

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O.C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPower EBAHOR

COURT NO: 11

SUIT NO: FCT/HC/PET/039/2017

BETWEEN:

MRS MERCY E.I. ABAH.....PETITIONER

AND

ABEL ABAH.....RESPONDENT

JUDGMENT

The Petitioner, Mrs Mercy E.I. Abah, filed the Notice of Petition along with the Petition on 6/12/17 seeking for the reliefs contained in Paragraph 9 of the Petition as follows:-

- (a) A Decree of Dissolution of the marriage between the Petitioner and the Respondent.
- (b) An Order granting the Petitioner custody of the child of the marriage.
- (c) An Order compelling the Respondent to be responsible for the welfare, education, upkeep and accommodation of the child of the marriage.
- (d) Cost of this Petition and any Omnibus relief.

The grounds upon which the Petition is premised are;

- (1) The Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
- (2) That the Respondent has deserted the Petitioner since 2013.
- (3) That the parties to the marriage has lived apart for continuous period of at least two years immediately preceding the presentation of the Petition.

The processes were served on the Respondent by substituted means vide an order made on 17/4/2018 to wit: by pasting at the last known address of the Respondent at Baba Right Estate, Flat 2, Room 3 Gbagalape, Aso C, Abuja. On the other hand, the Respondent did not file an Answer to the Petition was absent throughout hearing of the Petition and was not represented by counsel despite repeated service of Hearing Notices. The Petition thus proceeded as "Undefended".

The Petitioner testified as PW1 and adopted the deposition in her Witness Statement on oath filed on 30/11/20-18 as oral testimony in proof of the Petition in the course of the Examination -in-Chief of PW1 – the Petitioner the following documents were tendered any received in evidence;

- (1) The original Marriage Certificate issued No. 605 issued by Abuja Municipal Area Council (AMAC) Marriage Registry Abuja on 6/7/2012 evidencing marriage celebrated between the Petitioner and the Respondent admitted as Exhibit "A".

- (2) The copy of deposit Teller and the photocopy of Fortis Micro Finance Bank for payment of ₦220,000.00 (Two Hundred and Twenty Two Thousand Naira paid to Abel Abah admitted as Exhibit "B1-2".

At the close of Petitioner's evidence on 20/5/19 the case was adjourned for cross-examination and defence, but Respondent was absent in court and upon the application of counsel for the Petitioner, the Respondent was foreclosed from both cross-examination and defence by the court and called on the Petitioner through her counsel to file their final Written Address.

On 30/1/2020, E.J. Omale Esq of counsel adopted their Final Written Address dated 28/10./19, but filed on 29/10/19 as oral submission in support of the Petition.

In the said Final Address., Petitioner's counsel formulated a sole issue for determination is;

"Whether the Petitioner has proved the Petition entitling her to the dissolution of the marriage and custody of the only female child of the marriage".

Submits that the Petitioner has proved the facts relied on for the Petition refer to Section 82 (1) (2) of the Matrimonial Causes Act, Section 132 of the Evidence Act, the cases of Towoeni Vs Towoeni (2002) 1 SMC 173 and Ekerbe Vs Ekrebe (2005) 2 SMC 379. That the Respondent was not in court to contradict the facts proved by the Petition therefore urge the court

to deem those facts as admitted. Refer to the case of Exeribe Vs Ibeneme (2004) 19 NSCQR 32.

Submits on the issue of custody that the child of the marriage has been in the care of the Petitioner since Respondent deserted their home, that the child's interest would be better served if she is kept in the custody of the mother, refer to the case of Williams Vs Williams (2005) 2 SMC 326 @ 360.

Finally urge court to grant the claim of the Petitioner.

Having carefully considered the unchallenged evidence of PW1 – the Petitioner, the submission of counsel and the judicial authorities cited, the court finds that only 1 (one) issue calls for determination, which is;

“Whether the Petitioner has successful made out a case to warrant the grant of the relief sought”.

Firstly, Respondent did not file an Answer to the Petition and did not challenged the evidence of the Petitioner, the implication of this is that the court will deem the unchallenged and uncontroverted evidence of the Petitioner as true and correct and act on it. See the case of CBN Vs Igwilo (2007) 14 NWLR (PT. 1054) 393 @ 406. In the case of Afribank (Nig) Ltd Vs Moselad Enterprises Ltd (2007) ALL FWLR (PT. 421) 879 @ 894 Para E – F; Akaahs JCA (as he then was) had this to say;

“Where a Defendant does not produce evidence or testify, slight or minimum evidence, which can discharge the onus of proof would be required to ground the Plaintiff's claim.

I am, however, quick to add that, that minimum evidence must be credible enough for court to grant the claim of the Petitioner. See *Zenegal Ltd Vs Jagal Pharm Ltd* (2007) ALL FWLR (PT. 387) 950 Para F – G.

Now, in the determination of a Petition for dissolution of marriage, under Section 15 (1) of the Matrimonial Causes Act, it is competent for a marriage to the dissolution once a court is satisfied that the marriage has broken down irretrievably and to come to that conclusion, the Petitioner must prove to the reasonable satisfaction of court any of the facts as prescribed by Section 15 (2) of the Matrimonial Causes Act categorized in sub-section (a) – (h).

In the instant case, the Petitioner place reliance upon the grounds of Section 15 (2) (c) (d) (f) of the Matrimonial Causes Act, as gleaned from the pleadings and evidence adduced before this court the Section 15 (2) (c) reads;

“That since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent”.

To succeed under the above, the Petitioner must lead evidence to the reasonable satisfaction of the court of such particular acts or conduct of the Respondent which would warrant the grant of the relief sought. And such acts must be weighty and grave in nature to make further co-habitation virtually impossible. See the case of *Ibrahim Vs Ibrahim* (2007) ALL FWLR (PT. 346) 474 @ 489 Paras H – B. See also the English case of *Katz vs Katz* (1972) ALL ER 219.

In proof of this ground Petitioner testifying as PW1 – informed the court that;

“The Respondent is cruel to me by keeping me under bondage..... That Respondent is ill tempered, lack compassion and respect in his dealings with me and has physically abused me severally”.

PW1 further told the court that Respondent has not lived up to his responsibilities as a husband, he is deceitful and has been harassing, intimidating and threatening her life. That Respondent has made her to be indebted having deceived her into taking loans to boost his business which he has refused to promote, Respondent also cajoled her into selling her property on the pretext of building a house which never materialized.

From the evidence of the Petitioner, summed up above, and which remained unchallenged, the court finds that the behaviour or conduct of the Respondent as stated by the Petitioner are grave and weighty to make further co-habitation impossible and this court therefore holds that the marriage has broken down irretrievably.

On the grounds of Section 15 (2) (d) and (f) relied upon for divorce by the petitioner and which grounds bothers on desertion and living apart by the parties, the court in the case of Nnana Vs Nnana (2006) 3 NWLR (PT.966) 1 @ 32 said;

“It is not enough to show that the parties have lived apart for a continuous period of two years immediately preceding the presentation of the Petition, but that the living apart within Section 15 (2) (d) (e) (f) must be one where any of the parties have been

abandoned and forsaken without justification thus renouncing his or her responsibilities and evading its duties”.

In this case, it is the unchallenged evidence of the Petitioner that;

“The Respondent locked me out from our matrimonial home and we have lived apart since 25th February 2013”.

She also stated that;

“Respondent have deserted me since 2013 over five (5) years.

“That Respondent sold all my belongings including clothes I was selling and disappeared from the house to an unknown place”.

“That when I returned from home after delivery there was nothing in the house we were staying and no one could give me account of his whereabouts”.

PW1 finally told the court;

“That the Respondent deserted me, my child and I decided to go and stay with my Uncle at behind Top Brain Academy, Tunga Maje Abuja”.

The Matrimonial Causes Act merely requires living apart for a continuous period of three (3) years and desertion for at least one year preceding presentation of Petition to ground dissolution of marriage under Section 15 (2) (d) and (f) of the Act. In this case co-habitation between the parties ceased on 25/2/2013 and the Petition was filed on 6/12/2017, which is clearly more than the prescribed period of desertion and living apart. And this suffices for the ground for dissolution of marriage, this court therefore

holds that these grounds relied upon for dissolution of marriage avails the Petitioner.

On the claim for custody of child of the marriage, in evidence, PW1 stated that the Respondent deserted her and the child and since she decided to go and put up with her uncle. The grant or otherwise of custody of the child of the marriage is at the discretion of the court which it must exercise judicially and judiciously placing reliance on cogent facts and not according to its whims. It is trite that, it is the interest of the child that is of paramount consideration. See Section 71 (1) of the Matrimonial Causes Act. What a court may consider in the determination of the issue of custody of a child of the marriage in a matrimonial cases, the court held in the case of Damulak Vs Damulak (2004) 8 NWLR (PT.374) 151 @ 156.

“In all matters relating to custody and welfare of the children of the marriage the dormant issue that calls for consideration is absolute interest of that child or children”.

Based on the unchallenged evidence of the Petitioner – PW1, it is the firm view of the court that the welfare and interest of the child of the marriage would be better served if she remain in custody of the Petitioner, since Respondent is said to have deserted them. I so hold.

On the claim for an order compelling the Respondent to be responsible for the welfare, education, upkeep and accommodation of the child of the marriage.

By the Provision of Section 71 (1) of the Matrimonial Causes Ac, what the court may consider in making an award in that regard, is the interest of the

child. In the case of Damulak Vs Damulak (Supra) 171 Para D 0 E, the court held;

“By virtue of Section 70 (2) of the Matrimonial Causes Act, in making an order for maintenance the court must always have regard to the means earning capacity, the conduct of the parties to the marriage and other relevant circumstance:

The evidence of the Petitioner in support of this claim against the Respondent in my consideration opinion are vague and cannot in any way help the court to determine the earning capacity and means of the Respondent nevertheless, it is the duty of a Father to provide for his child in this regard the court must exercise the discretion granted it under Section 71 of the Matrimonial Causes Act in the manner that will serve the course of justice in the circumstance.

On the claim for cost of the Petitioner, the award of cost is always at the discretion of the court which it must exercise judiciously and judicially. See Egbuju Vs Mbagwu (2005) ALL FWLR (PT. 429) 569 @ 577 Ratio 14. Cost follows event however, in my opinion this is not an instance where cost will be imposed against a litigant.

From all of these and having proven to the reasonable satisfaction of court of facts relied upon for the dissolution of marriage this Petition succeeds and Judgment is accordingly entered in favour of the Petitioner as follows:

- (1) The marriage celebrated at Abuja Municipal Area Council, Abuja under the Marriage Act on 6/7/2012 between Mrs Mercy E.I. Abah – the Petitioner and Mr Abel Abah – the Respondent has

broken down irretrievably and I hereby pronounce a Decree Nisi dissolving the marriage between them.

- (2) This Order shall become absolute after three (3) months from the date of Judgment.
- (3) Custody of Helen Abah the child of the marriage is hereby granted to the Petitioner with access to her at reasonable time by the Respondent.
- (4) The Respondent is hereby ordered to pay the school fees of the child of the marriage and pay a monthly sum of ₦20,000.00 for her maintenance and upkeep.
- (5) Relief (d) for cost of the Petition fails and is hereby dismissed.

HON. JUSTICE O.C. AGBAZA

Judge

13/5/2020

E.MAJI FOR THE PETITIONER

NO REPRESENTATION FOR THE RESPONDENT