IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA
ON, 6TH FEBRUARY, 2020.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

PETITION NO.:-FCT/HC/PET/162/2018

BETWEEN:

SULLIVAN I. CHIME:.....CROSS PETITIONER

AND

MRS. CLARA C. CHIME:.....CROSS RESPONDENT

Paul M. Onyia for the Cross-Petitioner.
AchikeG. William-Wobodowith Levi E. Nwonye for the Cross-Respondent.

JUDGMENT.

The cross-respondent as petitioner, petitioned the Respondent for judicial separation.

The Respondent in turn cross-petitioned against the cross respondent for the dissolution of their marriage. After the parties had exchanged pleadings, the petitioner/cross respondent withdrew her petition and same was struck out, while trial proceeded on the cross petition.

On the 18th day of March, 2019, the cross petitioner, Sullivan I. Chime, gave evidence in proof of his claims. In his adopted statement on oath he stated that he contracted a statutory marriage with the cross-respondent on 5th September, 2008 at the Marriage Registry, Enugu North L.G.A., Enugu State. His cross-petition is for a decree of dissolution of his marriage

based on the ground that the marriage has broken down irretrievably, the parties haven lived apart for a continuous period of more than 3 years from the 21st day of October, 2013.

The cross-petitioner averred that the marriage has an only child, a ten year old Ugomsinachi Chime, who has been in his custody, and whose custody he intends to retain. That he has been providing the child with high quality education in a reputable school, and will ensure that he continues to get quality education at every level of his education.

He stated that he lives in a decent house, complete with recreational facilities suitable for children, in a serene residential neighbourhood at Independence Layout, Enugu, and that he is open to the cross-respondent being allowed reasonable access to the child at periodic intervals in any suitable and conducive location in Enugu City, other than his residence, for interaction and bonding with the child.

The cross petitioner thus prayed the Court for the following orders;

i) A decree of dissolution of the marriage contracted between him and the cross-respondent, Clara C. Chime on 5th September, 2008, on the ground that the marriage has broken down irretrievably.
ii) Custody of the Child of the marriage, Ugomsinachi Chime.

The Marriage Certificate of the cross-petitioner to the cross-respondent was tendered by the cross-petitioner and same admitted in evidence as Exhibit PW1A.

Under cross examination, the cross-petitioner told the Court that it is the child's welfare that is uppermost in his mind, and that given the circumstances surrounding the cross-respondent,

the child may not all the time have the gratification of seeing his mother.

The cross-petitioner further stated that the cross-respondent has not recovered from her health challenges as she is meant to be on medication for life. That the parties are where they are today because the cross-respondent refused to take her medications as prescribed by her psychologists/doctors whom she accused of having been hired by the cross-petitioner to kill her.

In answer to the cross-petition, the cross-respondent stated that even though she had earlier petitioned for judicial separation, she does not want to object to the cross petition for dissolution of marriage. She however, stated that she vehemently objects to the proposed arrangement for the custody of the child of the marriage. She stated that she was responsible for putting the child in the so called best school in Enugu and was also paying the child's school fees during her stay at the government house. That as an alternative, she would put the child in American International School, Durumi, Abuja.

She further stated that a mother's love and care ought to be superior to recreational facilities, and that there is no type of recreational facility in Nigeria that she cannot afford or provide for her child. That the child is growing up and the absence of his mother's love will pose a psychological challenge on him in the future. That she has no other child and will therefore, sacrifice anything for the child's wellbeing.

On the 2nd day of May, 2019, the cross-respondent Mrs. Clara C. Chime adopted the statement on oath which she deposed to on the 19th day of March, 2019 wherein, she stated that, it was the cross-petitioner who deserted her. That it was on the order and supervision of the cross-petitioner, the security personnel

of the cross-petitioner bundled her and took her to her mother's residence.

In another breath, she said that she did not object to the dissolution of marriage because she was hurt by the cross-petitioner's Answer to her petition and his intention to dissolve the marriage, but that having put the emotion behind her, she now objects to the dissolution of her marriage as she intends to remain married to her husband. That she and the cross-petitioner have been talking on a more friendly manner such that she anticipates that over time they will resolve their differences. Also, that the marriage is blessed with a child who deserves to be raised by his both parents together.

The cross-respondent in the alternative, stated that her interest ought to be taken into account should the Court agree to any decree of dissolution of the marriage. That during the marriage, she and the cross-petitioner had the following;

i. House No. 1, Coal City Garden, GRA, Enugu.
ii. House No. 2, Coal City Garden, GRA, Enugu.
iii. Plot 2543, Hassan Musa Kastina Street, Asokoro, Abuja.
iv. Block 4, 7th Street, Godab Estate Life Camp, Abuja: and so many others.

She stated that she is entitled to one building or the sum of N500,000,000.00 (Five Hundred Million Naira) only to enable her purchase a building where she could inhabit.

That in addition to the monthly pension which the cross-respondent receives from the Enugu State Government, he also earns substantial income from his business interests in Polo Park Mall, Spar Mall, San Calos Farms at Awgu Local Government Area, etcetra.

She stated that she currently run her own small scale business and also serve as Adviser to her State Governor (Abia State), but that the cross-petitioner had exposed her to a new and affluent lifestyle and status while she was first lady of Enugu State and now she is unable to maintain that status with her present means.

The cross-respondent further stated that presently she no longer has health challenges. That it was the unfavourable situation she found herself at the Government House, Enugu, since her marriage to the cross-petitioner that made her unhappy and forced her into depression but that since being deserted, she is happier and healthier. That she is more stable to return to her matrimonial home.

She stated that she is both emotionally and physically stable to take care of her child. That she wants custody of her child in order to give him motherly care and love which he lacks presently.

In her witness statement on oath, she prayed the Court to refuse the dissolution of her marriage, or in the alternative to:

i. Grant her custody of her son for proper motherly attention, care and love.
ii. Grant monthly maintenance for the child.
iii. Grant her one of the houses listed above for her habitation or the sum of N500,000,000.00 to enable her purchase a house for her habitation.
iv. The sum of N2,000,000.00 only as monthly upkeep to remain and maintain her status as former first lady of Enugu State.

In the course of adopting her statement on oath, the cross-respondent, with reference to paragraph 3 of her statement on oath, told the Court that she is not objecting to a divorce.

She told the Court further, that she is asking for her child's custody and maintenance allowance of N500,000.

She stated that the cross-petitioner only permitted her to see her child for only 5 hours in a month. That when she went to visit him during the last Easter, she observed that the pants he wore was torn completely; his hair was not oiled and brushed, and that his finger and toe nails were over grown.

Under cross examination, the cross-respondent said that she has never been on drugs and that she has never had any mental challenge. She denied ever visiting any psychiatric hospital or being diagnosed with schizophrenia, while maintaining that she is not on any medication.

She admitted that she has no idea of the amount the cross-petitioner receives as pension. She further admitted that she has been living well notwithstanding the fact that she has not been receiving maintenance allowance from the cross-petitioner.

At the close of evidence, the parties filed and exchanged final written addresses.

The learned Cross-Respondent's counsel, Achinike G. Wiiliam-Wobodo, raised two issues for determination in his final written address, namely;

i. Whether from the available evidence before the Court, the Cross-Respondent is entitled to an unfettered access to, and custody or joint custody of, her only child, being the lone child of the marriage?
ii. Whether, having regards to the Matrimonial Causes Act 2003, the Cross-Respondent is entitled to settlement and maintenance, and if so, has the Cross-Respondent

established a case to warrant the award of settlement and maintenance of the Cross-Respondent?

As a prefactory submission, the learned counsel posited that notwithstanding the fact that the Cross-Petitioner failed to establish grounds for dissolution of marriage and regardless the initial opposition by the Cross-Respondent, the Cross-Respondent no longer opposes the application for dissolution of marriage, but concedes to same.

Proffering arguments on issue one, learned counsel posited that the award of custody of a child is not automatically linked to the success or failure of a petition or cross petition in matrimonial proceedings. That it does not necessarily follow that a party who succeeds in a petition or cross petition shall be awarded custody of the child(ren) of the marriage. He referred **Eluwa v. Eluwa (2013) LPELR-22120 (CA).**

Relying on **Lafun v. Lafun (1967) NMLR 401; Alabi v. Alabi (2007) 9 NWLR (1039)297**, inter alia, he contended that each case is to be decided on the peculiar facts and circumstances placed before the Court in the proceedings.

Learned counsel contended that the welfare and interest of children is of paramount importance and a vital factor in determining the issue of custody of children in matrimonial proceedings. He argued that the cross respondent, in the instant case, has by her evidence and testimony before the Court, demonstrated a clear evidence of affection and concern for the child unlike the cross petitioner, who by his evidence, believes that the child only deserves ***"a decent house, complete with recreational facilities suited for children in a serene residential neighbourhood at Independence Layout, Enugu…, a visiting consultant paediatrician and a resident nurse…"***.

He contended that the child of the marriage, needs parental care, love and affection, which have become a legal right of a child by virtue of Sections 1 and 14 of the Child Rights Act, 2003. He argued that the cross petitioner, who is a former governor and active politician has not shown any intention of bonding with the child, neither demonstrated that he clearly understands that the child needs parental care, love and affection beyond recreational facilities, paediatricians, nurses and friends.

While conceding that the cross petitioner has better financial disposition than the cross respondent, to cater for the education of the child, he argued that this does not override or derogate from the happiness and overall welfare of the child. That the law has anticipated such situation and made provision for maintenance. He referred to Section 70 of the Matrimonial Causes Act; **Anoliefo v. Anoliefo (2019) LPELR-47238 (CA).**

Relying on **Odogwu v. Odogwu (1992) LPELR-2229 (SC),** he posited that it is trite that in cases of children of tender age as in this case where the child is only 10 years old, unless other facts and circumstances make it undesirable, custody should be put under the care of the mother.

Learned counsel argued that there is no credible evidence of any undesirable circumstance or fact that would make this Court to decide otherwise. That the cross respondent gave uncontroverted evidence that she is “both emotionally and physically stable” to take care of her child; that her health challenge at some point in the marriage was as a result of the unfavourable situation that she found herself in the marriage that made her unhappy and forced her into depression.

He contended that the piece of evidence as to what caused the depression to the cross respondent was not contradicted by the

cross petitioner. That on the contrary, the bogus and vague claim of the cross petitioner that the cross respondent had a psychiatrics challenge was not substantiated.

That no evidence was called in proof of such allegation. He posited that it is trite law that he who asserts must prove, as the onus is on the party, in this case, the cross petitioner, who would lose if no evidence at all was called, to prove the allegation.

Relying on **Uzochukwu v. Uzochukwu (2014) LPELR-24139 (CA),** learned counsel urged the Court to create a balance by granting joint custody of the child to both parents, where the Court is not enthused to address the financial disparity of the cross petitioner and the cross respondent with an award of maintenance.

He further urged the Court to resolve issue one in favour of the cross respondent and grant custody of the only child of the marriage to the cross respondent, and to make consequential order directing that the cross petitioner shall be responsible for the cost of education, medication and general welfare of the child, and that he shall have a right of access to the child at all reasonable times.

On issue two, learned counsel contended that the cross respondent, by virtue of Sections 70 and 72 of the Matrimonial Causes Act, is entitled to maintenance and settlement by the cross petitioner, and that this Court has the jurisdiction to make that award in favour of the cross respondent. He referred to **Kpilah v. Ngwu (2018) LPELR-45395 (CA); Obajimi v. Obajimi (2011) LPELR-4665 (CA) and Adejumo v. Adejumo (2010) LPELR-3602 (CA).**

He posited that in making an award for maintenance in a particular situation, the Court will take into consideration the following guidelines; For maintenance:

1) The stations of life of the parties and their life styles.
2) Their respective means,
3) The existence or non-existence of child or children of the marriage, and
4) The conduct of the parties.

- **Mueller v. Mueller (2005) LPELR-12687 (CA); Hayes v. Hayes (2000) 3 NWLR (Pt 648) 276.**

For settlement, he posited that the Courts are enjoined to render justice based on fairness and equity. He referred to **Ibeabuchi v. Ibeabuchi (2016) LPELR-41268 (CA);** Section 72(1) of the Matrimonial Causes Act.

He contended that the Cross-Respondent has made out a case for settlement and maintenance from the cross petitioner and urged the Court to resolve the issues in favour of the cross respondent and to grant her prayers.

The learned cross petitioner's counsel Chief P.M.B. Onyia, also raised two issues for determination in his Final Written Address, to wit;

a) Whether enough credible evidence has been placed before the Court to entitle the cross petitioner to an order of decree of dissolution of the marriage between the parties, on the ground that same has broken down irretrievably?
b) Whether from the totality of the evidence before the Court, it would not be in the greater interest of the only child of the marriage (a minor) that his custody be granted to the cross petitioner?

On issue one, learned counsel argued that the fact relied on by the cross petitioner as constituting the ground that the marriage between him and the cross respondent has broken down irretrievably, is as provided for in Section 15(2)(f) of the Matrimonial Causes Act, LFN 2004; that is, that the parties have lived apart for a continuous period of more than 3 years immediately preceding the presentation of the cross petition, to wit; since 21st October, 2013. He contended that the averment in paragraph 24 of the cross petition on the above fact was not denied by the cross respondent who instead, stated that she does not object to the dissolution of the marriage. He submitted that the law is trite that an uncontroverted averment contained in a pleading, is deemed admitted, and thus need no further proof. He referred to Section 123 of the Evidence Act, 2011; **Abdulganiyu v. Adekeye&Anor (2012) LPELR-9250.**

Learned counsel posited further, that a couple living apart for a continuous period of at least 3 years immediately preceding the presentation of a petition, is in itself, a statutorily recognised basis for coming to a determination that the marriage has broken down irretrievably, and that this is irrespective of whatever the circumstances that led to the living apart might be.

He urged the Court to resolve issue one in favour of the cross-petitioner.

In arguing issue two, learned counsel contended that it is in evidence before the Court, that since 2013 when the cross-respondent moved out of her matrimonial home, the only child of the marriage, then 4 years old, has been in the custody and care of the cross petitioner, with no objections from the cross respondent.

He argued that while it is the case of the cross-petitioner that he has been providing the child with high quality education in a

reputable school; and that he would continue to do so for the child at every level of his education, even as he has made provisions for the medical and recreational needs of the child; the cross-respondent in her Answer to the cross petition, failed to deny the averments as to these facts as contained in paragraphs 26-28 of the cross petition. He contended that the assertions by the cross respondent that she was the one that enrolled the child in the school he currently attends while she was still living with the cross petitioner and that she could afford any kind of recreational facility in the country, are not sufficient to constitute, in law, a denial or traverse of the said paragraphs of the cross petition. He referred to **Kolo v. Lawan (2010) 3 FWLR (Pt 530) 5173.**

The learned counsel argued that having not joined issues with the cross petitioner on the facts upon which the relief for custody of the child of the marriage is premised, the cross respondent, in law, is taken not to be disputing those facts, and that they thus need not be proved.

He contended that even if the cross-respondent had joined issues with the cross-petitioner on those facts, that the only option open to the Court is to grant custody of the child to the cross-petitioner, as the cross-respondent, in her Answer to the cross-petition, did not ask for even a single relief, not to talk of one of custody of the child of the marriage. He argued that the prayer by the cross-respondent for a grant of custody of the child, in paragraph 18 of her written statement on oath, cannot be taken seriously in view of the fact that no such relief is contained in her pleadings.

Relying on **Union Bank v. Salaudeen (2017) LPELR-43415 (CA),** he submitted that parties are bound by their pleadings, and thus the Court must confine itself to the pleadings of the parties.

Arguing that there is nothing in the pleadings of the cross-respondent that is capable of sustaining the prayer for custody contained in her statement on oath, he relied on **Total Nig PLC v. Anyiam (2013) LPELR-22803 (CA),** to posit that the Courts are not in the habit of giving parties what they did not ask for.

He argued in conclusion that the cross-petitioner led ample credible and uncontroverted evidence in proof of his capability, availability and willingness to provide and care for the only child of the marriage. He urged the Court to also resolve issue two in favour of the cross-petitioner.

In his response to the cross-respondent's Final Written Address, learned counsel to the cross-petitioner contended to the effect that the cross-respondent having earlier withdrawn her petition, consequent upon which same was struck out; that what remains before the Court is the cross-petition, in answer to which the cross-respondent claimed no reliefs whatsoever.

He contended that the Final Written Address of the cross-respondent is flawed, as same is based on a false premise, having proceeded on an assumption or delusion as to the state of affairs regarding the cross-respondent's Answer to the cross petition. He argued that issues are joined in the pleadings and that parties are bound by their pleadings; that evidence on facts not pleaded goes to no issue.

He referred inter alia to, **Kubor&Anor v. Dickson &Ors (2013) 4 NWLR (Pt 1345) 534; Diamond Bank PLC v. Monanu (2012) LPELR-19955 (CA); Akinbade&Anor v. Babatunde&Ors (2018) 7 NWLR (Pt 1618) 366.**

The learned counsel to the cross-petitioner further argued that the learned counsel to the cross-respondent has introduced some prayers in the witness statement on oath which are for custody of the child of the marriage, for maintenance of the

cross-respondent and child of the marriage, for settlement of property, or lump sum payment of N500,000,000. That these prayers are countenanced for the reason that reason that witness statement on oath cannot introduce reliefs being sought in judicial proceedings. That any such attempt at sneaking in reliefs through the backdoor is liable to be treated with levity and should be dismissed. That all the cross-petitioner needed to look at is the cross-respondent's Answer to the cross-petitioner and he relied on **NDDC v. Otuke&Ors (2018) LPELR-45146 (CA)** to submit that litigation is no a game of hide and seek. He further submitted that the cross-respondent clearly abandoned her reliefs when she withdrew her petition without relisting it and that a party should not be allowed to benefit from his wrong doing or default – **Ibrahim v. Osunde&Ors (2009) LPELR-1411 (SC).**

In furtherance to his submission, learned counsel stated that the cross-respondent's inconsistency and serial indecisions and hesitancy throughout the proceedings go to reflect the negativity state of mind and her capacity and disposition towards taking custody of a child should be a ground for refusing the cross-respondent the custody of the child. In conclusion, learned counsel to the cross-petitioner urged the Court to grant all their reliefs sought in the absence of any reliefs sought by the cross-respondent.

A petition dated and filed on 26th March, 2018 was initiated by Mrs. Clara Chime andseeking the following prayers;

a) A decree of judicial separation of the marriage between her and Sullivan I. chime the respondent that has broken down irretrievably.
b) A full award of custody of the child Ugomsinachi Chime of the marriage to petitioner and
c) Granting of visitation rights on weekends to Respondent.

Upon service of the petition on the Respondent, the Respondent filed an answer/cross petition dated and filed on 1st June, 2018 seeking the dissolution of the statutory marriage contracted on 5th September, 2008 on the ground that the marriage has broken down irretrievably.

In response, the petitioner filed a Reply to the Answer to the petition and counter petition on 2nd July, 2019. Pleadings were exchanged and the matter was set down for hearing.

On the 24th October, 2018, the petitioner claimed that on 6th September, 2018, the petitioner filed and served on the Respondent/counter petitioner a Notice of Discontinuance of the petition and thereafter the petitioner also filed a notice of change of counsel but none of these processes were found in the Court's file.

The Court adjourned the matter to enable the petitioner put her house inorder.

On 10th December, *2018*, the petitioner and her counsel were conspicuously absent, and upon application by the Respondent counsel, the petition was struck out and what was left out was the ***'Answer to the petition and counter petition of the Respondent'*.**

However, on subsequent adjournment, the petition was relisted and the petition was formally withdrawn by the petitioner and struck out on 4th February, 2019 by the Court. Thus leaving behind only the counter petition of the Respondent and the reply to the counter petition by the petitioner now the cross-respondent as the ONLY pleadings. Parties were ordered to file depositions on oath for their witnesses.

On 2nd May, 2019, the counter petitioner Sullivan I. Chime testified as PW1, was cross examined and he closed his case.

On 6th March, 2019, the Cross-Respondent, Mrs. Clara Chime testified as DW1 and was cross examined and she closed her case.

The Court upon hearing the parties in the course of their respective testimonies and being in avantage position,I raise these issues for consideration.

1) Whether credible evidence has been led to make an order for dissolution of the said marriage.
2) Whether the cross-petitioner should be granted the custody of the sole child of the marriage.
3) Whether the cross-respondent is entitled to settlement and maintenance by the cross-petitioner.

On **whether credible evidence has been led to make an order for dissolution of the marriage?**

One of the conditions for the grant of dissolution from marriage is that the Court hearing the petition for dissolution of marriage shall dissolve the marriage if the marriage is broken down irretrievably. Section 15(1) (2) of the Matrimonial Causes Act set out the facts as follows that:

> ***"The Court hearing the petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the Court of one or more of the following facts – (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."***

The evidence so far led by both parties go to confirm that they have lived apart for more than two years immediately preceding

the prosecution of this petition and both parties willingly agree to a dissolution of the marriage contracted on 5th September, 2008, after several prevarications on the witness statement on oath and oral evidence of the cross-respondent.

For the word 'SHALL' to have an effective command operative, the counter-petitioner or the cross-petitioner in the instant case must prove that parties to the marriage have lived apart for more than two years. This evidence is confirmed.

Secondly, the cross-respondent must show no objection to the dissolution. In the case of the cross-respondent only surviving pleadings which is 'Answer to the cross-petition' dated and filed on 2nd July, 2018,admitted in paragraph 7 of the Answer to the counter-petition to a dissolution. While in her witness statement on oath, of 19th March, 2019 paragraph 7,shestirred contrary to her paragraph 3 of the same statement on oath.Opposing to the dissolution of the marriage.Later in her evidence in chief and questions to cross examination she agreed to a dissolutionof the marriage.

It is pertinent to state that the contradictions in testimony which would upturn the decision of a Court must be material contradictions and not discrepancies –**Farouk Oligie v. JohnbullAduni (2014) LPELR 24480 CA.**Without doubt, the deposition and oral evidence of the cross-respondent are by themselves inconsistent with the pleadings in form of Answer to the cross-petition thus making the Court disbelieving the cross-respondent.

However, it is settled law, in the case of **Omotunde v. Omotunde (2001) 9 NWLR (Pt 718) 252,)** that the petitioner and in this case the cross-petitioner must lead satisfactory evidence to prove his entitlement to the decree. Whether the cross-respondent pleaded an objection or admission to the

dissolution, the duty befalls on the petitioner or cross-petitioner to lead effective evidence to prove the dissolution. The cross-petitioner led evidence that the cross-respondent left the matrimonial home refusing to continue with her anti-depressive treatment. The cross-respondent during cross examination admitted both in writing and oral evidence that she left as she found herself in an unfavourable situation in the hands of the cross-petitioner. They never got back to re-unit. There is clear evidence that they are still living apart. In this regard, the petitioner has satisfied the Court that parties to the suit are living apart for over two years.Upon these facts, this Court holds that the marriage has broken down irretrievably.

On issue two, **whether the cross-respondent should be granted the custody of the sole child of the marriage?**

Before considering the above issue, there is need to ensure whether the cross-respondent sought the full custody of the child as a relief.

Having critically examined the three-paragraph 'Answer to the cross-petition',I discovered that the cross-respondent did not include any relief in her answer to the counter-petition dated 2nd July, 2018. Rather in her Deposition dated and filed 19th March, 2019, the cross-respondent added the following reliefs to wit;

i. Grant me custody of my son for proper motherly attention, care and love.
ii. Grant monthly maintenance for the child.
iii. Grant me one of the Houses listed above for my habitation or the sum of N500,000,000.00 to enable me purchase a house for my habitation.
iv. The sum of N2,000,000.00 only as monthly upkeep to remain and maintain my status as former first lady of Enugu State.

It is pertinent to state that where a witness statement on oath or deposition of a witness contains reliefs, that amounts to a serious irregularity and renders the statement on oath incompetentsuch reliefs cannot avail the witness.Not only would a written statement on oath be rendered incompetent because it was unsworn, such witness statement on oathwill not suffice in the interest of justice and no Court would act on the reliefs sought in a witness statement on oath. The position of the law on oath documents represents evidence to be used by the Court in determination of the pleadings. I therefore, agree with paragraph 1.13 of the cross-petitioners final written address that the reliefs being sought in the deposition of the cross-respondent is incompetent to the extent that such reliefs cannot avail her. Nonetheless the Court can make use of the averments in the witness statement on oaththus expunging the reliefs.

In other words the cross-respondent failed to properly seek reliefs and prayers for ***"maintenance, settlement of properties/assets and custody of the child of the marriage".***Therefore the three-paragraphs pleadings of the cross-respondent is devoid of specific and clear reliefs sought and I cannot import the relief from the evidence led by the cross-respondent.

Effect of making an order not sought: -

The Supreme Court in **University of Jos v. Dr. M.C. Ike-gwuoha (2013)LPELR-2033 (SC),**Alagoa, JSC held,

> ***"Let me state without any fear or contradiction that the 'free giving' father Christmas no longer exist… See also Chief N.T. Okoko v. Mark Dakolo (2006) 14 NWLR (Pt 1000) 401***

…Ladoke v. Olobayo (1992) 8 NWLR (Pt 261) 605; Awosile v. Sotunbo (1992) 5 NWLR (pt 243) 514. The list of authorities on this subject matter is in exclusion and are all to the effect that a Court of law has no jurisdiction to grant to a party that which he has not asked for. It is an old legal principle and is quite sacrosanct. Action that is vague and lacks certainty is no claim at all".

The present case on the issue of lacking any reliefs in the pleadings of the cross-respondents rests squarely on the above decision. And I so hold that the cross-respondent presented no reliefs to be considered.

In considering therefore, the custody of a child in matrimonial causes proceedings, the Supreme Court had held in – **Odogwu v. Odogwu (1992) LPELR 2227 SC**

"If the parties are separated and the child is of tender age, it is presumed the child will be happier with the mother and no order will be made against this presumption unless it is abundantly clear the contrary is the situation – e.g. immorality of the mother, infections, diseases on the mother, insanity, and or her cruelty to the child…"

In respect of the evidence for and against the custody of the child by the parties, I have critically examined the evidence of the cross-respondent in response to the facts stated in paragraph 26-28 of cross-petition in respect of issues of custody.I refuse to agree with the cross-petitioners learned counsel argument in paragraph 3.2.3 of his final written address stating that the cross-respondent response was not sufficient enough to constitute in law a denial or traverse. I consider the answer to the cross petition to constitute enough traverse in law

in respect of the grant of the custody of the child to the cross-respondent.

However, despite the traverse to paragraph 26-28 of the cross-respondent pleadings, the cross-respondent failed to seek reliefs on the custody of the child. Even in the Biblical law of God, it says in Mathew 7:7-8;

> ***"Ask, you shall receive, seek, you shall find and knock it shall be opened unto you. For everyone that asks receives , and he that seeks, finds, and he that knocks shall be opened unto."***

Same goes with the court of law,without proper prayer, no Court will grant a prayer not asked. Pleadings are meant to have specific and precise prayers.

Thus also in **Ikarre Community Bank Nig Ltd v. Bola Ademiwagun (2004) LPELR 5729 (CA)** Court of Appeal held;

> ***"It is trite law that a Court of law cannot give and should never award a relief that is not sought or pleaded by a party. … a Court should not award a relief not specifically pleaded or sought… Anyalogu v. Agu (2002) 3 NWLR (Pt 753) 168, where this Court per Olagunju, JCA stated as follows notwithstanding, the lofty and magnanimous gesture of the learned Trial Judge, the law as it states, is not predisposed to beneficent philanthropy of doling out bounties on the basis of need.'*** Per Augie, JCA.

I therefore, agree with learned counsel to the cross-petitioner in paragraph 3.26 of the final written address that;

> ***"There is need for prayers to be specific, decisive, precise and to the point…."***

In the award of custody of a child in determining the issue of custody in matrimonial proceedings, plethora of cases have held that such should be governed by Section 71(1) of the Matrimonial Cause Act 1990,which enjoins Court to take the interest of the child as paramount consideration – See

BenjmainFolorunshoAlabi v. Eunice Albi (2007) LPELR 8203 (CA), Nnanna v. Nnanna (2006) 3 NWLR (Pt 960), Williams v. Williams (1987) 2 NWLR (Pt 54) 66.

It is well observed in all these cases that the welfare of the child is not only paramount but a condition precedent. In this regard having considered the testimonies of the parties in the determination of the welfare of the sole child of this marriage I further consider these relevant issues:

a) The familiarity of the child with the petitioner since the absence of the cross-respondent.
b) The amount of affections he has had from the cross-petitioner (the father) for over 10 years.
c) The financial status of the two parents and their ability to provide for the child.
d) The health challenges of the cross-respondent (his mother) is facing as admitted by bothparties.

Despite the fact that the child is still a minor, I am convinced that the welfare and upbringing of this child will be better handled by the cross-petitioner(the father) Sullivan I. Chime.

On the third issue of whether, the cross-respondent is entitled to settlement and maintenance by the cross-petitioner.Pleadings being the bedrock of the evidence to be led in each case before a Court is essentially to compel the parties to precisely and accurately define issue upon which their cases rest. Evidence cannot be substituted for pleadings neither would pleadings be substituted for evidence, each plays a role and in the absence of one the other cannot exist particularly in

civil matters. The duty of a trial Court is to receive evidence supporting the pleadings and not outside the pleadings. Where such evidence outside the pleadingsare received erroneously, the Court is bond to expunge itfrom therecords. Again,the essence of pleadings is to enable contending parties identify and settle issues in controversy and avoid springing up surprises. The essence of pleadings is also to compel the parties to be concise and unambiguous in presentation of their cases and as stated,per Uwais, JSC in**AshiruBoibi v. R.J. Fikolati& Amp &Ors (1987) 3 SC @ 119,** is to enable the Court and parties in the case be aware of issues joined and under contest. Adducing evidence that goes outside the pleadings have no impact on the pleadings. The primary duty of the Court in a trial is to ensure that facts are pleaded before the Court and the law is applied to the facts. I place reliance on both Court of Appeal and Supreme Court cases to emphasise that disputed facts in matters before a Court can be ascertained and defined in fair play upon the threshold of pleadings (facts). Parties are therefore, bound by their pleadings. See **Okeke v. Nwigene (2016) LPELR 41047 (CA); Ughitevbe v. Shonowo&anor (2004) LPELR 3317 Comproller Gen. of Customs &Ors v. Gusau (2017) LPELR 42081 SC.**

In the instant case as it stands, it is clear from the case of the only pleadings before this Court captioned “Answer to the Cross Petition for Dissolution of Marriage” on page 49 of the Court’s file did not state not even faintly any facts related to the issue of maintenance or settlement of property. It is trite in law that the address of a learned counsel no matter how elaborately, intelligently and brilliantly stated cannot be substituted as pleadings/evidence.The brigantry of paragraph 4.2.2 to 4.2.7 of the learned counsel to cross-respondent address does not indeed replace evidence or pleadings, this is settled law.–**New**

(Nig) Bank PLC v. Owie (2010) LPELR 4591 SC; Ojiakor&anor v. Nnamene&Ors (2013) LPELR 21255 (CA).

I am endeared to agree with the submission of the learned counsel to the cross-petitioner on these issues in concluding that the cross-respondent clearly withdrew and abandoned her petition containing her reliefs, relying only on the "Answer to the cross petition" which is devoid of any facts of pleadings and reliefs on settlement of properties and maintenance. The law is very certain on facts not pleaded and led in evidence that goes to no issue –**Duro v. INEC &Ors (2010) LPELR 8587 (CA).** Therefore, any evidence whether oral or undeposed led on the issue of maintenance and settlement of properties which are unpleaded goes to no issue and are herebydiscountenanced. I place reliance on **Abdul-Rahman v. Kadiri (2012) LPELR 8001 CA, and Sam-Omotosho v. Obidairo (2014) LPELR 23006 (CA), Adeyeri&Ors v. Okobi&Ors (1997) LPELR 8055 (SC).**

In other words, itis not my business to forage for evidence for the other party (cross-respondent) so as to boost her case where in actual sense the cross-respondent failed to precisely plead and lead evidence upon facts on maintenance and settlement of property. The Court is bound by law to adjudicate on evidence led to support thepleadings.

I am conscious of the requirements of the lawin dealing with issues of maintenance and settlement of properties where by the means and earnings capacity of the parties are considered. Those are relevant and material factors in determining maintenance proceedings which **HAYES v. HAYES (2000) 3 NWLR (648) 276,** stated the following principles;

a) The states of life of the parties and their life styles.
b) Their respective means.

c) The conduct of the parties.
d) Existence or non-existence of a child or children of the marriage.

In considering these factors, facts must be pleaded and evidence must be adduced in support of such pleaded facts. In the instant case no such fact or evidence was adduced. In the absence of these relevant and material factors, which the law requires for consideration, the Court is not expected to import facts to feel up the cross-respondents gap. It is equally observed that the cross-petitioner also neither raised issue of settlement on property nor maintenance of the cross-respondent in his cross-petition but both parties in their various pleadings concentrated on the dissolution of the marriage and the custody of the only child. My hands are really tied to invoke any law in determination of settlement of property and maintenance outside the pleadings of the parties.

Reference is made particularly to paragraphs 22- 29 of the cross-petitioner witness statement on oath for dissolution of marriage (see pages 42-43 of the file) and the whole paragraphs dealing on 'Answer to the cross-petition' for dissolutionof marriage. These are the parties' pleadings and any evidence led outside of these in respect of settlement of properties and maintenance are hereby expunged. Presently, the issues on settlement of properties and maintenance are not issues before the Court for determination. Court is bound by the issues before it in the pleadings. – **Dada v. Jonathan Dosume (2006) LPELR 909 (SC);**

> ***"It is settled law that parties and the Court are bound by the pleadings of the parties".***Per Onnoghen, JSC.

No matter the brilliance and fluency adorning the partiesfinal written address on the issues of settlement of properties and

maintenance, they are considered a total academic exercise. Thus, meaning that those issues do not require any answer or adjudication by any Court of law because they are unpleaded. – See**Eric Uchegbu&anor v. Pastor Peter Mgbeahuroike&Ors (2017) LPELR 41683 (CA).**

Having clearly to my mind examined the issues raised in this civil suit. I conclude by considering the reliefs sought by the cross-petitioner.

In respect of relief (a), the cross-petitioner seeks a dismissal of the petition.

I am well informed by the case of **EffanaBasseyEffiom v. BasseyEffiomEdet (2016) LPELR 42047 (CA)**perOyewole, JCA stating thus;

> ***"… while the Answer is in essence a rebuttal of the facts contained in the petition and narration of a contrary story as in a statement of defence in a civil action, commenced via a writ of summons without seekingany prayer within the context of a matrimonial cause, a cross-petition goes further to seek a dismissal of the petition while seeking a relief in the context of a matrimonial cause similar to counter-claim".***

It is further settled in the case of **Tabansi v. Tabansi (2008) LPELR 4365 (CA)**

> ***"It is pertinent to state here and that where a cross-petition is filed by a respondent, it isas good as a petition and a respondent cannot in law be prevented from giving evidence on his cross-petition"*** per Alagoa, JCA.

For the purposes of clarity therefore, Section 75 of the Matrimonial Cause Act (MCA) which provides

> ***"Save as provided by this section the Court shall not make an order under this part of this Act where the petition for the principal relief has been dismissed."***

In other words where a petition is dismissed or struck out, it goes with the principal reliefs of the petition.

On 14th February, 2019 in deed the Court had struck out the petition on judicial separation filed on 26th March, 2018, based on the notice of discountenance.

The learned counsel for the cross-respondent failed to relist the petition to accommodate the reliefs that went with the struck out petition. Since therefore, there was no relistment, the cross-respondent was comfortable with the striking out and the learned counsel settled in for hearing of the cross-petition, relying on the reliefs of the cross-petitioner. This Court is not expected to make an order on the reliefs that have gone with struck out petition. It all means that the reliefs of the main petition had gone with it. The Court can only consider the reliefs of the cross-petitionerwhich stand as counter-claim in civil matters and a petition in matrimonial cause matter which must be consider on its own structure and on its own merit as a petition.A petitionand cross petition can stand on their own.They are independent and separate actions, such that failure of one does not automatically translate to success of the other of vice versa.

On the basis of the law where the petitioner has non-existent reliefs. The issues the Court would consider would be premised on the evidence proffered where the cross-respondent has existing reliefs. In the instant case it is the reverse, the cross-petitioner has reliefs.The learned counsel for the cross-

respondent failed to explore the procedure of relistment at the stage where it was retrievable. The learned counsel for the cross-respondent again, cannot invite the Court to use its discretion to rectify the blunder he committed, when in actual sense he has sought for no such relief.

It is not in doubt that Court is conferred with the power to apply the law in accordance with the rules of law. The law is firm and settled and discretion of the Court can only be applied in accordance with the rules of law.

However, Section 70Marriage Cause Act permits an independent/separate action for order of maintenance.

On relief b(i), Court orders a decree of dissolution of the marriage contracted between the cross-petitioner and cross-respondent on 5th September, 2008, on the ground that the marriage has broken down irretrievably.

On relief b(ii), in accordance with the law, the Court makes the following orders regarding the custody of the lone child, Ugomsinachi Chime;

a) The full custody of the lone child of the marriageUgomsinachi Chime is granted to the cross-petitioner Sullivan I. Chime who has been residing with him since he was four (4) years.
b) The mother the cross-respondent,Clara Chime shall pay no maintenance towards him.
c) Court orders,the cross-respondent, Clara Chime has right of access to the child Ugomsinachi Chime at no other place other than the residence of the cross-petitioner,Sullivan I. Chime where the child resides on any of these days;Friday, Saturday and Sunday of the last weekend ofevery month of the year. The cross-respondent has to make a choice and inform the cross-petitioner of

any of the days - Friday, Saturday and Sunday of the last weekend of every month. The day of visitation must be agreed upon by both parties.

d) Peradventure, the child, Ugomsinachi Chime resides in a boarding school, Court orders that the cross-respondent/mother has a right of visitation to the child in the school on only one visiting day per a term in each school year.
e) Court orders, that the cross-respondent and mother of Ugomsinachi Chime has a right to take the lone child of the marriage Ugomsinachi Chime to stay with her for a period not exceeding two weeks during the school long vacation period of the school which normally falls in the month of August of every year until he is of age of 18 years.

No cost awarded.

HON. JUSTICE A. O. OTALUKA
6/2/2020.