IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT MAITAMA ABUJA

ON THE 14TH MAY, 2019

BEFORE HIS LORDSHIP; HON JUSTICE MARYANN E ANENIH

(PRESIDING JUDGE)

SUIT NO: PET/138/18

BETWEEN

DR CHIOMA NWANWANNE IHEANACHO……PETITIONER

AND

MR. IHEANACHO ANTHONY KELECHI……RESPONDENT

JUDGEMENT

Before the court is petition for dissolution of marriage filed on 2nd March 2018 by the Petitioner, Dr. Chioma Nwanwanne Iheanacho against the respondent Mr. Iheanacho Anthony Kelechi.

The petitioner seeks for decree of dissolution and permanent judicial separation of marriage which was solemnized on the 8th August, 2008 at the AMAC Registry, Abuja on the grounds that the Respondent has deserted the petitioner for a continuous period of at least one (1) year and irretrievable break down of the marriage in that the parties to the marriage have lived apart for a continuous period of at least two years.

The facts relied upon by the Petitioner as constituting the grounds in seeking for a decree of dissolution of marriage is that the Respondent has deserted the petitioner for a continuous period of at least one (1) year immediately preceding the presentation of the petition. And that since the marriage, the Respondent has behaved in such a way that the

Respondent (sic) could not reasonably be expected to live with the petitioner. And irretrievable break down of the marriage in that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of this petition and the respondent does not object to a decree of dissolution of their marriage being granted.

The petitioner prays the Court for the following reliefs;

a. A decree of dissolution of the marriage and permanent Judicial separation of the marriage held on 8th day of August, 2008 at the AMAC Marriage Registry, Abuja on the grounds:

i. That the respondent has deserted the Petitioner for a continuous period of at least one (1) year immediately preceding the presentation of the petition.

ii. That since the Marriage, the Respondent has behaved in such a way that the Respondent could not reasonably be expected to live with the petitioner.

iii. Irretrievable break down of the marriage in that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of this petition and the Respondent does not object to a decree of dissolution of their marriage being granted.

b. Continuous custody of the children of the marriage to the petitioner.

The respondent did not file any answer to the petition nor was he represented by counsel in court.

On the 3rd July 2018, the petitioner in proof of her case testified as (PW1), she tendered the following Exhibits;

Exhibit A: Marriage Certificate No. 1596 dated 8th August 2008

Exhibits B1 & B2: Two Birth Certificates No A08 568771 dated 10th May 2010 and No. AO12 25158 dated 4th December 2012 respectively.

Exhibit C; DHL courier service receipt 6839300296

The petitioner filed her written address on the 26th March 2019 and same was adopted on the 25th February 2020.

The petitioner in her final written address formulated one issue for determination which is:

Whether the petitioner has proved her petition to be entitled to Judgment.

On the sole issue raised, counsel to the petitioner submitted that the petitioner has proved her petition to be entitled to judgment. And the respondent did not file any answer in defence of the petition nor field any witnesses to testify on his behalf. And he did not cross examine the PW1 nor appear in court at any time during the petition despite the service of hearing Notices on him. Counsel canvassed that the resultant effect is that the respondent is deemed in law to have conceded the petition and admitted the facts stated in the petition as well as those deposed to in the written statement on oath of the petitioner.

Counsel further submitted that where the evidence of a party such as the petitioner is not challenged and there is no other set of evidence or set of facts in contradiction of the same, there would be no need to weigh the evidence of the petitioner on proverbial scale of justice. He referred the court to HYACINTH NWACHUKWU NZERIBE V. DAVE ENGINEERING CO.LTD (1994) 9 SCNJ, PAGE 161 @ 171-173.

He concluded that the petitioner has proved her case to be entitled to judgment in her favor.

I have considered the petitioner's case, the Exhibits, all the accompanying processes, and oral address. And I am of the view that the issues for determination are:

1. *Whether the petitioner has successfully established that the marriage being the subject matter of this petition has broken down irretrievably.*
2. *Whether the petitioner is entitled to the reliefs sought.*

It is trite law that dissolution of marriage contracted pursuant to our Marriage Law is guided by Matrimonial Causes Act, 1970. Under the said law, a petition by a party to a marriage for a decree of dissolution of the marriage may be presented to the Court by either party to the marriage upon the ground that the marriage has broken down irretrievably and 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. See:

IBRAHIM V. IBRAHIM (2007) 1 NWLR (Pt.1015) pg.383 or (2006) LPELR-7670 (CA)(P. 16, PARAS. B-D) where his Lordship Justice Ariwoola J.C.A postulated that;

> *"Dissolution of marriage contracted pursuant to our marriage Law is guided by Matrimonial Causes Act, Cap. 220. Under the said law, a petition by a party to a marriage for a decree of dissolution of the marriage may be presented to the Court by either party to the marriage upon the ground that the marriage has broken down irretrievably. See Section 15(1) of Matrimonial Causes Act." Per ARIWOOLA, J.C.A*

See also

BIBILARI V. BIBILARI (2011) LPELR-4443(CA) (PP. 17-19, PARAS. F-A)

And

Section 15 (1) and (2) of MATRIMONIAL CAUSES ACT 1970 which is hereunder reproduced;

> **15.** (1) A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition for a decree of dissolution of a 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-
>
> (a) that the respondent has willfully and persistently refused to consummate the marriage;
>
> (b) that since the marriage the Respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (c) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;
>
> (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;

(f) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;

(g) that the other party to the marriage has, for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under this Act;

(h) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

At the hearing of this case, on the 3rd July 2018 the Petitioner testified as (PW1) and tendered the Marriage Certificate which was marked as Exhibit A and also tendered two birth certificates marked as Exhibit B1 and B2 respectively. The Respondent was not represented by counsel and there was no opposition to the dissolution of the marriage. The Respondent neither appeared in person nor testified before this court.

The above issues formulated for determination by the court deals with whether the Petitioner is entitled to the relief of dissolution of marriage and custody of the children from the marriage.

By provisions of Section 15 (1) of the Matrimonial Cause Act, the sole ground for either party to a marriage to seek dissolution of their marriage is that the marriage has broken down irretrievably. And the court hearing a petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievably if, and only if, the petitioner satisfies the court of one or more of eight factual situations listed in paragraphs a - h of section 15 (2) Matrimonial Causes Act listed above. See

IBRAHIM V. IBRAHIM (Supra)

And

ANN OKWUCHUKWU MENAKAYA V. DR. TIMOTHY N. MENAKAYA (2001) 16 NWLR (PT.738) 203

The factual situation relied upon in the present Petition is the one provided in Section 15 (2) (c) (d) and (e) of the Matrimonial Causes Act which is to the effect that the respondent deserted the petitioner for a continuous period of at least one (1) year, that since the marriage the respondent has behaved in such a way that the petitioner could not reasonably be expected to live with the respondent, that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of this petition and that the respondent did not object to the decree of dissolution being granted. As a matter of fact the evidence of the petitioner encapsulates facts bordering on Section 15 (2) (d) and (e).

The provisions of the Matrimonial Causes Act on living apart have been described as the most radical departure from the old law. It is a non-fault provision which does not concern itself with whether either party to the marriage is at fault or not. The provision is mandatory and confers no discretion on the Court to exercise once it is shown that the parties to a marriage have lived apart for the statutory period. See

BAKARE V BAKARE (2016) LPELR-41344 (CA) PG 15 A-E

And

DR JOSHUA OMOTUNDE V. MRS YETUNDE OMOTUNDE [2001] 9 NWLR (PT. 718) 252 at 284

The petitioner's evidence on oath which remains unchallenged and un-contradicted reveals inter alia that the respondent and petitioner got married 8th August 2008 and on the 9th January 2016 the respondent absconded and deserted the petitioner and two children of the marriage. That the respondent is always quarrelsome and does not provide food

and other necessities of life for the children and petitioner. Also, that the respondent told the petitioner that he was a graduate but later she found out that he was not a graduate just some few weeks prior to their marriage. That the respondent has not been taking care of the petitioner and children of the marriage. They have been evicted from their residence on a couple of occasions because of the respondents inability to pay rent, and that the petitioner bore the cost of ante-natal care and all medical bills for the birth of the two children, and she has been the one paying for the children's school fees, medical bills, clothing and their general upkeep as a result of which the petitioner suffered a lot of emotional trauma and had to be hospitalized on a number of occasions.

It is imperative to note that where the parties to a marriage have lived apart from each other (whether rightly or wrongly) for a continuous period of, at least, two (2) years immediately preceding the presentation of the Petition and the Respondent does not object to the dissolution of the marriage, the court cannot but find and hold that the marriage between the Petitioner and the Respondent has broken down irretrievably.

The standard of proof in matrimonial matters is as embodied in section 82(1) of the MATRIMONIAL CAUSES ACT which provides thus:

SECTION 82 - Standard of proof.

> 1 *For the purposes 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.*

See also, on standard of proof in Matrimonial Causes the case of;

DR. JOSHUA OMOTUNDE V. MRS. YETUNDE OMOTUNDE (2000) LPELR-10194 (CA) (Pp. 62-63, PARAS. D-E) Where His Lordship Justice Adekeye JCA (as he then was) resonated as follows:

> *"Section 15(2) (1) of the Matrimonial Cause Act states that the court hearing a petition for a decree of dissolution of a 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:- (f) That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. The standard of proof in matrimonial matters is as embodied in section 82(1) of the Act which reads that:- For the purposes of this Act: a matter shall be taken to be proved if it is established to the reasonable satisfaction of the court'. In my view, what is reasonable satisfaction of court is difficult to define. There is no kind of blanket description for same either - but it must depend on the exercise of judicial powers and discretion of an individual Judge. It however entails adducing all available evidence in support of an assertion before the court. By section 15(2)(1) of the Act: a court hearing a petition for the dissolution of a marriage shall hold the marriage to have broken down irretrievably if the parties to the marriage lived apart for a continuous period of three years immediately preceding the presentation of the petition. The law is that the provision is mandatory and the court has no discretion to exercise. The section has the factor of absence of fault element characteristic of other matrimonial offences-the law behind the section that is 15(2)(1)as far as the living apart is concerned is not interested in right or wrong or guilt or innocence of the parties. Once the parties have lived apart, the court is bound to grant a Decree"*

The Petitioner gave evidence during examination in chief that the Respondent and herself have lived apart from each other for a continuous period of at least two years immediately preceding the presentation of this petition. The respondent did not attend court or

challenge the evidence of the petitioner. The evidence of the petitioner remains unchallenged and the law is trite that where evidence by a party to any proceedings was not challenged or controverted by the opposite party who had the opportunity to do so, it is always open to the court seized of the case, to act on such unchallenged or uncontroverted evidence before it. See

Unity Life & Fire Insurance Co. Ltd. v. I.B.W.A. Ltd. (2001) NWLR (Pt.713) 610 where his Lordship Justice Iguh J.S.C. postulated that

> *"Where evidence given by a party to any proceeding was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it"*

See also

OBINECHE & ORS v. AKUSOBI & ORS(20 I0) 12 NWLR (Pt. 1208) 383 S.C. or (2010) LPELR-2178(SC) (P.37, Paras.E-F).

And

KWANDE & ANOR v. MOHAMMED & ORS(2014) LPELR-22575(CA) (P.40,paras.D-F)

The Petitioner by her evidence has satisfied the court that cohabition between parties ceased since 2016. In line with the holding of the court in the case of OMOTUNDE V. OMOTUNDE (Supra) this court has little or no option in the circumstance other than to resolve the first issue for determination in favour of the Petitioner.

It is in line with the fact that the court is satisfied with the evidence adduced by the petitioner that issue one is hereby resolved in favour of the petitioner.

The second issue is whether the petitioner is entitled to the reliefs sought. The first relief sought for dissolution has been taken care of by resolution of issue one.

The second relief sought by the petitioner is for an Order of the Court for continuous custody of the children.

The petitioner gave evidence that she has two children (a daughter and a son), that they school in the East with her parents, that they were in Richmond Primary School Lokogoma before they went to the East and now school in Mayfair Academy in Umuahia and that she has been the one paying their fees and general welfare bills.

She has stated that she is a successful medical practitioner and that the respondent has no means of livelihood and cannot take good care of the children, their education and medical bills as well as their general welfare. She has asserted she would be responsible for their up keep.

There's no contrary evidence to that of petitioner presented to the court. I have not been given any reason to doubt the evidence of the petitioner nor her entitlement to the custody of the children.

The Court is empowered to grant custody of a child to a parent as provided for in **SECTION 69 OF THE CHILD RIGHTS ACT.** It is hereunder reproduced for clarity.

Section 69 (1) The Court may-

> (a) on the application of the father or mother of a child, make such order as it may deem fit with respect to the custody of the child and the right of access to the child of either parent, having regard to- (i) the welfare of the child and the conduct of the parent; and (ii) the wishes of the mother and father of the child;

(b) alter, vary or discharge an order made under paragraph (a) of this subsection on the application of - (i) the father or mother of the child; or (ii) the guardian of the child, after the death of the father or mother of the child; and

(c) in every case, make such order with respect to costs as it may think just.

See also on custody the case of **ADEREMI A. AJIDAHUN V. DAPHINE O. AJIDAHUN [2000] 4 NWLR (PT. 654) 605 at 612 OR (2000) LPELR-6774 (CA) P.18 PARAS E-F** where his Lordship Justice Galadimawa JCA resonated that:

> *"The court has no doubt, a delicate and difficult task in determining to whom the custody of a child should be granted. To make this task lighter the parties are required to furnish the court with the necessary materials and evidence".*

The petitioner having furnished sufficient evidence in the circumstance, this court has therefore considered the relief for custody and hereby resolved same in favour of the petitioner bearing in mind that the children are still minors and require necessary care and attention and that the petitioner is gainfully employed and appears to have been caring for the children hitherto.

Issue two is therefore also resolved in favour of the petitioner.

Suffice to say that, I am of the view that relevant facts and ground for consideration for dissolution of marriage has been made out, for the court to believe that the marriage has broken down irretrievably. The evidence adduced in proof of this Petition establishes the facts specified in section 15(2) (d) and (e) of the Matrimonial Causes Act for the dissolution of marriage.

Consequently and in view of the fact that the respondent did not object to the dissolution of the marriage nor the order sought for custody, it is hereby ordered as follows:

1. That the marriage had and solemnized on the 8th August, 2008 at the AMAC Marriage Registry, Abuja between the petitioner DR. CHIOMA NWANWANNE IHEANACHO and the respondent MR. IHEANACHO ANTHONY KELECHI shall be and is hereby dissolved on the grounds that same has broken down irretrievably by reason of the fact that the petitioner and respondent have lived apart for a continuous period of at least two (2) years immediately preceding the presentation of this petition and that the respondent does not object to the decree of dissolution of their marriage being granted.

2. Order is also hereby made granting custody of the two children of the marriage Kamsiriochi Blossom Iheanacho (Female) and Omasirichi Jesse Iheanacho (Male) to the Petitioner.

Decree Nisi will issue forthwith and shall be made absolute after three months from the date hereof if there be no cause to the contrary.

Signed

Honourable Judge

Representation:

Nnamdi Nwachukwu Esq for Petitioner

Respondent Unrepresented.