

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT 28 GUDU - ABUJA
ON THURSDAY THE 24TH DAY OF JUNE, 2021.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO -ADEBIYI

SUIT NO. PET/089/2019

BETWEEN

ESTHER ONYINYECHI EGBE -----PETITIONER

AND

M. W. O. DANIEL EGBE-----RESPONDENT

JUDGMENT

The Petitioner on the 6th day of December filed this petition against the Respondent, praying the Court for the following reliefs:-

- a. An order of a decree of judicial separation;
- b. An order granting custody of the children of the marriage to the petitioner until they each attain the age of maturity at 21 years;
- c. An order granting the Respondent access to the children as such time or period to be determined by the Court; and
- d. An order for the Respondent to provide for the upkeep and education of the children at such terms to be decided by the Court.

Filed along with the petition, is a verifying affidavit and certificate of reconciliation. The Respondent was served with the Petition and hearing notices by substituted means on orders of the Court. The Court thereafter set down the case for hearing. The Petitioner opened her case and testified as the sole witness in proof of her case. The summary of the evidence of the Petitioner is as follows; The Petitioner and the

Respondent got married on the 27th day of August 2005 at the Living Faith Church, Abuja.

That after the marriage, she cohabited with the Respondent at Abuja and Lagos as the Respondent who is a Naval Rating was always on military postings such that Respondent is hardly physically present with the Petitioner and the three children of the marriage. The Petitioner further testified that although she is a qualified nurse, she had to resign and abandon her appointment at a hospital in Samaru, Kaduna State where she worked at the time within two years of their marriage in order to join the Respondent in Abuja and no sooner had she joined the Respondent in Abuja that she had to relocate with the Respondent to Lagos at the instructions of the Respondent not minding that she was heavily pregnant at the time and that she lost her first child after delivery.

The petitioner testified further that as a result of constant moving and relocation, she and the Respondent agreed to settle the family, in Abuja. The Petitioner testified that on 12th of August 2017, the Respondent who was at the time serving at Ubima, near Port-Harcourt, Rivers State, visited the Petitioner and the children and under the pretext of having the children spend some time with him at Ubima, he took the children away and refused the Petitioner access to them since then. The petitioner testified further that the Respondent has deserted her since August 2017 with no form of support while he kept the children of the marriage with one of his relatives somewhere in Lagos with stern warning that on no account should the Petitioner be allowed to know the whereabouts of the children or have any access to them.

The petitioner concluded that she got to know the children were in Lagos as she got a call from one of his relatives informing her but she does not know the physical location of where her three children who are two females and a male, i.e. the eldest who is female, 9 years, the second who is also female, 7 years and the youngest, male, 4 years as at when the Respondent took them away to Ubima, near port, Harcourt in 2017.

The Petitioner in proof of her case tendereda copy of their marriage certificate dated the 27th day of August 2005 issued by Living Faith Church Abuja, which was admitted in evidence and marked as Exhibit A.

Upon conclusion of the examination in chief of the Petitioner, the Court adjourned for cross-examination and for the Respondent to open his case. The Respondent was issued hearing notice in respect of the next adjourned date but failed to appear in court to cross examine the Petitioner and open his defence and the Court on application of the Petitioner's Counsel, foreclosed the Respondent and adjourned the case for adoption of written address.

From the address filed, the Petitioner's Counsel raised one issue for determination, which is, "whether the petitioner has made out a case to ground a decree of judicial separation and custody of the 3 children of the marriage". Counsel arguing the sole issue, submitted that the Petitioner has made out a case to entitle her to a grant of all the reliefs sought in this petition, as it is clearly uncontroverted evidence that the marriage has broken down irretrievably as the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of this petition. Counsel relied on Sections 15 and 39 of the Matrimonial Causes Act and the cases of

Esene v. State (2017) All FWLR (Pt. 910) 338 at paras. D - E and Godwin v. Duro-Emmanuel (2017) All FWLR (Pt. 901) 758 at 769, para. F.

Counsel submitted that the Petitioner also established by unchallenged and uncontroverted evidence that the Respondent has deserted her since 12th August, 2017, a period of over one year preceding the filing of the petition. Submitted that the law is very clear under Sections 15 and 39 of the Matrimonial Causes Act, as to the decree that a party to a marriage is entitled to where one of the parties to the marriage behaves in the way and manner the Respondent has behaved.

Counsel submitted further that by virtue of the undisputed fact that the Respondent has deserted the Petitioner for over a continuous period of one year, Counsel urged the court to make a decree of judicial separation of the parties and grant custody of the children of the marriage to the petitioner as it is in the interest of the children to do so. Counsel relied on the cases of ODUSOTE V. ODUSOTE (2013) All FWLR (pt. 668) [p.888 para B-H) and TABANSI V. TABANSI (2009) 12 NWLR (Pt. 1152) 415 at 432, F-GJ:

It is pertinent to state at this point that from the contents of the case file, the Respondent was served with the Petition and hearing notices with respect to the dates scheduled for hearing. The Respondent was initially not present nor represented by Counsel in this case. Subsequently, Respondent filed a motion for extension of time to file his memorandum of appearance, his answer to the Petition and his cross petition which the Court granted. The Respondent indicated interest to settle which said interest was welcomed by the Petitioner and the Court referred parties to the multidoor courthouse to explore settlement. The Petitioner thereafter informed the Court that the

Respondent's consistent absence at the settlement meeting indicated his lack of seriousness and urged the Respondent to enter his defence. The Respondent's Counsel thereafter withdrew his appearance for the Respondent. The Respondent also failed to file a response to the Petition. The law is trite that where a party to an action has been given an opportunity to be heard but failed or neglected or refused to utilise that opportunity, he cannot later be heard to complain of lack of fair hearing. See the case of EZEIGWE V. NAWAWULU & ORS (2010) LPELR-1201 (SC).

Going into the substantive matter, having examined the evidence of the Petitioner and the final address of Petitioner's Counsel, the issue that is germane in this case is **"whether the Petitioner has made out a case to be entitled to the reliefs claimed in her Petition."**

In this Petition, the Petitioner is seeking for a decree of judicial separation. The grounds upon which an action for judicial separation can be instituted are provided under the Section 39 of the Matrimonial Causes Act and it provides thus

"Subject to this Part, a petition under this Act by a party to a marriage for a decree of judicial separation may be based on one or more of the facts and matters specified in sections 15 (2) and 16 (1) of this Act."

The petitioner does not need to prove that the marriage has broken down irretrievably as required for the grounds for dissolution of marriage rather the petitioner just needs to prove facts as provided under Section 15 (2) of the Act.

The facts as stated in Section 15 (2) of the Matrimonial Causes Act that can be basis for grounds for judicial separation are as follows:

- a. That the respondent has 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 a way that the petitioner cannot be reasonably 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.

In this petition, the Petitioner testified that the Respondent has deserted her since the 12th of August, 2017. That there has not been any form of cohabitation between the Petitioner and the Respondent since

2017. This piece of evidence was not challenged or controverted by the Respondent as he failed to file an answer to the Petition or cross examine the Petitioner. The law is trite and enjoins a Court to act on unchallenged evidence. The Court in the case of MATAZU V. MAZOJI (2014) LPELR-23071 (CA), Per ABIRU JCA in P. 70, paras. D-F held

“The law is that where evidence of a witness is credible and it is not challenged under cross examination or met by contrary evidence, it is tantamount to an admission and should be relied upon by the trial Court”.

In my view, the Petitioner has satisfied the one of the facts as stated in Section 15(2) which is paragraph (d) in that, the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of this petition and as the Petitioner has pleaded and led credible evidence to prove that the Respondent abandoned the matrimonial home in August 2017. Hence, the case of the Petitioner succeeds with respect to her first relief and I hereby grant a Decree of Judicial Separation in favour of the Petitioner with respect to the marriage contracted with the Respondent on 27th of August 2005 at the Living Faith Church, Durumi, Abuja. It is pertinent to state at this point for the benefit of the parties that the grant of this decree of judicial separation, the marriage between the parties has not been dissolved. This order for Judicial separation only touches on legal cessation of the rights of cohabitation by the parties to the marriage.

With respect to the reliefs of custody and maintenance of the three children sought by the Petitioner, from the provisions of Section 71(1) of

the Matrimonial Causes Act, Cap 220 Laws of the Federation of Nigeria, 1990 and Section 1 of the Child's Right Act 2003, the Court is bound to have regard to the interest and welfare of the children as the paramount consideration in the grant of this custody and maintenance of children.

The Respondent having not filed any process or led evidence in challenge of the reliefs sought by the Petitioner implies he is not averse to the Court granting the reliefs.

The children from the evidence adduced by the Petitioner are still minors and have always been with the Petitioner save for the period the Respondent took them away for a visit and never returned them till date. There is no evidence that the Petitioner has been an unfit parent towards the children.

From the evidence adduced, it is also apparent that the Respondent who is a Naval rating has always been on military postings even sometimes, on board ships or outside the shores of Nigeria often for a long period of time and has taken the children to stay with his uncle in Lagos, it will be difficult for him to devote time, care and attention for the three children, who are still minors. It is also not in the best interest of the children to continue staying with their uncle in Lagos when their mother, the Petitioner is willing to accommodate and take care of them. In my view, the children are of tender age and have remained in custody of their mother from birth up until 2017. The children who are still in their formative years will be better cared for by their mother, and happier due to the closeness and intimacy and affection they have shared with the Petitioner over the years. In the circumstances, I will grant custody of the children to the Petitioner until they attain the age of maturity at 18 when they would decide

whom they would reside with. The Petitioner in the third relief is urging this Court to grant the Respondent access to the children, that the Respondent is entitled to be granted access to the children.

Consequently, the Respondent shall be granted access to visit the children at the Petitioner's residence after due consultation with the Petitioner.

With respect to the relief relating to the education and upkeep of the children, by Section 70 (1) of the Matrimonial Causes Act Cap 220 Laws of the Federation of Nigeria, 1999, the Court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. In this case, there is nothing before me to show the means and earning capacity of the Respondent. Be that as it may the provision of Section 70 of the MCA is what should guide the Court in granting an order for maintenance and is not automatic. The education and welfare of a child are serious and sensitive matters that is guaranteed under the Child Rights Act of 2003 and should not be hampered with by technicalities. What is best for the child should take precedence over all other considerations in the Court. The Petitioner in this case testified that the Respondent was always on transfer and mostly out of town due to the nature of his job and as a result, the Petitioner has been saddled with the responsibility of taking care of the children, it is only fair that the Respondent shall pay to the Petitioner the sum of ₦150,000.00 every month for the upkeep and maintenance of the children. Consequently, I hereby order as follows;

1. I hereby grant a Decree of Judicial Separation between the Petitioner and the Respondent with respect to the marriage contracted with the Respondent on 27th of August 2005 at the Living Faith Church, Durumi, Abuja.
2. I hereby grant custody of the three children to the Petitioner until they each attain the age of maturity at 18years old, however, the Respondent shall be granted access to visit the children at the Petitioner's residence after due consultation with the Petitioner.
3. I hereby Order that both parties shall be responsible for the education of the children of the marriage on a 60/40 basis. Respondent to pay 60% of the school fees while Petitioner to shoulder 40% of the school fees of the children.
4. Respondent is hereby ordered to pay to the Petitioner the sum of N150,000.00 monthly for the maintenance and upkeep of the 3 children on a prorata basis of N50,000.00 per child per month.

Parties: Petitioner is present. Respondent is absent.

Appearances: Michael k. Bielonwu representing the Petitioner.
Respondent not represented.

HON. JUSTICE MODUPE .R. OSHO-ADEBIYI

JUDGE

24TH JUNE, 2021