

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE GWAGWALADA JUDICIAL DIVISION
HOLDEN AT ZUBA

BEFORE HIS LORDSHIP:- THE HON. JUSTICE A. O. EBONG

THIS WEDNESDAY, THE 8TH DAY OF MAY, 2019

SUIT NO: PET/125/2016

BETWEEN:

MRS. OLUKEMI ATABUH PETITIONER

AND

MR. KODJO GAMELI ATABUH RESPONDENT

JUDGMENT

This petition was filed on the 25/2/2016. The petitioner, Mrs. Olukemi Laretta Modupeola Atabuh, desires the Court to dissolve her marriage with the respondent on the ground that same has broken down irretrievably. She also prays for custody of the two children of the marriage, namely, Edina Robinson-Atabuh born 2/4/2002, and Eyram Robinson-Atabuh, born on 2/10/2003.

The petition is founded on intolerable behaviour as well as desertion for a continuous period of 11 years, under sections 15(2)(c) and 18 of the Matrimonial Causes Act (MCA), 1970.

The facts of the case are as follows. The petitioner is a Nigerian citizen born on the 25/10/1967, while the respondent, Mr. Kodjo Gameli Atabuh, is a citizen of the Republic of Togo. He was born on the 23/3/1964. The petitioner is a staff of the ECOWAS Commission. At the time of filing this petition, and up to the 10/4/2017 when she testified in Court, she was the Director of Conference/Protocol at the Commission's Headquarters, here in Abuja, Nigeria.

In 2001 she was based in Lome, Togo, serving with the ECOWAS Bank for Investment and Development. There, she met the respondent, who was a friend to one of her colleagues, another Togolese citizen, working with the Bank. She and the respondent later got married at the Local Government Registry in Lome on the 20/10/2001, and the marriage was blessed with the two children earlier mentioned in this judgment.

Trouble seems to have started for the couple quite early in the day. In her evidence in support of the petition, the petitioner gave the following account concerning the genesis of her problem with the respondent:

“We lived as husband and wife with the respondent at House No.416 Avenue Des Evala, Djidole, Lome, Togo. During our courtship, we did not reside together with the respondent, so I was unaware that the respondent was not a practising Catholic despite his statements in that regard. He was an animist. So, when we starting co-habiting quarrels developed. He would not want to go for mass. As the head of the family, he would not want to lead the family prayer. But there is no divorce in the Catholic Church, so despite noticing all these, I felt that this was the cross I will have to carry ...”

Continuing her evidence, the petitioner said the respondent used to absent himself from home frequently and she would be unable to reach him for one or two days. Then the periods of his absence increased to more than three days when she could neither find him nor contact him. That on an occasion after she had gone searching in vain for him during one of his disappearances, he later told her upon his return home that he was a high priest in their religion and that he had gone to offer sacrifices; that if he does not perform the sacrifices he would die.

She tried to get him to meet with her Catholic priest to help him break free from his religious practices, but he refused the invitation. Thereafter he disappeared again for several days. About a week after this disappearance, she went with his own sister to try to locate him at a certain village where she said he was, but she was not allowed to see him. They had a row when he returned home two days later and informed her of a sacrifice he needed her consent to perform for their daughter in line with the dictates of his religion.

The final straw was in 2005 during Togo's presidential election, following the death of President (Gnassingbe) Eyadema. The contest was between the ruling party (represented by Eyadema's son), and the opposition. At the end of the election, President (Olusegun) Obasanjo of Nigeria, who was then the ECOWAS Chairman, declared that the election was not free and fair and this provoked demonstrations by the ruling party in Togo. The demonstrations degenerated to all-round violence, and all non-Togolese nationals left Togo as they said the border would be closed. Within this period, two of her ECOWAS colleagues were attacked in the town despite the fact that they were using diplomatic plate numbers. At this point, she could not find or reach the respondent, and people were being killed in the streets. When he finally came home, she pleaded with him to allow her take the children to Lagos for their safety, explaining that even her life was at risk in the streets, as Lome was a small place and she was well-known as an ECOWAS officer. But he turned down her request.

She then snatched his car keys from him as he sought to leave the house again, but he got a knife from the kitchen and came after her with it. Her neighbours heard her cries and rushed in. Then she dropped the keys and he immediately drove away, only to return the next day and pack his things out of the house. She still pleaded with him that she did not know anyone else in Togo beside himself and her colleagues who had already gone back to Nigeria. She wanted him to at least take them to a

neighbouring country where they would be safe. But he simply packed his things and left, and she has not seen him ever since. She went to his village but could not find him; she also went to his Bar and found it deserted.

She claims that after the respondent's departure, she found some photographs in the house which showed the respondent performing what she believed to be a ritual ceremony. She had no idea where, when or how the alleged photographs were taken, or who took them. Subsequently, she got a letter from the ECOWAS Headquarters deploying her back to Abuja.

Regarding previous proceedings between the parties, the petitioner said following the respondent's desertion of the matrimonial home, she filed a petition for delegation of parental authority before the District Court of the First Instance at Lome, Togo. That she needed this as the respondent was no longer available to sign certain documents requiring the signature of both parents. The Court sent a bailiff to investigate the circumstances of her request and file a report. Thereafter, she was issued two documents, namely: (i) Notice of Abandonment of Marital Home; and (ii) Delegation of Parental Authority. She tendered the original copy of each in French Language, together with its English translation, which were admitted respectively as follows:

- (i) Notice of Abandonment of Marital Home and its English translation - Exhibits 3 and 3A;
- (ii) Delegation of Parental Authority and its translation – Exhibits 4 and 4A.

She read out the English translations of the two documents (i.e. Exhibits 3A and 4A) to the hearing of the Court. She had earlier tendered a copy of her marriage certificate as Exhibit 1.

She said her intention is to continue to care for both children, and to be responsible for them financially and morally; that even during the period of her cohabitation with the respondent,

she was the one providing for them. She stated that both children are presently attending a good Catholic missionary secondary school, the Eucharistic Heart of Jesus Model College, located at Ilorin, Kwara State. According to her, the School was rated 5th in the ranking of Secondary Schools in West Africa in 2017. She prayed the Court to grant her petition for divorce and for full custody of the two children.

By order of Court made pursuant to section 106 MCA and Order VI Rule 7 of the Matrimonial Causes Rules (MCR), the respondent was served with the petition and notice thereof by publication in L'Independent Express ("The Independent Express"), a national newspaper circulating in Togo. He was served hearing notices for subsequent sittings of Court via the same medium. The first publication of the proceedings was on the 4/10/2016, with other publications on the 14/3/2017, the 5/5/2018, the 17/7/2018 and the 12/2/2019. But the respondent never reacted either by filing processes or attending Court for the proceedings.

The petitioner's counsel, Mr. Mas'ud Alabelewe, filed his final written address on the 5/10/2018, and urged the Court to grant the petition as the petitioner's evidence is unchallenged and has, in his view, established the facts relied upon by the petitioner. He cited the cases of SHELL PETROLEUM DEV. CO. NIG. LTD V. EDAMKUE (2009) 14 NWLR (Pt.1160) 7 at 41 E-F, and OGUNLEYE V. JAIYEoba (2011) 9 NWLR (Pt.1252) 339 at 351H – 352A, to contend, inter alia, that where the evidence of a party is not challenged by the opposite party who had the opportunity to do so, it is open to the Court to act on such unchallenged evidence. He submitted that by deserting his wife and children for such length of time and failing to appear in Court despite repeated service, the respondent has shown that he is no longer interested in the marriage and does not care about the life and welfare of his children. He pressed that the interest of the children of the marriage would be better served by an order of custody in favour of the petitioner who

has been saddled with their care, upkeep and maintenance since the respondent's desertion.

Now, it cannot escape attention that virtually all the facts relied upon in support of this petition occurred outside Nigeria. For that reason, I believe the first issue to resolve is whether this Court is the proper forum for this action. That needs to be ascertained as it goes to the Court's jurisdiction, and the law is trite that any decision given without jurisdiction is a nullity, no matter how sound or erudite it may be. See MADUKOLU & ORS. V. NKEMDILIM (1962) LPELR-24023(SC). An overview of the provisions of the MCA, particularly sections 2, 7, 53 and 114, however provide some comfort in this regard. Section 2 MCA confers jurisdiction on this Court to hear and determine matrimonial causes brought at the instance of any person domiciled in Nigeria. This proceedings is a matrimonial cause within the definition of that term in section 114 MCA; and the petitioner is a person domiciled in Nigeria by virtue of Section 7(b) MCA which provides that a wife who is resident in Nigeria at the date of instituting a matrimonial cause proceedings and who has been so resident for the period of three years immediately preceding that date, is deemed to be domiciled in Nigeria. The conditions for assuming jurisdiction as laid down by the Supreme Court in MADUKOLU & ORS. V. NKEMDILIM, supra, is therefore satisfied. On the issue of the facts having all occurred in Togo, section 53(1) MCA empowers this Court to grant or refuse a decree notwithstanding that some or all the facts and circumstances of the case took place outside Nigeria. I am satisfied in the light of the above, that this petition is properly before me.

I now turn to the merits of the action. The facts relied upon as already stated are intolerable behaviour under section 15(2)(c), and desertion. This petition will succeed if the petitioner proves either, or both, of these facts. In his final address, the petitioner's counsel dwells exclusively on desertion as the basis

for seeking divorce. He states thus at paragraph 1.0.1 of his said address:

“The petition herein dated the 25th day of February 2016 was filed the same date. The ground of petition inter alia is complete and total desertion for eleven (11) years leading to irretrievable breakdown of the marriage.”

Then in paragraphs 2.04 to 2.06 he marshals argument on why the petition should succeed because of the respondent's desertion. There is not a single paragraph or sentence in the final address that urges me to grant the petition based on the alleged unreasonable behaviour of the respondent under section 15(2)(c) MCA. And I think that this is significant, if not wholly deliberate on the part of learned counsel. There are two alternative conclusions that could be drawn from this: (i) that intolerability as a fact in support of the petition has been abandoned by the petitioner; or (ii) that on the evidence adduced, the petitioner has no faith in the viability of that fact to sustain the petition. Either way, I think it is a good assessment of the petitioner's case as it relates to her reliance on section 15(2)(c) MCA.

In a matrimonial cause proceedings, the standard of proof is as laid down in section 82 MCA. It provides thus:

- “(1) For the purpose of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.*

- (2) Where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.”*

The question is, am I reasonably satisfied on the evidence led that the facts alleged in support of this petition have been established. I agree with the submission that a trial court can rely and act on the uncontroverted evidence of a claimant. But for such uncontroverted evidence to avail, it must meet the requisite standard of credibility and probability approved by the law: see NEKA B.B.B. MANUFACTURING CO. LTD V. ACB LTD (2004) LPELR-1982(SC) at 27E-28E.

Under section 15(2)(c) MCA the conduct envisaged must be grave and weighty as to make continued cohabitation between the spouses virtually impossible; and the test to be applied is an objective test: see IBRAHIM V. IBRAHIM (2007) 1 NWLR (Pt.1015) 383 CA; BIBILARI V. BIBILARI (2011) LPELR-4443(CA). The petitioner's evidence in this regard is that the respondent sometimes left home to undisclosed destinations and could not be reached for a number of days before returning home; and also that he confessed to being an animist rather than the Catholic that she had assumed he was. While these conducts may no doubt have occasioned some inconvenience to the petitioner, there is hardly anything grave or weighty about them. Nowhere is it shown in the evidence that she at any point in time found it unbearable to continue living with the respondent.

It was sometime in 2002 that she claims the respondent confessed to being an animist. That discovery did not seem to make any difference in her relationship with the respondent. She simply took it in her stride. Furthermore, there is no evidence that his being an animist posed any peculiar threat or danger to her or the children of the marriage; or that she found it particularly repugnant or revolting. The family continued to live normally for the next three years following the alleged confession, until the respondent himself finally moved out for good sometime in 2005. The purport of Section 15(2)(c) MCA is that the respondent's conduct has been such that the petitioner cannot reasonably be expected to live with him. But

in this case, the petitioner's evidence is that even after the respondent packed out of the matrimonial home in 2005, she still went searching for him in his village and at his Bar apparently to persuade him to return home. That is not the conduct of a wife who finds it unbearable to live with the husband. I hold that section 15(2)(c) MCA is not available to the petitioner on the established facts of this case.

The second arm of the petition alleges desertion by the respondent. On this aspect, section 15(2)(f) MCA provides that a marriage shall be held to have broken down irretrievably, if the Court is satisfied that the parties thereto have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. The uncontradicted evidence in this case is that the respondent packed out of the matrimonial home since the 25/4/2005 and never returned. This fact is confirmed by Exhibits 4 and 4A, being court records and decision of the District Court of the First Instance of Lome, Togo, issued after due enquiry into the matter. Thus the parties in this case have not lived together since the 25/4/2005, when the respondent abandoned his matrimonial home. From the 25/4/2005 to the 25/2/2016 when the petitioner filed this petition, is a period of about 11 years. This satisfies the fact contained in section 15(2)(f) MCA. The marriage has therefore broken down irretrievably.

The petition cited section 18 MCA, which deals with constructive desertion. On the established facts of this case, that section is inapplicable. It was not the petitioner that left the matrimonial home due to the unbearable conduct of the respondent; it was the respondent that abandoned his wife and children in the matrimonial home. The case is one of actual desertion, not constructive desertion, by the respondent.

In the light of the above findings, and pursuant to sections 55 and 56 MCA, a *decree nisi* of dissolution of the marriage

contracted between the petitioner and the respondent on the 20th day of October, 2001, is hereby granted.

The petitioner also prayed for custody of the two children of the marriage. In approaching such an order, section 71 MCA makes the interest of the children of the marriage the paramount consideration. Section 1 of the Child's Rights Act 2003 also makes similar provision, while section 2 of that Act requires that a child be given the protection and care necessary for his well-being. The effect of these provisions, in my view, is to ensure that the children of divorced parents derive the highest advantage from any order made for their custody.

In relation to the order for custody, the evidence is undisputed that the respondent abandoned his family in April 2005, while the children were still in their tender years, and has not been heard from since then. They have been the petitioner's sole responsibility from then till date. The Court in Togo granted her sole parental authority over the children in 2006 via Exhibit 4A, and she has continued to exercise that responsibility in seeing to their welfare, education, and advancement in life. She told this Court that both children at presently in a good secondary school in Ilorin, Kwara State, which was ranked 5th among similar schools in West Africa as at 2017. And she undertakes to continue to care for them and educate them up to tertiary level. She stated that even while cohabiting with the respondent, she was the one providing for the children. As between the two parties in this case, it is clear to me from the evidence that the interest and welfare of both children would be better protected if custody is granted to the petitioner. Accordingly, I grant full custody of the two children of the marriage to the petitioner.

I make no order as to cost of the proceedings.

(SGD)

HON. JUSTICE A. O. EBONG
(08/05/2019)

LEGAL REPRESENTATION

- (1) MAS'UD ALABELEWE, ESQ, with Abdulrasheed Usman, Esq, and A. D. Atanda, Esq., for the Petitioner.
- (2) No legal representation for the Respondent.