes Rules.

On issue 3, he submits that in awarding custody, the interest of the child is of paramount consideration. He argues that it is in the best interest of the children to grant their custody to Petitioner who has taken care of them since Respondent abandoned them with her. She stated unequivocally in her testimony that she lives in a 2 bedroom flat in the heart of Kubwa where the children also attend their school. She is gainfully employed and has been taking care of their education, feeding and healthcare. He refers the court to section 7 (1) of the Matrimonial Causes Act, and the case of **WILLIAMS VS WILLIAMS (1987) 2 NWLR (pt. 54) page 66** which specifically deals with the issue of custody.

In conclusion, he submits that Petitioner has complied with section 15 (2) a – h of the Matrimonial Causes Act in praying for the grant of an order for the dissolution of the marriage. He urged the court to so hold.

Section 15 of the Matrimonial Cases Act provides for Matrimonial Offences such as when proved before a court, the court can hold the marriage to have broken down irretrievably..

It provides sub section (2) (c) and (e) thus:

The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, and only if, the Petitioner satisfies the court of one or more of the following facts.

(c) that since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

(e) 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 the Respondent's Answer and cross petition, Respondent also prays the court for dissolution of the marriage in that since the marriage the Petitioner has committed adultery with other men.

Respondent/cross Petitioner also prays the court to grant him custody of the two children of the marriage.

I will purse here and consider the Petitioner's case. The allegation in this petition is that the marriage has broken down irretrievably, in that, parties to the marriage have lived apart for a continuous period of 2 (two) years immediately preceding the presentation of the petition and also that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent.

She gives instances of when the Respondent behaved or conducted himself in a manner unacceptable to the Petitioner, most of which the Respondent denied.

Apart from merely stating that the parties to the marriage have lived apart for a continuous period of two years immediately preceding the presentation of the petition, there is nowhere she specified the date the Respondent moved out of the Matrimonial Home, for the courts consideration.

A mere statement that the parties have lived apart for a continuous period of two years, immediately before the presentation of the petition is not sufficient. The last date the Respondent co-habited with the Petitioner ie the date the Respondent finally moved out of the Matrimonial Home, must be stated. Proof of living apart is a matter of fact and evidence and not mere assertion as in this case.

Admitting the fact of living apart, Respondent stated that although parties to the marriage have lived apart for more than two years before the presentation of the petition, he was never responsible for the said living apart.

The immediate cause that led to the living apart was barely stated, in that, the court was left to insinuate that it might be as a result of the alleged adultery.

In her oral testimony before the court Petitioner merely adopted her evidence on oath and added no more, leaving the date of living apart still instated.

The fact of living apart for up to two years must be proved for a petition that is based on living apart to succeed, as the petition must be proved on the facts presented before the court.

In **EKANEM VS EKENAM & ANOR (2012) LPELR - 14275 (CA)** the court held thus:

The trial judge held that since both parties pleaded that the marriage has broken down irretrievably there was no point calling oral evidence to prove the break down. Yes both parties have agreed that their marriage has broken down. This does not suffice to ground a dissolution of the marriage. The law provides and it is mandatory that one of the reasons for the breakdown must be proved as provided by Section 15 (2) of the Matrimonial Causes Act.

The Petitioner's ground of living apart for at least two years is therefore not proved.

On the issue of a behaviour which the Petitioner cannot tolerate and be expected to live with; her evidence is not weighty enough to ground a dissolution of the marriage.

She stated in her evidence on oath that she cares for the children all by herself. She pays the children's school fees while the Respondent fails to be supportive.

She however did not tender one receipt from any school as evidence of payment of the school fees. Similarly, she tendered no rent receipts as evidence of payment of same. All the other minor complaints are such that a woman who wants to keep her home would adequately handle, including asking God for wisdom to handle, as it is a fact that in every home and in every human being there must be something to be improved upon. And for young people like the parties in this case, there is a lot of room for improvement. Petitioner refused to explore any avenue for improving herself or her home.

In divorce proceeding a party must prove to the court that the marriage has factually broken down irretrievably upon presentation of unassailable facts and evidence. Divorce should not be granted whimsically as it is a sacred institution and, in the interest of society and the children of the marriage. See **OGUNTOYINBO VS OGUNTOYINBO (2017) LPELR - 42174 (CA)**.

The Petitioner has therefore not proved her case to entitle her to judgment. Her petition hereby fails.

The Respondent's cross Petitioner hinges his petition primarily on adultery of the Petitioner.

Section 32 (1) of the Matrimonial Causes Act states:

Where, in a petition for a decree dissolution of marriage or in an answer to such a petition, a party to the marriage is alleged to have committed adultery with a specified person, whether or not a decree of dissolution of marriage is sought on the basis of that allegation, that person shall, except as provided by Rules of court, be made a party to the proceedings.

The law is that when there is an allegation of adultery, the co-adulterer must be joined. The Petitioner has not joined the co-adulterer. A critical look at the section shows that a specified person shall be so joined.

The Respondent named one **Mr. E голу** a 75 year – old man as one of the men committing adultery with the Petitioner **Mr. E голу** is a named or specified person who should be cited as a co-adulterer in this petition but was not so cited. There is also a Liberian Ambassador to Nigeria whose name the Petitioner can ask, but did not. I excuse that.

Cross Petitioner says that the cross Respondent has repeatedly practiced infidelity and committed adultery with various men, meaning, it is not only one specified person that is involved but the one identified person ought to have been made a co-Respondent.

The omission of the name of an identified person as a co – adulterers in this suit, in my view, is fatal for non-compliance with rules.

In the circumstance of the case, none of the parties is entitled to judgment, as judgment cannot be entered in favour of any. This petition is hereby struck out.

Singed
Hon. Judge
28/06/19

APPEARANCES

1. H. C. OZEGBE with CHARLSE ODANG for Petitioner.
2. CHISON ODOEMELA with ENIOLA OLADEJI for Respondent/Cross Petitioner.

AUTHORITIES

1. **BIBILARI VS BIBILARI (2011) 13 NWLR (pt. 1264).**
2. **BAB-IYA VS SIKELI (2006) 3 NWLR (pt. 968) pg 508.**
3. **IGBINOVIA & ORS VS AGBOIFO (2002) FWLR (pt. 103) 505 at 514.**
4. **INTERNATIONAL NIGERBUILD CONSTRUCTION CO. LTD. VS GIEVA (2002) FWLR (pt. 107) 1312 at 1354.**

5. **WILLIAMS VS WILLIAMS (1987) 2 NWLR (pt. 54) page 66.**
6. **EKANEM VS EKENAM & ANOR (2012) LPELR - 14275 (CA).**
7. **OGUNTOYINBO VS OGUNTOYINBO (2017) LPELR - 42174 (CA).**

Cross Petitioner states that on several occasion he has know that the cross Respondent exchanged scandalous and immoral text messages with other men.

The cross Respondent denied some of the other allegations against her but was silent on this issue.

Facts not denied are deemed admitted. See **HARUNA VS LABARAN (2013) LPELR - 22502 (CA)** where the court held:

Generally a fact which is not denied is deemed to have been admitted.

Apart from this, the evidence of the Respondent is so clear and unambiguous and unassailable. I in the circumstance find that the cross Petitioner has proved his case on the evidence alleging adultery. I so hold.

In view of the above I order a Decree Nisi dissolving the marriage contracted between **Johnson Prosper Ayorinde** and **Mrs. Loveth A. Ejije** at the Zion Baptist Church Owa-Abbi on the 7th day of April 2007. The order shall be made absolute three months from the date of judgment.

Now to the issue of custody of the children of the marriage.

Section 1 of the Child Rights Act provides that the best interest of the child shall be paramount in the decision of the court concerning the child.

There are two children of the marriage – **Paris Johnson** who was 6 years at the time this suit was instituted and **King David Johnson** who was 2 years then.

Paris is 11 years by now and King David, 7. Parish has or is approaching puberty. She will need her mother to teach her how to become a woman.

There is mood swing when a girl child becomes a young woman with physical changes of breast formation, growth of pubic hairs and on set of monthly flow. An outsider or a father may not be the best friend at this stage.

At the same time the law frowns at the grant of custody of children of a marriage to the mother if the mother has been adjudged adulterous. The reason for this, is to prevent the children from copying bad character and adulterous traits from the mother.

However, the procurement of a teenage girl as stated by the cross Petitioner for the purpose of taking care of these children one of who is 11 already, in my view is not satisfactory.

Growing children need adults to take care of them and not youth who themselves need to be cared for.

It is in view of this that I make the following orders:

I grant the custody of the two children of the marriage **Paris Johnson** and **King David Johnson** to the Petitioner **Loveth**, under the close supervision of their father, **Prosper Ayorinde Johnson**.

I order the cross Petitioner to continue with the payment of the children's school fees until they obtain their first degree.

The Petitioner shall be responsible for the wellbeing, welfare and maintenance of the children including feeding, clothing, health and shelter.

When the children gain admission into the University the cross Petitioner shall be responsible for the school fees while the Petitioner shall cater for other school needs.

Petitioner shall be responsible for the moral upbringing of these children as one does not hope that once an adulterous always an adulterous. It shall be to her credit if these children grow up morally upright.

Parties are ordered to control their tempers so as to avoid scenes of rancour particularly in the presence of the children.

This is the judgment of the court.

Singed
Hon. Judge
28/06/19

RULING/JUDGMENT

Upon being granted leave to goon with the case learned counsel to the 1st Respondent/Applicant informed the Court of their intention to move their motion dated and filed on the 11/05/2011 which was brought pursuant to the inherent jurisdiction of the Court as provided for by section 6 (6) of the 1999 constitution of the Federal Republic of Nigeria. Praying for the following orders:

An order of this Court dismissing the sustentative suit on the ground that this Court lacks the jurisdiction to entertain same.

And for such further orders as the Court may deem fit to make in the circumstance and the grounds upon which the application was brought were that:

There is an earlier suit on the same subject matter pending before Justice Kutigi of High Court 29 Wuse Zone 5, Abuja with motion No. M/4331/11 dated 21/03/2011 and filed on 22/03/2011.

Following this present suit to continue will amount to abuse of Court process.

Counsel further submitted that they have also filed and will relied on all the averment in their paragraphs affidavit in support of the motion on notice deposed to by one Doris Eze a litigation secretary in their firm and a certify true copy of processes filed in Justice Kutigi's Court motion number: M/4331/11 between Dr. Ikenna Ihezub Vs Inspector General police & 3 Ors annexed and marked as exhibit 'A' that they also filed a written address and same was adopted as their oral argument in this suit.

Finally counsel urge the Court to dismiss the suit. Because the Respondent/Applicant in this suit is also the Applicant in the case before Justice Kutigi's Court while 2nd and 3rd Respondents in this suit were also Respondent with two others. And same were the subject matter of these two suits pending before Courts of co-ordinate jurisdiction at the same time.

Counsel submit that this amount to an abuse of Court process and referred the Court to the case of Onalaja Vs Oshinubi Cited in his written address.

Applicant/Respondent counsel did not file a counter affidavit but respond on point of law by opposing the said application and submitted that it is a ploy to delay hearing of their application which rules of Court frown at. He further submitted that the parties subject matter, and reliefs sought were not the same and referred the Court to page 12 of the annexure under the heading 1 preliminary statement where the car registration number: is JHMCM 56894-CO 35926 whereas in the application before this Court the car Reg. No. is BV 645 RSH.

Learned counsel to the Applicant/Respondent further stated that in the suit before Court 29 of the High Court of FCT. N1,000,000.00k damages was claimed against all the Respondents and Applicant in this suit who the 1st Respondent in the above mentioned case whereas the Applicant in the instant suit is claiming N10,000,000.00 against the 1st Respondent alone. Learned counsel to the Applicant/Respondent cited the case of Ubeng Vs Usua (2006) 12 NWLR (pt 994) 244 at pg 255 Paragraph E – H Ratio 1 and urge the Court to dismiss the application because there is no evidence that the Applicant/Respondent in this suit has instituted several suits against the Respondents.

Further more learned counsel to the Applicant/Respondent adopted the argument of 2nd and 3rd Respondents counsel where they assert that the parties, subject matter and the reliefs sought in the two different suits before the two different Courts pending at the same time were not the same. He submitted that the authorities relied upon by the 1st Respondent do not apply in this suit and referred the Court to the case of Ette Vs Edoho (2009) 8 NWLR (pt 114) 601 at 603 Ratio 3.

Again learned counsel to the Applicant/Respondent argued that the Court can hear his application that day even as the 1st Respondent/Applicant which ought to have file a counter affidavit by that time is yet to do same. Also referred the Court to order 8 rule 4 of the Fundamental Human Right Enforcement

procedure rules and the case of Abia State University Vs Chima Anya Ibe (1996) 1 NWLR (pt 439) 646 at 660.

Finally, learned counsel urged the Court to dismiss the preliminary objection of the 1st Respondent/Applicant and grant their reliefs as contained in the Applicant motion on notice dated 24/03/11 and filed the same date.

Going through the processes filed by all the parties and their oral submission on point of law, it is trite principle of law that once an issue of jurisdiction is raised that the Court should first decide on it first. This is because if at the end, it is found out that Court acted without jurisdiction all the proceedings shall be rendered null and void see the case of Madukolu Vs Nkemdilim (1962) 2 SCNLR R 341 and Arowolo Vs Adsina (2011) 2 NWLR (pt 1231) 315. It is on that strength that the issue of jurisdiction as raised by the 1st Respondent shall be considered first.

We have earlier on stated the prayer of the 1st Respondent/Applicant in his motion to dismiss suit for lack of jurisdiction on the ground that the suit is an abuse of judicial process that there is a similar suit between the parties pending before Justice Kutigi's Court in High Court 29.

This been the contention of the 1st Respondent/Applicant, thus the term abuse of Judicial process has been Judicially defined to mean that the process of the Court has not been used bonafide and properly. It also connotes the employment of judicial process by a party in improper use to the irritation and annoyance of his opponent and the efficient and effective administration of Justice see the case of Umeh Vs Iwu (2008) 8 NWLR (pt 1089) 225. In order to sustain a charge of abuse of process there must Co-exhibit inter alia

- (a) A multiplicity of suits
- (b) Between the same opponents,
- (c) On the same subject matter, and
- (d) On the same issues.

It is against this backdrop of these laid down condition that there arises the need to glance through the aforesaid suits No: M/4611/11: Miss Chika Ogu Vs Dr. Ikenna Ihezvo & 2 Ors and suit No: M/4331/11 Dr. Ikenna Ihezvo Vs I.G.P & 3 Ors. It is obvious from the faces of the two suit that the parties are not the same as a result both parties are entitled to initiate and air their grievance at the law Courts as when there is a right, there must be a remedy.

On the question of the same subject matter in both aforesaid suits. The instance suit No: M/4611/11 has been instituted for a relief against the 2nd and 3rd Respondent to release her car Honda Accord with registration number Abuja BV 645 RSH which was detained upon the instigation by the 1st Respondent and Ten Million Naira (10,000,000.00) against the 1st Respondent as exemplary damages for the unwarranted and malicious infringement of the Applicant's Fundamental Rights. Whereas suit No: M/4331/11 on the other hand is a declaration against the Inspector General of Police and 3 Ors that the continuous detention of the Applicant's vehicle, a red 2004 Honda Accord with Vehicle identification number JHMCM 56894 CO35926 by the Respondents is illegal, unconstitutional, oppressive and a gross violation of the Applicant's Fundamental Rights as guaranteed by section 44 (1) of the constitution of the FRN 1999; an order releasing the said Applicant's vehicle being detained by the Respondents, and an order awarding the sum of One Million Naira (N1,000,000.00) only against the Respondents jointly and severally being general damages for the violation of the Applicant's Fundamental Rights.

In view of the above the subject matter in issue in suit No: M/4611/11 is the releasing of 2004 Honda Accord car with registration number Abuja BV 645 RSH to the Applicant and the particulars were exhibited as per exhibits 'G', 'A', 'J' 'K' in the Applicant's paragraph 32 of her affidavit in support of the motion and N10,000,000.00k exemplary damages. While on the other hand the subject matter in issue in suit No: M/4331/11 is a recovered stolen car from the suspects (Names Unknown) and N1,000,000.00 general damages. It is difficult here to state that both suits were the same to sustain charge of abuse of Court process in addition based on the careful perusal/appraisal of the two suits, the contending issues in both suits are not the same.

It is therefore in the interest of Justice that the application for dismissal of the instant suit is hereby refused since there is no prove to show any abuse of Court process by the 1st Respondent/Applicant.

SUBSTATIVE CASE

The Applicant in this suit brought an application dated 24/03/2011 and filed the same day to enforce her Fundamental Human Rights against the Respondents pursuant to sections 44, 46 (1) and (2) of the 1999 constitution of the Federal Republic of Nigeria (as Amended) and order 2, Rules 1,2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009 seeking the following reliefs:

A declaration that the seizure and or detention of the Applicant's Honda Accord car with registration number Abuja, BV 645 RSH since October, 29th 2010 by the 2nd and 3rd Respondents on a false allegation and instigation of the 1st Respondent is unlawful unwarranted and contrary to section 44 of the constitution of the Federal Republic of Nigeria.

An order directing the 2nd and 3rd Respondent to release the said Honda Accord car with registration number Abuja, BV 645 RSH to the Applicant forth with without my conditions whatsoever.

Ten Million Naira (10,000,000.00k) against the 1st Respondent as exemplary damages for the unwarranted and malicious infringement of the applicant's Fundamental Rights.

And for such further order or orders as this Honourable Court may deem fit to make in the circumstance.

The Applicant also filed and relied on her statement of fact which was brought pursuant to order 2 Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009, 38 paragraphs in support of the motion on notice deposited to by the Applicant she relied on all the averment and the attached exhibits thereto and marked as follows:-

- (i) A copy of the invitation card to the traditional wedding ceremony between the 1st Respondent and her sister. Marked Exhibit A.
- (ii) Two pictures of the traditional wedding ceremony between the 1st Respondent and her sister. Marked Exhibits B and B1.
- (iii) A copy of the Applicant's statement of account from United Bank for Africa Plc Domiciliary Account Number 049013000472 showing two transfers of \$4,500 to Salome Chizoba Ogu. Marked Exhibit C.
- (iv) Teller showing deposit of the sum of N140,000 into Zimus Resources Limited account with intercontinental Bank Plc. Marked Exhibit D.
- (v) Teller showing deposit of the sum of N130,000 into Zimus Resources Limited account with Intercontinental Bank Plc. E.
- (vi) A copy of the Applicants statement of account from United Bank for Africa Plc Account Number 049002001874 showing transfer of N47,200 to Callistus Onyenaobi. Marked Exhibit F.
- (vii) Shipping documents given to the Applicant by Fano Shipping Agencies Limited covering the two 2004 Honda Accord vehicles and two other vehicles. Marked Exhibit G.
- (viii) Copies of Vehicle License and proof of Ownership Certificate for Honda Accord with registration number BG 16 GWA. Marked jointly as Exhibit H.
- (ix) Copies of registration papers for Honda Accord with registration number BV 645 RSH (the subject matter of this suit). Marked jointly as Exhibit J.
- (x) Picture showing the 1st Respondent and his wife standing in front of the Honda Accord with registration number BV 645 RSH at the family house of the Applicant in Aboh Mbaise, Imo State in April 2010. Marked Exhibit K.

Finally a written address in support of the Applicant's application was equally filed by learned counsel to the Applicant. Formulating one issue for determination '**whether the Respondents have violated the Fundamental Right of the Applicant to own and keep movable property so as to warrant a grant of the reliefs sought by the Applicant**'.

Counsel affirm the lone issue formulated by him and referred the Court to provisions of section 44 (1) of the constitution of the Federal Republic of Nigeria which provides that 'No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquire compulsorily in any party of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:

- (a) Requires the prompt payment of compensation therefor; and
- (b) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a Court of law or tribunal or body having jurisdiction in that part of Nigeria.

Learned counsel to the Applicant/Respondent contend that the Applicant has put before the Court evidence to enable the Court hold that the Honda Accord car with registration number BV 645 RSH belongs to the Applicant and she is entitled to a protection of her right to own same. Even though they were not unmindful of the limitation placed by the provisions of section 44(2)(k) of the constitution which provides as follows:

- (2) Nothing in subsection (1) of this section shall be construed as affecting any general law –
- (k) relating to the temporary taking possession of property for the purpose of any examination, investigation or enquiry;

Counsel further urge the Court to hold that the continued seizure and or detention of the Honda Accord car the subject matter of this suit since October 29, 2010 without charging anybody to Court for any offence or releasing the car to the Applicant by the 2nd and 3rd Respondents is unreasonable and can no longer qualify as '**temporary taking possession of a property for the purpose of any examination, investigation or enquiry**'. Counsel referred the Court to the case of Nawa Vs A.G. Cross River State (2008) ALL FWLR (pt 401) pg 807 at 840 where it was held that it is the duty of Court to safe guard the Rights and liberties of individual and to protect him from any abuse or misuse of power.

Learned counsel to the Applicant also submitted that the Applicant has made out a case against the 1st Respondent through the averment in her affidavit and the documents attached as exhibits for the violation of her right to own and keep movable property by the Respondents and urge the Court to grant all the reliefs sought particularly the relief of Ten Million Naira (N10,000,000.00k) exemplary damages against the 1st Respondent. On this counsel referred the Court to the cases of Odogu Vs A.G. Federation & Ors (2000) 2 HRLRA 82 and Jimoh Vs A.G. Federation (1998) 1 HRLRA 513.

Learned counsel to the Applicant/Respondent moved his motion in terms of the motion paper on the 12/05/2011 and further relied on the 2nd and 3rd Respondent Counter Affidavit especially paragraph 5(iii) and 5(vii) and urge the Court to grant their reliefs as prayed because all their facts and the attached exhibits were unchallenged by the Respondents.

Learned counsel to the 1st Respondent/Applicant submitted that they do not file any Counter Affidavit to enable them contradict the Applicant/Respondents position but choose to reply on point of law.

Counsel then referred the Court to Exhibit 'G' where at the 2nd page the name of the 1st Respondent/Applicant appears at the column of Exporter /Importer. Counsel then submitted that the 1st Respondent is the owner of the said vehicle and has not transferred his ownership to the Applicant/Respondent even from the attached exhibits to the motion.

By way of response to the 3rd relief ieN10,000,00k exemplary damages sought by the Applicant/Respondent against 1st Respondent, counsel further submit that the 1st Respondent/Applicant did not violate her Fundamental Human Rights but rather contest the vehicle's ownership with her and that if the Court so hold, it wasn't with malice because there were several letters from him to the police to investigate his stolen car. Counsel urge the Court to be guided by principle of fair play in its ruling.

In another breath learned counsel to the 2nd and 3rd Respondent also informed the Court that they opposed the 1st relief sought by the Applicant/Respondent against the 2nd and 3rd Respondent and in view of their opposition they filed and relied on 8 paragraphs Counter Affidavit deposed to by on Jonah Wutu police officer and litigation clerk in the legal department of the Force C.I.D. Abuja. In further opposition to the said relief one, counsel to the 2nd and 3rd Respondent having filed also adopted his written address where it contended that up till that day, 1st Respondent is still contesting the ownership of the said vehicle with the Applicant/Respondent and that their action was not actuated by malafide but promise to handover the car to the true owner when a Court of competent jurisdiction ordered same.

Finally counsel urge the Court to dismiss relief one sought by the Applicant/Respondent against 2nd and 3rd Respondent but conceded to the 2nd relief and stated that the 3rd relief do not affect them.

