

THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY 12TH SEPTEMBER, 2019
BEFORE HIS LORDSHIP: HON. JUSTICE V. V.M. VENDA
SUIT NO: FCT/HC/PET/63/16

BETWEEN:

MRS. KATE UZOYIBO UDEPETITIONER

AND

MR. MICHAEL CHIKAODI UDERESPONDENT

JUDGMENT

The Petitioner by an amended Petition No: FCT/HC/PET/63/2016 dated and filed on the 7/11/2016 prays this Honourable Court for nullity of Marriage against the Respondent on the ground(s) that the marriage is voidable in that the Respondent is incapable of Consummating it, that the said marriage is not valid under the law as the consent of the Petitioner was obtained by fraud.

Based upon which the Petitioner prays for:

- 1. An order for a decree of nullity of marriage on the ground that the Respondent is incapable of consummating the marriage.*

- 2. An Order for a decree of nullity of marriage on the ground that the marriage is invalid under the law as the consent of the Petitioner was obtained by fraud.*
- 3. An Order of this Honourable Court for a grant of custody of Miss MIRABEL AMARACHUKUW ANN, being a child of the Union to the Petitioner.*
- 4. An Order of this Honourable Court for the payment of a monthly sum of N50,000,00 as maintenance to the Petitioner until she gets married.*
- 5. And for such order(s) as this Honourable Court may deem fit to make in the circumstance.*

Petitioner filed her evidence on Oath dated 3/4/2017 and also testified in court as PW1.

In her testimony before the court, witness states that she married the Respondent on the 15th of April, 2014 and immediately after the marriage ceremony she noticed that the Respondent was managing an ailment which he did not want the Petitioner to know about; a large portion of which is the Respondent's inability to consummate the marriage owing to an acute erectile defect.

PW1 states that the only sexual intercourse she had with the Respondent which happened on the 18th of March, 2014 was aided

by the application and reliance on some high dosage of a male sexual stimulant drug applied by the Respondent without her knowledge. That probably as a result of prolonged usage of these sexual stimulant drugs, the Respondent has become resistant and can no longer respond to their application.

That the only intercourse between the Petitioner and Respondent on the 18th March, 2014 produced a child MIRABEL AMARACHUKWU ANN who is the only child of the marriage.

PW1 states further that it is clear that the Respondent know from the onset that he had a problem and is “not marriageable” but kept the facts away from her ostensibly to take advantage of her innocence. She states that the Respondent has no control over his sexual emotions as a result of which he cannot be easily aroused.

That Respondent’s sexual arousal comes intermittently and at odd periods which makes it impossible for mating, same, lasting for less than a minute. PW1 states that the Respondent in all of this has refused to submit himself to proper treatment for the purpose of curing himself of the condition.

That the Respondent and Petitioner have ceased living together since September, 2014.

It is PW1 states that she is seeking for the permanent custody of the only child of the marriage in view of the child's age and in consideration of her welfare. PW1 also wishes to refund the traditional pride price paid as consideration at her traditional marriage to the Respondent's family.

She tendered the following, in evidence:

- 1. Marriage Certificate dated 15/4/2014 with No 745 bearing the names MICHAEL FRANCIS CHIKAODI UDE and KATE UZOYIBO EDOZIEH as Exhibit 1 and*
- 2. Birth Certificate of MIRABEL AMARACHUKWU UDE dated 29/1/2015 as Exhibit 2.*

Under cross examination, PW1 stated that she met the Respondent through his Sister and she wasn't forced to marry him as she consented to the marriage based on the details she had of the Respondent at the time. PW1 informed the court that the Respondent is the father of the only child of the marriage and that they did the court marriage on the 15th of April, 2014 and their child was born on the 18th of December, 2014.

She stated further that she wants the marriage annulled because the Respondent is not marriageable, meaning that he does not respond to sexual touch probably from his mental dysfunction. PW1 stated

that because she found out that the only successful intercourse she had with the Respondent which produced a child was aided by drugs and other stimulants and ever since then, they have never had any sexual intercourse not because of any trouble but because the Respondent cannot. PW1 stated that she found out all of these things about the Respondent after the marriage ceremonies and felt deceived into marriage.

PW1 states further that since the birth of the child, the Respondent's financial aid has been grossly inadequate. That the Respondent and his family have refused him from subjecting to medical examination and as a productive and family health specialist, she can tell an abnormality when she sees one.

Under re-examination PW1 informed the court that before the marriage, Respondent told her that they will wait till they are married to have intercourse; that their traditional marriage was on the 15/3/2014 and the only intercourse of the marriage was on 18/3/2014.

She states further that, after that, they decided to wait until after the court and white weddings but unfortunately after these weddings, she noticed that Respondent couldn't even Respondent to touch or be aroused by her. She said that the Respondent's erections come at

its own time and the Respondent seems not to have any control over it as the erections go as soon as they come. PW1 asserts that she found some neuro drugs and sexual stimulants in the Respondents belonging and when she confronted him, he confessed that he knew he had a problem before he married her and apologized.

PW1 stated that she found Lyrical made by Pfizer in the Respondents possession whose indication is epilepsy neuropathic pain, and general anxiety disorder.

In answer to further questions put to her, PW1 stated that in her research, one of the side effects of the drug is erectile malfunctions and this all corresponded with her observations of the Respondent.

She said she also found another drug called Tiger and this was all about a month after their wedding. That she confronted the Respondent with her findings on the 24/5/2014 (a day after she found the drugs) and he told her that he took an over does of the Tiger and due to abuse of these drugs, they no longer work on him.

The witness added that it is not in dispute that the Respondent is the father of their daughter as there is an obvious resemblance of the Respondent and the only child of the marriage.

In his defence, Respondent filed an answer and cross Petition dated 28th of November, 2016 and filed on the 30th of November, 2016.

Respondent states among other facts that he and the Petitioner had sexual intercourse on diverse occasions before the marriage, on the day of their marriage and subsequent days thereafter, till the Petitioner deserted the Respondent in June, 2014.

That the marriage has been consummated and thus blessed with one child; MIRABEL AMARACHUKWU ANN, born on 18th December, 2012. Respondent states also that the child has been living with the Petitioner since her birth and should continue living with her until she attains the age of 18.

Respondent demands for unrestricted access to the child and visitation rights at holidays and admits to paying for maintenance and education of the child provided the child is always enrolled in a school mutually agreed upon by the Petitioner and the Respondent.

Respondent/Cross Petitioner testified as DW1.

The Respondent states that shortly after the marriage ceremonies, there was a disagreement between him and Petitioner and the inability of both parties to resolve the said disagreement led to the

Petitioner moving out of the Matrimonial home on 28th of June, 2014 and has deserted the cross Petitioner for a continuous period of at least one year immediately preceding the presentation of this cross Petition despite the cross Petitioner and his family's appeal to the Petitioner to see reason and reconcile.

Cross Petitioner states further that the marriage has broken down irretrievably and that he is not contesting the dissolution of this marriage.

He states also that he has been taking care of the child of the marriage by paying money into the Petitioners account monthly till date and that such monies is sufficient to adequately cater for the needs of the child.

Cross Petitioner therefore, proposes to be responsible for the maintenance, school fees, (provided that the child is enrolled in a school mutually agreed upon by both parties in this suit) of the child.

That the child will continue to live with the Petitioner until she is 18years old and that cross Petitioner will be given unrestricted access to the child of the marriage and visitation rights at holidays.

Under cross examination, DW1 stated that he met the Petitioner through his Sister's friend and the relationship lasted roughly 2 months before the marriage. DW1 states that he does not have erectile dysfunction but that he ejaculates earlier than the Petitioner expects during sexual intercourse and he sees this as a challenge. He states further that it is untrue that his erection comes when it wants with no control but states further that to rectify this challenge, Petitioner got him a drug called 247 which he started using; and also that he attended clinic which the Petitioner recommended and was later certified Ok however, he does not have evidence to show that he is ok.

DW1 states that he has no objections to dissolving this marriage between himself and the Petitioner.

Under re-examination, DW1 states that he does not have erectile dysfunction but only ejaculates sooner than expected and that he consummated his marriages severally with the Petitioner.

Parties were ordered by the Honourable Court to file their written addresses.

Respondents, final written address was dated and filed on the 2/2/2018 wherein counsel on behalf of Respondent formulated a sole issue for determination vis:

Whether having regards to the facts and circumstances of this suit, and the evidence adduced, the Petitioner has established her claims for nullity of the marriage between the Petitioner and the Respondent.

In his argument, counsel on behalf of Respondent submits that the burden of proof lies on the Petitioner to prove with credible and quality evidence her case and that the Respondent bears no burden to adduce any evidence or satisfactory evidence. Counsel cited Section 137 Evidence Act and **IBRAHIM VS. IBRAHIM (2007) NWLR (PART 1015) 383; KODILINYE VS. ODU (1935) WACA 226.**

Counsel submit's further that Petitioner herein seeking for nullity of the marriage has not led any evidence before this court to prove the claim of lack of consent or that her consent was obtained by fraud. Counsel submits that the Petitioner having alleged fraud as the ground for her Petition has the duty to specifically plead the fraud with particulars and to prove same beyond reasonable doubt. Counsel relies on **GEORGE VS. DOMINION FLOUR MILLS (1963) 1 SCNLR 117** and **UKEJE VS. UKEJE (2014) 11 NWLR (PT 1418) 384 @ 402-403** and submits further that merely pleading a fact without credibly adducing evidence to prove it goes to no issue. **IBRAHIM VS. IBRAHIM (SUPRA) PG 402 PARAGRAPHS B-C.**

Therefore, having failed to discharge the onus on Petitioner, there is no onus on Respondent to lead evidence in rebuttal. Thus, on that ground, the case of Petitioner must fail. Counsel relied on **ANIOKE VS. ANIOKE (2011) LPELR -3774 (CA)**.

Respondent's counsel submits that a successful proof that there is a child of the marriage is a conclusion that the marriage was consummated as there can be no conception without consummation.

On the sole issue formulated from Respondents Cross Petition viz:

Whether the Cross –Petitioner has established his claims in this case to entitle him to the reliefs sought.

Counsel submits that, Cross Petitioner's claim for dissolution of marriage is on the grounds that the marriage has broken down irretrievably. He relied on section 15(2) MCA and paragraphs 12 & 13 of his sworn affidavit as well as the testimony of the Petitioner on her desertion of the matrimonial home on the 28th June, 2014.

He submits therefore, that the Respondent/Cross Petitioner has satisfied the requirement as stated under section 15 (2) (d) MCA by virtue of the evidence adduced, relying on, **TIMINS VS. TIMINS (1953) 2 AER 187**.

In conclusion, counsel prayed the court to dismiss the Petitioner's Petition in its entirety and grant the Respondent's prayers for dissolution of the marriage.

Petitioner's final written address dated 27/4/2018 listed a sole issue for determination:

Whether the Petitioner has proved her Petition for nullity of marriage on the balance of probabilities and therefore entitled to the reliefs sought in court.

As a preliminary issue, Petitioner's counsel drew the courts attention to section 29 MCA which is to the effect that a decree of nullity of a marriage and a Petition for a decree of dissolution of marriage does not co-exist. Counsel contends that it is an abuse of Judicial process on the part of the Respondent/Cross Petitioner and therefore liable to be struck out.

In similar circumstance, counsel cited Section 30 MCA and states that the parties in this suit wedded on the 15th April, 2014 and the Petition was filed on the 30th of April, 2015 being less than 2years of marriage and the Respondent after avoiding service for months filed an answer to Petition and cross Petitioner. Counsel submits that a Cross Petition is deemed to have been filed on the day the substantive Petition was filed which in this case is 30th March, 2016. Counsel submits that by computation of time, cross Petition as

presented by the cross Petitioner is incompetent as it was filed in violation of section 29 & 30 MCA and that such breach of the 2 Sections of the Act is an abuse of court process. Counsel relied on **ABUBAKAR VS. BEBEJI OIL & ALLIED PRODUCT LTD (2007) ALL FWLR (PT 362) RATIO 1. AGWASIN VS. OJICHIA (2004) 7 MJSC 201,(2004) 10 NWLR (PT 882) 613 @ 622-623 F-B.**

On the issue for determination, counsel contends that Petitioner by her evidence is paragraph 13(1) & (ii) of Petitioners notice of Petition for nullity of marriage dated 7/11/2016 pleaded particulars of fraud. Counsel further contends that Respondents admission to the fact that he has an erectile challenge and did not inform the Petitioner about his health challenge before the marriage is proof of deceit and misrepresentation (see Respondents testimony in court on 14/11/2017).

Counsel states that the combined effect of the respondent admitting to the fact that he has erectile dysfunction challenge and that he never disclosed his true sexual state of health to the Petitioner is evidence of the fact that the Petitioner has proved her allegations against the Respondent beyond reasonable doubt as a party who admits a fact in a statement of claim, defence or reply is bound by his admission(s) see **SMOGRAPH SERVICES NIG LTD VS. EYUAFE**

(1976) 9-10 SC 135 AND BUHARI VS. INEC (2009) ALL FWLR PT 459 PG 419.

Counsel argued that because a baby was born in a marriage does not automatically translate to mean the marriage was consummated. He referred the court to **DR. LEONIE MCSWEENEY** in his book LOVE and LIFE page 81. That the Respondent admits before the court that, he suffers from premature ejaculation which means that a man spills his Semen either before he penetrates spills too soon after penetration.

Counsel submits further that Respondent's premature ejaculation comes before Penetration is achieved and there has not been any sexual intercourse between the parties in this suit since after the marriage.

The Petitioner/Respondent submits that the ground under which the cross Petition is made is void as the marriage sought to be dissolved will be less than 2 years from the date of filing.

Petitioner states further that cross Petitioner consciously missed their traditional wedding for no excuse and is not entitled to any of the reliefs sought in his answer and cross Petition.

Petitioner urged this court therefor to dismiss the Cross Petition as same is ill conceived and an abuse of court process.

I wish to clear one fact which is this:

The law is trite that a Cross Petition is regarded as a Petition of its own. The Cross Petitioner therefore, had need to comply with the Rules of court in Matrimonial Causes. Section 30 of the MCA Provide that where a marriage is less than 2 years, a Petitioner ought to obtain leave of court before bringing a Petition for dissolution of the said marriage. This was not done by the Cross Petitioner. I agree with the Petitioner's counsel that the Cross Petition was prematurely presented and is not proper before the court. It is hereby discountenanced.

In this suit the Petitioner' prayer for a decree of Nullity of Marriage is premised on the fact that the Respondent is incapable of consummating a marriage and that the Petitioner's consent to the marriage was obtained by fraud.

The evidence before the court can be summarized thus:

The Petitioner states that the Respondent has an ailment which had to do with difficulty in maintaining an erection among others, which he did not want the Petitioner to

know. That due to this erectile defect, the parties have not successful engaged in any sexual relationship, since April, 2014. That the first and only sexual inter cause they successfully had was on the 18th March, 2014 after their traditional marriage which the Petitioner claims was drug induced, after which, according to the Petitioner, there has been no further consummation of the marriage. Fortunately that single act produced the only child of the marriage.

Evidence before the court also reveals that the Respondent's erection comes at will and at the time it is needed it coils back.

Although the Respondent attempted to deny this under cross examination he could not take it far.

The question was:

Q. *Are you aware that your wife said your erection has no control? It comes when it wants and later does not come again?*

A. *No. Not true.*

Petitioner's counsel rather turned and put the question this way as a follow up question.

Q. *Did you make any effort to rectify this?*

A. She got a drug called 247, and showed me, so I went to where she recommended for me and started using 247. I was later told I am O.K. by the clinic she recommended for me in Lagos.

Q. Do you have further evidence to show you are O.K.

A. No.

Answer to these questions above negate the answer “Not true” earlier given. It is a total betrayal of the denied fact.

If there was no problem with sustaining an erection, there would be no need for the drug, 247 and consequently no need for the clinic to tell the Respondent that he was ok after administering the drug, 247.

This goes to show that there was a problem which needed to be treated and an attempt to treat same was made by the use of the drug 247. There is no proof that he was actually Ok after the use of the drug 247. Except that he was told that he is ok.

In my view the answer in the negative to the question whether the Respondent is aware that the Petitioner’s case is that his erection comes at will, is only face saving. He wouldn’t have gone for the treatment with the drug 247 if there was nothing to treat.

On another question thus:

Q. *Before the marriage did you discuss this challenge with the Petitioner?*

His answer was:

A. *It was not a challenge, as such there was no need for discussion.*

What this means is that the Respondent did not consider his state as a challenge therefore there was no need to discuss it with the Petitioner. This to my mind goes to prove that this medical state of the Respondent was never brought to the knowledge of the Petitioner before the marriage, which goes to prove the fact that there was non-disclosure of the true state of the Respondent, in this regard, before the marriage.

To further buttress her point, and in answering the question under re-examination:

"Why do you think you were deceived" Her answer was (among many others) that,

He confessed that he knew that he had a problem before he marriage me but that he is sorry, I should forgive. I recorded this confession because I knew that the moment the family comes into the issue, they and he, will deny, and that is what is happening. My

lawyer has the recording, if the court permits let him play it to buttress my observation.

The Evidence Act has stipulated how evidence of this nature should be tender as regards the proper foundation to be laid. As counsel did not abide by same, Respondent's counsel objected to the admissibility of this same tape.

In his testimony as DW1, the Respondent did not deny the confession nor the tape. The fact that he confessed, even aside of the tape, remains uncontradicted.

Again under re-examination Respondent was asked the question.

"Do you have erection problem? This question which, in the circumstance and for any reasonable man, had only one answer "No". Though the Respondent said "No" he went further to state that he only has "ejaculation problem", meaning he is aware it is a problem.

To my mind again it boils down to the same thing, if an erection is obtained and soon ejaculates it means that erection cannot be maintained for a reasonably normal period which is exactly what the Petitioner is complaining about.

The issue here is that, even though the Respondent knows that he ejaculates earlier than expected, he never told the Petitioner of this before the marriage and has not told this court that he was a virgin before the marriage so as to create the impression that he was not aware of the condition.

In the long run Respondent under cross examination said he had no objection to the dissolution of the marriage but did not clearly say if he objects to the nullity.

I find in the end, that the Petitioner has proved her cause that the Respondent can no longer sustain an erection for proper coitus, after the first act which resulted in pregnancy that has produced the only child of the marriage. I also find that the Respondent knew of his condition but failed to discuss it with the Petitioner. This, I find to be a concealment of a material fact to this marriage.

Where there is a concealment of a material fact as in the instant case, it goes to the root of the consent obtained by the party for the marriage, as same is deemed having been obtained by deceit. In my opinion, the consent given to the Respondent by the Petitioner when the Respondent sought the Petitioner's hand in marriage was given based on facts known to her and the facts concealed from her which

have been proved before the court have rendered that consent null and void.

It is based on the evidence that the Respondent cannot sustain an erection to engage in proper coitus which he used to get with the aid of drugs and the fact that he had this condition but did not bring this to the notice of the Petitioner before her consent was obtained for the marriage, that I have come to the conclusion that the marriage was actually a nullity.

I therefore, hereby grant a decree of nullity of the marriage between MRS. KATE UZOYIBO UDE and MR. MICHAEL CHIKAODI UDE parties in Petition No Pet/63/2016 dated 30/3/2016 and filed on the same day.

As for the custody of the only child of the marriage, the law is trite that in every cause, in which a child is the subject, the best interest of same shall be of paramount consideration of the court. See section 1 of the Child's Right Act and the case of **ODOGWU VS. ODOGWU (1992) 2 SCNJ 357.**

In **ALABI VS. ALABI (2008) ALL FWLR (PT 418) 245** the court held:

"Custody of a child connotes not only the control of the child, but carries with it the concomitant implication of the

preservation and adequate care of the child's personality, physically, mentally and morally. In other words, this responsibility includes his/her needs in terms of food, shelter, clothing and the like".

Evidence shows that the only child of this marriage was born on the 18th December, 2014; the child is therefore only four (4) years and 9 months as at today and shall be five (5) by December, 18, 2019. This is a female child who needs the care of the mother being a woman. The child will definitely be better cared for by the mother. In addition to her being a female child, she is of a very tender age and cannot, at the moment, care for herself.

It is in the circumstance that I think it expedient to award custody of this child to the Petitioner.

The Petitioner who is usually known as MRS. KATE UZOYIBO UDE is hereby awarded custody of MISS MIRABEL AMARACHUKWU UDE. The Respondent MR. MICHAEL C. UDE is granted access to the child at weekends when the child is not in school and on giving 48 hours notices to the Petitioner until she attains an age she can take care of herself-say age 12 and above as she is too young to go on holiday alone now.

Should the Petitioner chose to remarry custody of the child reverts wholly to her father, the Respondent.

The Respondent shall continue to be responsible for the education and fee books of the child and where the child is facing health challenges (May God forbid) that attract bills of up to N20,000.00 the Respondent shall bear 50% of the cost. The Petitioner shall be responsible for the child's other needs, including school uniforms, feeding, clothing and shelter.

This shall be the arrangement until the child obtains first degree there after she may choose who to live with till she is married.

This is the Judgment.

Signed
Hon. Judge
12/9/2019

APPEARANCE:

SHAKA AWELIENA for Petitioner.

HAPPINESS NNAMDI with Naomi Bryce for Respondent.

AUTHORITIES:

- 1. IBRAHIM VS. IBRAHIM (2007) NWLR (PART 1015) 383;
KODILINYE VS. ODU (1935) WACA 226.**
- 2. GEORGE VS. DOMINION FLOUR MILLS (1963) 1 SCNLR 117
and UKEJE VS. UKEJE (2014) 11 NWLR (PT 1418) 384 @
402-403.**
- 3. IBRAHIM VS. IBRAHIM (SUPRA) PG 402 PARAGRAPHS B-C.**
- 4. ANIOKE VS. ANIOKE (2011) LPELR -3774 (CA).**
- 5. TIMINS VS. TIMINS (1953) 2 AER 187.**
- 6. ABUBAKAR VS. BEBEJI OIL & ALLIED PRODUCT LTD (2007)
ALL FWLR (PT 362) RATIO 1. AGWASIN VS. OJICHIA (2004)
7 MJSC 201,(2004) 10 NWLR (PT 882) 613 @ 622-623 F-B.**
- 7. SMOGRAPH SERVICES NIG LTD VS. EYUAFE (1976) 9-10 SC
135 AND BUHARI VS. INEC (2009) ALL FWLR PT 459 PG
419.**
- 8. ODOGWU VS. ODOGWU (1992) 2 SCNJ 357.**
- 9. ALABI VS. ALABI (2008) ALL FWLR (PT 418) 245.**