IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 6TH DAY OF MAY, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 10
SUIT NO: PET/185/2017

BETWEEN:

MR. ORIMISAN AKINNAGBE ---- PETITIONER

AND

NGOZI BEATRICE AKINNAGBE ---- RESPONDENT

JUDGMENT

The Petitioner Mr. Orimisan Akinnagbe filed this Petition for the dissolution of his marriage to his wife Ngozi Beatrice Akinnagbe. The said Petition is dated 20/1/2017. The Petitioner seeks for the following reliefs:

"a.) A decree of dissolution of the marriage on the ground that the marriage has broken down irretrievably. Petitioner and Respondent no longer cohabit.

(b) An order granting custody of Daniel Olawale Chinecherem Akinnagbe the only child of the marriage to the Petitioner."

At the trial, the Petitioner gave evidence. He testified that after the marriage, the Respondent started exhibiting some strange behaviours. She locks him out of the matrimonial home and when she eventually lets him in she fights him until dawn. This made him to start sleeping in the office. She came and begged him and he returned.

Few months later the Petitioners only younger brother passed the night in the matrimonial home and the Respondent fought him in the day time, and starved him until he left out of frustration. The Petitioner stated that the Respondent fights him and sometimes tore his clothes. By 2012, the Petitioner was diagnosed with High Blood Pressure, and despite all these, the Respondent kept fighting with him. By November, 2015 the Petitioner was diagnosed with Diabetes and was admitted in the hospital but the

Respondent never came to see him. The Respondent threatened the Petitioner that it is either she kills him or he kills her. She even went as far as attempting to strangle the Petitioner, but he escaped. The Petitioner stated that he eventually took a loan and sought for alternative accommodation and packed out of the matrimonial home on the 7/2/2016 under the supervision of the Respondent.

He testified that he pays all the school fees of his son, and pays money into the son's account for maintenance. He also opened medical Insurance Card for the Respondent which she can use to access treatment in any hospital free of charge. He tendered the following documents:

- Certificate of marriage marked as Exhibit A.
- Receipt from Top Hill Primary School (18 Nos.) collectively marked as Exhibit A1.
- Receipt of payment of school fees from Stella Maris collectively marked as Exhibit A2.

- Receipt (certificate of confirmation) marked as Exhibit A3.
- Power of Attorney dated 20/5/07 marked as Exhibit A4.
- Bank Statement conditionally marked as Exhibit A5.

He then prayed the Court to dissolve the marriage.

Under cross examination, the Petitioner denied being the one threatening the Respondent. He stated that he did not have any medical report showing that he was diagnosed with High Blood Pressure and Diabetes, neither did he have any evidence of torn clothes. He admitted that he left the matrimonial but that he has been going there to see his son and to provide for their needs. That at the moment he does not know where the Respondent is staying.

The Respondent was served with the Notice of Petition on the 7/4/17 and in response filed an Answer to the Petition and prayed for the following reliefs therein:

"1. An order dismissing in totality the prayers of the Petitioner.

2. An order granting full custody of the only child of the marriage to the Respondent.
3. An order of Court for the sale of the three bedroom property in Madalla, a joint effort of the parties and sharing the proceeds equally.
4. An order of Court for a monthly allowance of N500,000.00 (Five Hundred Thousand Naira) to the Respondent and her son."

The Respondent in her testimony said the marriage has not broken down irretrievably as it has been peaceful with no quarrels. That it was when the Petitioner got a better paid job which attracted various women, that the problem began. That the Petitioner refused to listen to wise counsel. That he had an affair with one Vivian Ogbonna and other women. He leaves for work 8am and returns at 1.am and, when she complains he says she is nagging. This led to his moving out of the house with one Halimat Lawal Husseini. The Respondent testified that the Petitioner got married to the said Halimat in 2007 during the subsistence of this

marriage, and that she had evidence to show. Concerning the property, she said she is a member in a Cooperative and she collected several loans and gave to the Petitioner which he refused to pay back. That it was with those monies that the land was acquired and built in Madalla. The Respondent said she had evidence to show as she signed as witness. She denied chasing the Petitioners brother out of the house. She admitted that the Petitioner paid the school fees for the child. She also told the Court that the Petitioner works with ECOWAS.

The following documents were tendered by the Respondent:

- CTC of the civil summons and record of proceedings marked as Exhibit D
- Handwritten undertaking as to costs marked as Exhibit D1
- Land Agreement marked as Exhibit D2
- Notice to quit dated 27/6/16 marked as Exhibit D3.

- Two photographs and certificate of compliance marked as Exhibit D4.

Under cross examination, she admitted being aware that the Petitioner had health issues. She denied being aware that the Petitioner was on admission in 2015. She stated that she earns N80,000.00 (Eighty Thousand Naira) monthly and the N500,000.00 (Five Hundred Thousand Naira) she is asking for is for her maintenance as a wife. She confirmed that the Petitioner pays school fees and upkeep once in a while. That there is an account where he pays upkeep into. She affirmed that she has pictures to show that her husband married another woman.

At the close of evidence **Julius Mba Esq** filed the Respondent's written address on the 21/5/2019 and raised two issues for determination as follows:

"1. Whether having regards to the pleadings and the evidence led in this matter, the Petitioner proved that the Respondent has behaved in such a way that the

Petitioner cannot reasonably be expected to live with her.

2. *Whether the Petitioner and the Respondent have continuously lived apart to warrant the dissolution of the marriage by the Court as prayed by the Petitioner."*

Oluwagbenga Adeosun Esq filed the Petitioner's final written address dated 18/7/2019. Counsel raised three issue for determination as follows:

"1. Whether the Petitioner has discharged the onus of proof imposed on him to warrant the dissolution of the marriage between the Petitioner and the Respondent.

2. Whether it is in the interest of the child of the marriage (Daniel Olawale Chinecherem Akinnagbe) to grant custody to the Petitioner.

3. Whether the Respondent can seek for any relief before this Court without filing a cross Petition."

Under and by virtue of Section 15(2) of the Matrimonial Causes Act, the Court is empowered to grant an order of dissolution of any marriage where it is satisfied that the marriage has broken down irretrievably. Before the Court can come to this conclusion however, it must be satisfied that the alleged ground for dissolution of marriage falls within Section 15(2)(a – h) of the Matrimonial Causes Act.

The Petitioner has alleged that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. By Section 15(2)(c) of the Act,

> *"The Court hearing a 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 –*
>
> *(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;"

Unreasonable behaviour has more to it than meets the eye. It is not enough to adduce evidence that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. There is a duty on the Court to consider the matrimonial history to come to a conclusion, while analyzing the conduct that is complained of, whether same is grave and weighty enough to warrant the Court holding that the conduct is unreasonable to hold that the marriage has broken down irretrievably. See **Livingstone – Stallard vs. Livingstone – Stallard (1974) 2 All E R page 766 at 771**

In the case of **Katz vs. Katz (1972) 1 WLR 955 at 960,** the Court gave a guide as to what will constitute 'behaviour' within the meaning of Section 15(2)(c) of the Act as follows:

"....Behaviour...is an action or conduct by the one which affects the other. Such conduct may either take

the form of acts or omissions or may be a course of conduct and, in my view, it must have some reference to the marriage."

Two sets of facts call for proof under Section 15(2)(c) of the Matrimonial Causes Act and they are;

(a) The sickening and detestable or condemnable conduct of the Respondent; and

(b) The fact that the Petitioner finds it intolerable to continue to live with the Respondent.

These two facts are severable and independent and both must be proved. The Petitioner must prove the detestable and condemnable conduct and then proceed to prove that he finds it intolerable to live with the Respondent. Unless the Petitioner satisfies the Court on both of these matters, the Court will refuse to hold that the marriage has broken down irretrievably.

In the instant case, the burden of proof is on the Petitioner who alleged that the Respondent behaved in such

a way that he could not reasonably be expected to live with her to prove his allegation. See Damulak vs. Damulak (2004) 8 NWLR (part 874) 151.

The test as to whether a Petitioner for the dissolution of a marriage can or cannot be expected to live with the Respondent is objective. Consequently, it is not sufficient for a Petitioner to merely allege that he or she cannot live with the Respondent because of the Respondent's behaviour. The behaviour alleged must be such that a reasonable man cannot endure.

In the instant case, the Petitioner alleged that the Respondent's behaviour put him under stress that he was diagnosed with High Blood Pressure. He however failed to tender any medical report to that effect. When he said the Respondent threatened to kill him, he did not bring any witness to corroborate this fact. The conduct of a Respondent that a Petitioner will not be reasonably expected to put up with must be grave and weighty in nature as to

make further cohabitation virtually impossible. But before the Court can come to that conclusion, the entire matrimonial history of the marriage has to be considered. In other words, the Court must consider the totality of the matrimonial history of the parties. See **Ibeawuchi vs. Ibeawuchi (1973) 3 ECSLR page 56.**

In this instance, the Petitioner in my view failed to prove the alleged intolerable behaviour of the Respondent which he wanted the Court to believe he could not continue to live with. None of the allegations raised against the Respondent was grave and weighty enough to amount to intolerable behaviour envisaged by Section 15(2)(c) of the Matrimonial Causes Act. In other words, the requirements of Section 15(2)(c), Matrimonial Causes Act which the Petitioner relied upon were not met.

It is noted that the Respondent in her Answer alleged that the Petitioner got married to one Halimat Lawal Husseini and had evidence to show. What is on record are

copies of photographs tendered by the Respondent. I do not believe the above evidence of the Respondent as the only way to prove the existence of a marriage under the Act is by production of the Certificate of Marriage, and that has not been done.

However, though the ground of this petition under Section 15(2)(c) has failed, there are situations where the Court can grant dissolution at the discretion of the Court. And as rightly noted by learned counsel to the Respondent, it will be dangerous to the society to force the willing wife on an unwilling husband. Though the Respondent testified that she still loved her husband and the marriage has not broken down, the Petitioner on the other hand said he cannot live with the Respondent under the same roof as husband and wife. In the case of **Nwanya vs. Nwanya (1966 – 1979) Vol. 5 Oputa LR page 74 at 520, Oputa J,** (as he then was) held;

"It takes two to marry and to discharge the marital obligations. It is apparent that as far as the Petitioner is concerned this marriage is at an end. It will be useless pretending otherwise…To refuse a decree in such circumstance will work under hardship not only to the Petitioner but also on the Respondent to whom no blame attaches."

And in the case of **Fidelis Eleje vs. Emmanuel Eleje 7 E.N.L.R, 126 Sir Louis Mbanefo C.J.** held that in circumstances such as the above a marriage may be dissolved at the discretion of the Court.

On that ground therefore I am inclined to grant the Petition and dissolve this marriage. **I hereby order a Decree Nisi to issue**.

The Petitioner has prayed for custody of the only child of the marriage. In **Buwanhot vs. Buwanhot (2009) 16 NWLR (part 1)** the Court held that the welfare of the children of the marriage in terms of their peace of mind, happiness,

education and coexistence is the prime consideration in granting custody. The conduct of the parents to the child is a factor sometimes to be taken into consideration by the Court when exercising its discretion. However, that discretion must not be exercised as a punishment for one party or a reward for the other party. See **Afonja vs. Afonja (1971) 1 UILR Page 105, Williams vs. Williams (supra).**

The child in question is 13 years now and has been with the Respondent since 2016. The child is currently in school. The Respondent has also prayed the Court to grant her custody stating that the bond between her and the child is so strong. In this circumstance I will adopt the reasoning of my Lord **Oputa, J** (as he then was) in **Tagbo vs. Tagbo (1966 – 1979) Vol. 5, Oputa LR page 138,** when he stated thus;

> *"will it not be callous and unkind to uproot this child from her familiar surroundings and from the love of a mother whom she knows, and then cast her adrift unto a father who no doubt loves her equally, but*

unfortunately, she does not know, but will only gradually come to know and love".

To uproot this child from the care of the mother will certainly not be in his interest at this stage. In this instance, there is a strong bond between the child and his mother, the Respondent and it will not serve his interest if that bond is broken. And as noted earlier an order of custody is not a penal order on either parent and should not be construed as such. Custody is never awarded as a reward for good conduct nor is it ever denied as a punishment for the guilty party's matrimonial offences. See Eziashi vs. Eziashi Suit No. B/255/80 (unreported) 12 November, 1982, High Court, Benin, Okafor vs. Okafor (1966 – 1979) Vol. 5 (Oputa LR) page 102 at 105.

It is noted also that there seems to be some form of harmony between the parties towards the well being of the child. **I make an order granting custody to the Respondent.**

The Petitioner shall have unfettered access to the child. The child is also encouraged to spend part of his holidays with the Petitioner his father. The Petitioner shall also continue to provide for the school fees and maintenance of the child of the marriage as he has been doing.

The Respondent has claimed some reliefs before the Court. On the issue of the property in Madalla the Respondent has testified that she collected loan from Cooperative which was used to purchase the land. She also said she signed as a witness on the land agreement. She did not present anything before the Court to show that indeed some monies were collected from any Cooperative and remitted to the Petitioner. Signing as a witness does not make the Respondent joint owner of the property. It is noted that one Mohammed A.B. also signed as a witness to the Petitioner. Will that entitle him to joint ownership of the property too? The land documents are in the name of the Petitioner, and the Petitioner has testified that he single

handedly bought the property. I believe him and this relief is accordingly refused.

As for the N500,000.00 (Five Hundred Thousand Naira) maintenance, the Respondent testified that this is for her maintenance as a wife. Section 70(1) of the Matrimonial Causes Act provides that the Court may make an order for maintenance of a party to the marriage or of the children of the marriage as it thinks proper having regard to the means, earning capacity and conduct of all parties to the marriage. Similarly in Nanna vs. Nanna (2006) 3 NWLR (part 966) page 1, the Court held that:

> *"Before a Court makes an order of maintenance, it must take some factors into consideration. These include (a) the parties income, (b) earning capacity and by implication properties owned by each party, (c) financial resources, (d) financial needs and responsibilities (e) standard of life of the parties before the dissolution of the marriage, their*

respective ages and the length of time they were husband and wife. Regard is had also to **Negbenebor vs. Negbenebor (1971) All NLR 210 SC.**

Be that as it may, at common law a man has a duty to maintain his wife and his children. Thus the husband is obliged to maintain his wife and his children and may by law be compelled to do so. See **Erhahon vs. Erhahon (1997) 6 NWLR (part 510) page 667.** By virtue of the Matrimonial Causes Act, maintenance is now a matter within the discretion of the Court to grant or to withhold. See **Olu-ibukun vs. Olu-ibukun (1974) SCNJ of 8th February, 1974.**

I have in this case no evidence of the means of the Petitioner and his earning capacity. The Respondent however is gainfully employed as an Accountant. In the case of **Okagbue vs. Okagbue (1966 – 1979) Vol. 5 (Oputa LR) page 111 at 116, Chukwudifu Oputa, J** (as he then was) held that *"an order for maintenance cannot be made in vacuo."*

This relief is therefore refused.

Hon. Justice M.A. Nasir

Appearances:

Oluwagbenga Adeosun Esq – for the Petitioner

Julius Mbah Esq – for the Respondent