

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 30TH DAY OF SEPTEMBER, 2020

BEFORE: HON. JUSTICE M. A. NASIR

COURT NO: 9

SUIT NO: PET/77/2016

BETWEEN:

JULIET MOGHALU ----- CROSS-PETITIONER

AND

MADUAKONAM MOGHALU ----- CROSS-RESPONDENT

JUDGMENT

By a Notice of Petition filed on the 19th January, 2016 the Petitioner Mr. Maduakonam Moghalu (now Cross Respondent) initiated a Petition for decree of dissolution of marriage between him and the Respondent Mrs. Juliet Moghalu (now Cross Petitioner). The Respondent (now Cross Petitioner) filed an Answer together with a Cross-

Petition on the 15th February, 2016 to which the Petitioner (now Cross-Respondent) filed a Reply on the 18th March, 2016.

The Petitioner (now Cross Respondent) withdrew his Petition and same was struck out on the 9th May, 2016. The Respondent (now Cross Petitioner) proceeded with her Cross Petition and by an order of this Court the Amended Cross Petition dated the 16th March, 2017 was deemed properly filed before this Court.

It should be noted that all these transpired before my learned brother Hon. Justice A. B. Mohammed prior to re-assignment of this Petition to this Court vide an order of the Hon. Chief Judge made on the 12th April, 2017.

By the Amended Cross Petition dated the 16th March, 2017, the Cross Petitioner (Mrs. Juliet Moghalu) a legal Practitioner, is praying this Court for the reliefs stated hereunder:

“a) A decree of dissolution of the marriage between the Cross-Petitioner and the Cross-Respondent as the marriage has broken down irretrievably on the ground that the Cross-Respondent has behaved in such a way the Cross-Petitioner cannot reasonably be expected to continue to live with the Cross-Respondent.

b) An order of this Honourable Court directing that the sole custody of the three children of the marriage: (Chukwudumeme Chukwuka Moghalu-8years), (Somtochukwu Daniel Moghalu - 6years), (Chukwudubem Victor Moghalu - 4years remain with the petitioner.

c) An order of this Honourable Court directing that based on the peculiar facts and circumstances of this matter, the Respondent to the Cross-Petition be allowed to have limited access only to the children for a period of 1-3 hours every month in the presence of a welfare officer(s) from the welfare department of the Abuja

Municipal Area Council or from any other Area Council of the Federal Capital Territory or supervised visit to the children in the presence of law enforcement officer or officers until such a time that the children are old enough to defend themselves from harm or danger.

d) An order directing the Cross-Respondent to henceforth, pay in full the school fees of the three children of the marriage as assessed by their educational institutions and to pay in full cost relating to the educational advancement of the three children of the marriage, including cost of lessons, textbooks, extracurricular activities, uniform, clothing and vocational activities of the children of the marriage:

1. Chukwudumeme Chukwuka Moghalu - current school fees N890,000= (Eight Hundred and Ninety Thousand Naira only) per term.

- 2. Somtochukwu Daniel Moghalu – N863,000= (Eight Hundred and Sixty Three Thousand Naira only) per term.*
 - 3. Chukwudubem Victor Moghalu – N589,000= (Five Hundred and Eighty Nine Thousand Naira only) per term.*
 - 4. The sum of N70,000= (Seventy Thousand Naira) per month for each of the three children being extra lesson fees currently being paid for the children by the Cross–Petitioner.*
 - 5. The sum of N60,000= (Sixty Thousand Naira) per month being the current piano lesson fees for each of the three children.*
- e) An order directing the Cross–Respondent to pay such education fees and needs as may be reviewed or required by their educational institutions from time to time.*

f) An order directing the Cross-Respondent to pay the cost of the specialist medical attention of the first child of the marriage Chukwudumeme Chukwuka Moghalu and the second and third children of the marriage as may be required from time to time.

g) An order directing the respondent to the Cross-Petitioner to refund the Cross-Petitioner the following sums:

a. \$9,810 (Nine Thousand Eight Hundred and Ten U.S Dollars); E4,338 (Four Hundred, Three Hundred and Thirty Eight British Pounds); E220 (Two Hundred and Twenty British Pounds); E100 (One Hundred Pounds); another E220 (Two Hundred and Twenty Pounds); E193 (One Hundred and Ninety Three Pounds) as the delivery and medical fees for the first child paid by the Cross-Petitioner which remains outstanding after the

Cross-Respondent refunded the sum of N2,Million Naira to the Cross-Petitioner.

b. The sum of \$26,775.68 (Twenty Six Thousand Seven Hundred and Seventy Five Pounds and Sixty Eight Pence) paid by the Cross-Petitioner as the medical and delivery fee for the third child of the marriage remaining outstanding after repaying the Cross-Petitioner the sum of N2, Million Naira and which the Respondent agreed to refund to the Cross-Petitioner.

c. The sum of N1,Million Naira collected by the Respondent to the Cross-Petition from the Cross-Petitioner sometime in 2007 which remains outstanding after the payment of N2, Million Naira in 2015 by the Cross-Respondent to the Cross-Petitioner.

d. The sum of N1, Million Naira which remains outstanding after repayment of N2, Million Naira

by the Cross-Respondent to the Cross-Petitioner in 2015 being the balance of 50% of the cash gifts made to both the Cross-Petitioner and the Respondent to the Cross-Petitioner by guest invited by both the Cross-Petitioner and Respondent to the Cross-Petitioner but squandered by the Respondent to the Cross-Petitioner and agreed to be repaid by the Respondent to the Cross-Petitioner in 2015 and part of which were repaid by the Cross-Respondent to the Cross-Petitioner in 2015.

e. The sum of \$29,600 (Twenty Nine Thousand, Six Hundred U.S. Dollars being the cost of delivery for the second child of the marriage paid by the Cross-Petitioner which the Respondent to this petition agreed to refund and remains outstanding after the repayment of N2, Million Naira made by the Cross-Respondent to the Cross-Petitioner in

2015 which remains outstanding after the repayment of N2, Million Naira by the Cross-Respondent to the Cross-Petitioner.

f. The following sum paid by the Cross-Petitioner as school fees for Chukwuka Chukwudumeme Moghalu the first child of the marriage, all of which the Respondent to the Cross-Petitioner agreed in 2015 to refund and remains outstanding after the repayment of N2, Million Naira only by the Respondent to the Cross-Petitioner.

(i) Play Group I - \$4,830 (Four Thousand Eight Hundred and Thirty US Dollars) paid at the Regent School Abuja by the Cross-Petitioner.

(ii) Play Group II - \$6,420 (Six Thousand Four Hundred and Twenty US Dollars)

paid at the Regent School Abuja by the Cross-Petitioner.

(ii) Nursery – \$6,650 (Six Thousand Six Hundred and Fifty US Dollars) paid at the Regent School Abuja by the Cross-Petitioner.

(iii) Reception – N1, 104. (One Thousand One Hundred and Four Naira) paid at the Regent school Abuja by the Cross-Petitioner.

(iv) – £12,132,46. (Twelve Thousand One Hundred and Thirty Two, Forty Six British Pounds Sterling and Forty Six Pence) paid as fees for the first and second children class in London by the Cross-Petitioner.

(v) – *The sum of N1,104,000. (One Million One Hundred and Four Thousand Naira)*

(vi) – *The sum of \$4,530 (Four Thousand Five Hundred and Thirty US Dollars.*

(vii) Year – *N890,000 (Eight Hundred and Ninety Thousand Naira) paid by the Cross-Petitioner being the School fees for the first year 3.*

g. The following sum paid by the Cross-Petitioner as school fees for Somtochukwu Daniel Moghalu (the second child of the marriage, part of which the respondent to the Cross-Petitioner began refund in 2015.

(i) 2012 – N689,000. (Six Hundred and Eighty Nine Thousand Naira) less Developmental

fees paid by the Cross-Petitioner at the Play House Abuja.

(ii) 2013 - N508,000 (Five Hundred and Eight Thousand Naira) being fees paid by the Cross-Petitioner at the Regent School Abuja.

(iii) 2014 - £12,133,46. (Twelve Thousand One Hundred and Thirty Three, Forty Six British Pounds Sterling and Forty Six Pence) paid as fees for the first and second children class in London by the Cross-Petitioner.

(iv) 2016 - N863,400 (Eight Hundred and Sixty Three Thousand Four Hundred Naira) being fees paid by the Cross-Petitioner as fees for first term of year 1 for the second

child of the marriage at the Regent School Abuja.

(v) – *N863,400 (Eight Hundred and Sixty Three Thousand Four Hundred Naira) being fees for the first child paid in 2017.*

(vi) – *The sum of \$2,710. (Two Thousand Seven Hundred and Ten US Dollars) being fees and development levy paid by the Cross-Petitioner (2010).*

(h) The following sum paid by the Cross-Petitioner as school fees for Chukwudubem Victor Moghalu (the third child of the marriage.

i. January – May 2015: £6000. (Six Thousand British Pounds Sterling) paid by the Cross-Petitioner in the play group class in London.

ii. The following sum paid by the Cross-Petitioner as School fees for the third child:

N589,950. (Five Hundred and Eighty Nine Thousand, Nine Hundred and Fifty Naira) for 2016 and 2017.

(17) In the best interest of the lives of the children of the marriage, the Cross-Petitioner prays for a perpetual injunction restraining the Respondent to the Cross-Petition from:

- i. Threatening, harassing, beating or in any way exhibiting any violent behavior(s) against the Cross-Petitioner, the children and domestic staff of the Cross-Petitioner.*
- ii. Threatening the lives of the Cross-Petitioner and the children which have continued unabated.”*

In addition to the Amended Cross Petition, the Cross Petitioner also filed a Supplementary Cross Petition wherein she prayed this Court for the dissolution of the marriage on the ground that the Cross-Respondent has deserted the

Cross-Petitioner for a continuous period of at least one year from (6th January, 2016 to 15th March, 2017) immediately preceding the presentation of the Supplementary Cross-Petition.

On the 10th October, 2017, the Cross-Respondent filed an Answer to the Amended Cross-Petition and Supplementary Cross-Petition. Then on the 12th January, 2018 the Cross-Petitioner filed a Reply to the Answer of the Cross-Respondent.

Now, pleadings having been filed and exchanged by the parties the matter proceeded to hearing. At trial, the Cross Petitioner testified and called two other witnesses. Ms Obioma Obiadi testified as PW1 and adopted her witness Statement on oath dated 16th March, 2017, while Dr. Olayemi Oluwole Olaomi testified as PW2. He also adopted his witness Statement on Oath of 16th March, 2017. Then the Cross-Petitioner testified as PW3 on the 23/1/2019 and

adopted her witness statement on oath deposed to on 16/3/2017.

She testified inter alia that she got married to the Cross-Respondent on the 27th August, 2007, at the Abuja Municipal Area Council (AMAC) Marriage Registry. Parties cohabited at No. 52 Yedseram Street, Maitama Abuja. The marriage is blessed with three male Children viz:

1. Chukwudumeme Chukwuka Moghalu born on the 26th September, 2008 in a Hospital under the county of Los Angeles Department of Public Health, California, USA.
2. Somtochukwu Daniel Moghalu born on the 16th October, 2010 in California USA.
3. Chukwudubem Victor Moghalu born on the 28th May, 2012 in West Minster England.

In her evidence as PW3, the Cross Petitioner had told the Court that the Cross Respondent is a violent person who attempted to strangle her three times. That he is a

habitual drunkard, who left her and the children without means of support. He did not pay hospital bills during her pregnancies nor paid school fees for the children except for August, 2015 and January, 2016. That he was arrested and detained and charged for economic crimes.

She narrated an incident that took place in early 2009 barely 4 months after delivery of the first child. The Cross Respondent came home drunk and forcefully collected the remote to the television from her. When she cautioned him, he slapped her and tried to strangle her. She then jumped up with the baby and called family members who intervened.

She said the Cross Respondent has on several occasions exhibited rage and violence against her in the presence of the house help and the children. He also used rude and vulgar languages around the house, and was violent towards the children. Further occurrence was on the

25/1/2015 when the Cross Respondent returned home from the custody of the EFCC and went straight to his room. When she enquired what had happened, the Cross Respondent got angry and went for her throat, pushed and pinned her to the wall in the bedroom. Her scream attracted PW1 to the room. The Cross Respondent then went after the house help and slapped her.

The Cross Petitioner told the Court that she was violently attacked on the 6/1/2016 and that was when the Cross Respondent hit her and she started bleeding from the ear. When the pain from the ear became unbearable, she was taken to Echo Scan Heart Centre Abuja where she was placed on medication, and further referred to National Hospital and placed on further medication. At the National Hospital, it was discovered that she had developed impaired hearing in the left ear. She was further treated at Garki Hospital Abuja by a specialist Ear doctor as patient No. 123600. By the time she returned from treatment on the

6/1/2016, the Cross Respondent had thrown her belongings outside. On the 7/1/2016, the Cross Respondent again tried to strangle her but he was accosted by a security officer one Magaji Lawal.

Under cross examination, PW3 said that her marriage to the Cross Respondent was tortuous though she lived with him for 9 years after the first incident of violence in 2008. She testified that the Cross Respondent did not pay any hospital bills during her trips to the UK and USA for deliveries of the children. That it was the Cross Respondent who threw her out of the matrimonial home.

In her evidence, PW1 Obioma Obiadi stated that on several occasions she witnessed the Cross Respondent beating up and violently manhandling the Cross Petitioner. On one occasion, she witnessed the Cross Respondent strangling the Cross Petitioner in her room, and when she attempted to plead on behalf of the Cross Petitioner, the

Cross Respondent charged at her and slapped her. She also stated that on the 7/1/2016 when she went to the matrimonial home of the Cross Petitioner to pick up some clothes for the children, she witnessed the Cross Respondent bringing out some belongings of the Cross Petitioner. The Cross Respondent then chased her out of the house.

Under cross examination, she stated that the Cross Respondent is a violent person and she had been a victim of that violence. She further stated that she had lived with the Cross Petitioner's mother before she started living with the parties after their marriage.

PW2 is Olayemi Oluwole Olaomi, a Consultant Surgeon with the National Hospital Abuja. He testified that the hospital conducted a medical examination on the Cross Petitioner on the 11/1/2016 and it was discovered that the Cross Petitioner had general body pains and impaired

hearing on the left ear. The examination also showed bruises on the face, worse on the left side and a perforation of the left tympanic membrane with conductive hearing loss of moderate degree. That the Cross Petitioner was given medication and advised accordingly. Exhibit A was tendered through the witness.

Under cross examination, PW2 stated that he has known the Cross Petitioner and members of her family for several years.

The following documents were tendered in evidence as Exhibits A1, A1 – A7 as follows:

- Medical report from National Hospital Abuja admitted as exhibit A.
- CTC of marriage Certificate admitted as exhibit A1.
- Receipt and follow up appointment card admitted as exhibit A2.
- Medical receipt conditionally admitted as exhibit A3.

- Bundle of receipts from The Regent School collectively admitted as exhibit A4.
- Copy of receipts from The Regent School conditionally admitted as exhibit A5.
- CTC Judgment of Federal High Court admitted as exhibit A6.
- Prescription form admitted as exhibit A7.

In reaction to the Cross Petitioners claims, the Cross-Respondent opened his case on 4th February, 2019 and testified as DW1. He adopted his witness Statement on oath of 10th October, 2017 and called three other witnesses. One Abba Ramadan, who is the caretaker of the Cross-Respondent's estate testified as DW2. Then, Joy Chioma Okezie from United Bank for Africa (UBA) Plc. testified as DW3. Finally, Mohammed Aminu Mohammed from Guaranty Trust Bank Plc testified as DW4.

In his evidence before this Court, the Cross-Respondent confirmed that parties were married under the Act at the Abuja Municipal Area Council (AMAC) Marriage Registry, on the 27th August, 2007. That parties lived together as husband and wife preceding the event of 7th January, 2016.

The Cross Respondent debunked all the allegations against him and testified thus:

On the allegation of not paying the medical bills and support for the Cross Petitioner and the children, the Cross Respondent testified that the Cross Petitioner paid for the bills using monies that he gave to her before each travel. He mentioned that the Cross Petitioner had convinced him that such payments made through her would aid her visa applications for further trips. That he gave the Cross Petitioner monies in cash which she paid into her foreign account. And this enabled her to use the foreign card for

payments. He stated that he travelled with the Cross Petitioner and the first child to London and he paid the bills for the child's surgery. The Cross Respondent added that he was not aware of the trip to Vision Express Clinic for the eye treatment of the first child, as the trip was made after the Cross Petitioner had moved out of the matrimonial home.

On allegation of physical violence, he testified that it was the Cross Petitioner who physically attacked him on the 7/1/2016 and later willfully packed her things and that of the children and left the matrimonial home. That due to the temperamental outbursts of the Cross Petitioner, parties have lived with 30 domestic staff during the period of cohabitation, with the Cross Petitioner physically hurting them. He denied ever going for the throat of the Cross Petitioner or slapping the house help. He maintained that it was the Cross Petitioner who was violent towards him. She

was the one who slapped the house help and the children have severally witnessed her violent conduct.

On the issue of not paying school fees, the Cross Respondent testified that he has been solely responsible for the payment of school fees of his children. He made payments through cash or bank transfers. The Cross Respondent denied the allegation that he paid school fees in anticipation of this suit.

The witness further testified that he never abandoned the Cross Petitioner and the children on the Christmas of 2015, but that he had reason to rush his sick mother to London for urgent medical treatment to the knowledge of the Cross Petitioner.

On the issue of his arrest by the EFCC, the Cross Respondent testified that he has never been convicted by any Court for any wrong doing, and he is presumed innocent in the eyes of the law.

Under cross examination the Cross Respondent testified that parties have lived apart since 6/1/2016. That he did not pay school fees from 2017 to 2019 because he was denied access to the children of the marriage. That he paid the rents and other payments for upkeep of the matrimonial home. He said it was the Cross Petitioner who attacked him on the 6/1/2016 and he tendered a video to that effect. He stated that he sent money to the Cross Petitioner while she was in the USA through her colleague in Stanbic IBTC who in turn transferred same to the Cross Petitioner. He said he had no objection to an order for dissolution of the marriage.

DW2 Abba Ramadan is the caretaker of the estate where parties cohabited. He testified that it was the Cross Respondent who paid the rent for the property. That sometime in 2016, the security man called and informed him that he noticed movement of property from the Cross Respondent's house. DW2 upon reaching the house

discovered that it was the Cross Petitioner who was packing out of the premises. He said the Cross Respondent is a good man and lived peacefully in the premises and sometimes used his personal money to effect repairs on the property.

Under cross examination, he stated that he is only a caretaker and not the owner of the property.

DW3 Joy Chioma Okezie was subpoenaed and produced the UBA Plc account statement of the Cross Respondent. DW4 Mohammed Aminu Mohammed was also subpoenaed and he produced the Cross Respondent's GT Bank account statement but the document was admitted and marked rejected.

The following documents were tendered by the Cross Respondent and admitted in evidence as Exhibits D, D1 - D11:

- GT Bank Account Statement as exhibit D.

- Two official rent receipts dated 21st January, 2014 and 2nd April, 2016 collectively admitted as exhibit D3.
- Cash receipt for Honda Cross-tour as exhibit D4.
- Flash drive and certificate of compliance as exhibit D5.
- Cross-Respondent's International Passport exhibit D6.
- Photographs and certificate of compliance as exhibit D7.
- Print out of text messages conditionally admitted as exhibit D8.
- Receipts for payment of house rent conditionally admitted as exhibit D9.
- UBA account statement admitted as Exhibit D10
- Guaraty Trust Bank Account statement admitted as Exhibit D11 rejected.

At the close of evidence, parties were directed to file their final written addresses.

Learned counsel to the Cross Respondent Isaac Anumudu Esq. filed the written address dated 23rd March, 2020. Upon receipt of the Cross Petitioner's written address, he also filed a Reply on points of law dated 29/6/2020. Both processes were adopted on the 30/6/2020. He then formulated three issues for determination as follows:

- “1. Whether the marriage between the parties have broken down irretrievably?*
- 2. Whether the Court can grant sole custody to the Cross-Respondent, or in the alternative a joint custody of the three children of the marriage to both parents in the best interest of the children?*
- 3. Whether this Honourable Court can grant the reliefs sought by the Cross-Respondent as it relates to the*

welfare, education and advancement of the children of the marriage?”

In the final written address, learned counsel for the Cross Respondent submitted that any party who wishes the Court to make an order or to give judgment based on any set of facts has the burden to prove the existence of such facts or set of facts. That the Cross Petitioner has failed woefully in proving that the Cross Respondent has behaved in a way that she is not expected to live with him. Counsel added that the Cross Petitioner in her evidence averred that the Cross Respondent has failed in his responsibilities and based on such averments the Court should find that the marriage has broken down irretrievably. That the Cross Petitioner has not led evidence in anyway to show that the Cross Respondent has behaved in such a manner as claimed in the averments. He cited Bakau vs. Bakau (2013) LPELR – 22687 (CA), Anioke vs. Anioke (2011) LPELR – 3774 (CA).

Learned counsel to the Cross Petitioner Henry U. Itseuwa, Esq. submitted a lone issue for determination. The written address was adopted by J.U.K. Igwe SAN on the 30th June, 2020. The issue is:

“Whether in view of the evidence/facts placed before the Honourable Court, the Cross-Petitioner proved her case before the Honourable Court and entitled to the reliefs sought from the Honourable Court?”

In his submission, learned senior counsel for the Cross Petitioner urged the Court to accept the evidence of the Cross Petitioner as cogent proof of the facts in support of unreasonable behaviour. This is moreso as the authenticity of the medical report tendered was not challenged by the Cross Respondent. That the medical report can only be rebutted by documentary evidence from the hospital to show that it did not exist as it cannot be rebutted by oral

evidence. He cited Anionwu & ors vs. Anionwu & anor (2009) LPELR – 8754, Adegbuyi vs. APC & 2 ors (2014) 12 SC (part 1), NBC Plc vs. Ubai (2013) SC 95, Military Gov. of Lagos State & 4 ors vs. Adeyuba & 6 ors (2012) 2 SC (part 1) 68, A.G. Federation vs. A.G. Abia State (2006) 6 NWLR (part 764) 542, Airtel Networks Ltd vs. George & 3 ors (2015) 4 NWLR (1448) 60.

Upon perusal of the entire evidence and the written submissions of both counsel, the issues which should determine this Cross Petition are as follows:

1. Whether the marriage between the parties has broken down irretrievably.
2. Whether the Court can grant sole custody to the Cross Petitioner.
3. Whether this Court can grant the reliefs sought by the Cross Petitioner.

ISSUE ONE

“Whether the marriage between the parties has broken down irretrievably?”

From the Cross-Petition the factual grounds relied upon by the Cross Petitioner are those of intolerable conduct/unreasonable behaviour and desertion.

“Unreasonable behavior” is the term used to describe the fact that a person has behaved in such a way that their partner/spouse cannot reasonably be expected to live with the other. It is not easy to prove unreasonable behaviour. There is more to it than meets the eye. Such behaviour has to be negative. Allegations of some negative behaviour of a spouse is not enough to warrant the Court holding that the spouse is guilty of unreasonable behaviour.

What is the nature of the behavior envisaged under Section 15(2)(c) of the Matrimonial Causes Act? The Act did not define the phrase “behaved in such a way.” However,

the behavior has to be negative. It must be such that a reasonable man cannot endure it. The conduct must be grave and weighty in nature as to make further cohabitation virtually impossible. See: Oguntoyinbo vs. Oguntoyinbo (2017) LPELR – 42174 (CA), Damulak vs. Damulak (2004) 8 NWLR (part 874) 151 and Bibilari vs. Bibilari (2011) LPELR – 4443 (CA), Ibrahim vs. Ibrahim (2007) 1 NWLR (part 1015) page 383.

The duty on the court is to consider whether the alleged behaviour is one in which a right thinking person would come to the conclusion that the Respondent has behaved in such way that the Petitioner could not reasonably be expected to live with him taking into account the whole of the circumstances, and the matrimonial history of the parties. Ibrahim vs. Ibrahim (supra), Nanna vs. Nanna (2006) 3 NWLR (part 966) page 1, Katz vs. Katz (1972) 3 All ER page 219.

Unreasonable behaviour in matrimonial proceedings is provided for under Section 15(2)(c) of the Matrimonial Causes Act which states as follows:

“15(2) 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.”

It should be noted that the test of whether the behaviour complained of is intolerable to expect the Petitioner to continue to live with the Respondent is objective and not wholly subjective. Therefore there is every possibility that what the Petitioner terms ‘intolerable’ may

not pass this objective test. However, Section 16(1)(a – g) exhaustively listed the various behaviours that qualifies as intolerable behaviour that will be unreasonable to require the Petitioner to continue to cohabit with the Respondent under Section 15(2)(c) of the Matrimonial Causes Act.

In summary Section 16(1) of the Matrimonial Causes Act listed the behaviours to include:

- a.) Commission of sexual offences such as committed rape, sodomy or bestiality.
- b.) Habitual drunkenness or drug addiction for a period of not less than two years.
- c.) Frequent convictions and imprisonment for crime.
- d.) Habitual leaving of a spouse without reasonable means of support.
- e.) Attempt to murder and assault spouse
- f.) Habitual and willful failure to provide Court ordered or agreed support for two years
- g.) Insanity and unsoundness of mind

In other words, unless and until any of the conditions listed in Section 16(1)(a – g) exist with credible evidence; the Court shall refuse to make an order of dissolution of marriage. See Emmanuel vs. Funke (2017) LPELR – 43251 (CA).

The burden is on the Cross Petitioner to prove not only the undesirable behaviour of the Respondent which she is averse to, but also that she finds it intolerable to continue living with the Cross Respondent. If she is unable to prove any of these allegations, her petition cannot succeed and it will be dismissed even if the divorce is desired by both parties. See Oguntoyinbo vs. Oguntoyinbo (2017) LPELR – 42174 (CA), Akinbuwa vs. Akinbuwa (2005) 2 SMC 81, Ekerebe vs. Ekerebe (1993) 3 NWLR (part 596) page 514.

Now Section 82(1) of the Matrimonial Causes Act provides that:

“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.”

The standard of proof required therefore is no more than that of preponderance of evidence. The Court in Nanna vs. Nanna (supra), and Damulak vs. Damulak (supra)

held that the Petitioner must prove:

- 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 separate and distinct from each other and therefore must both be proved. In the English case of Katz vs. Katz (1972) 1 WLR 955 at 960 cited in E.I. Nwogugu Family Law in Nigeria Revised Edition pages 166 – 167; Matrimonial Causes in Nigeria, Law and Practice by

Nasiru Tijani page 52, the Court gave a guide as to what will constitute 'behaviour' as follows:

“Behaviour is something more than a state of affairs or a state of mind, such as for example, a repugnance to sexual intercourse or a feeling that the wife is not being as demonstrative as he thinks she should be. Behaviour in this context is an action or conduct by 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.”

I have considered the evidence of the parties in this regard. If I may repeat the Cross Petitioner's evidence, she stated that the Cross Respondent was violent towards her. She tendered a medical report Exhibit A to that effect. It is noted that the Cross Respondent denied this fact in his

Answer to the Cross Petition and evidence before the Court. He alleged that it was the Cross Petitioner who was violent towards him and tendered the video recording of one of such instances before the Court. A careful viewing of the video recording tendered as Exhibit D5 did not particularly show any form of violence meted against the Cross Respondent. However from Exhibit A it was stated as follows:

“Medical Report

To whom it may concern

RE: Anohu Juliet (Hospital No. 477384)

The above named 34 years old lady presented to our hospital on the 11/1/2016 with few days history of domestic assault by the husband resulting in impaired hearing with the left ear and general body pains.

Examination showed bruises on the face worse on the left side.

There was perforation of the left tympanic membrane with conductive hearing loss of moderate degree.

She was given antibiotics and analgesics and advised to avoid water entering the left ear to prevent middle ear infection and meningitis.

Thank you.

Dr. Olaomi O.O.

Chief Consultant Surgeon.”

The Cross Petitioner’s evidence of violence was also confirmed by PW1 Ms. Obioma who stated under cross examination that the Cross Respondent was a violent person. Eventhough learned counsel to the Cross Respondent urged this Court to discountenance Exhibit A for lacking the minimal threshold of a professional medical

report, the Cross Respondent has not provided this Court with any professional medical report which meets the standard described. I believe the evidence of PW2 and ascribe probative value to Exhibit A.

The Cross Petitioner in her testimony further stated that the Cross Respondent exhibited his usual rage and violence against her in the presence of the children. Infact, when asked during cross examination to confirm whether the Cross Respondent was a violent person, she answered as follows;

“I did not claim that the Cross Respondent was violent to me, it is a fact that he was violent. And that is extremely so.”

This Court has noted also that the Cross Petitioner referred to the incident of 5/1/2016, the date Master Chukwudubem took ill with fever and the 6/1/2016 when she was violently attacked by the Cross Respondent and he

also threatened to kill her. She added that she was slapped and punched three times; the last one hitting her very hard on the ear that she could barely move or turn her head. The Cross Respondent denied these facts and tendered his International Passport as Exhibit D6 stating that he had travelled to the UK and only returned to the country on the 6/1/2016.

A look at Exhibit D6 showed that the Cross Respondent was seen on arrival back to Nigeria on the 5/1/2016 and not on the 6/1/2016 as alleged. He was in the country from the 5/1/2016 up till the 7/1/2016 when the incident of violence took place. The Cross Respondent was also stated to be a habitual drunkard.

Exhibit A6 which is the CTC of the Judgment of the Federal High Court also confirmed that the Cross Respondent (as Defendant) was charged and convicted for the offence of Money Laundering.

In Ibeawuchi vs. Ibeawuchi (1974) UILR page (103) 67,
the Court held per Oputal J, (as he then was),

“In cases of unreasonable behaviour, the Court may have to consider in its entirety and totality the matrimonial history of the parties, for certain acts though trifling by themselves alone, may in association with other acts or by sheer force of accumulation assume the shape of unreasonable behaviour.”

I had the opportunity of seeing both parties while giving their testimony. The Cross Petitioner appeared to be of calm disposition. I believe her evidence that the Cross Respondent was violent towards her throughout the duration of the marriage. She even broke down in tears during one of the Court sessions while narrating her story.

I also witnessed the anger of the Cross Respondent who was shouting on top of his voice during one of the

sessions. He indeed portrayed his anger before the Court. The behaviour of the Cross Respondent is unjustifiable. In Obiagwu vs. Obiagwu (1966 - 1979) Vol. 5 Oputa LR page 81, Oputa, J (as he then was) citing Evans vs. Evans (1790) Heg. Con. 35 where Lord Stowell observed as follows:

“In a state of personal danger no duties can be discharged; for the duty of self preservation must take place before the duties of marriage which are secondary both in commencement and obligation.”

The case of Bibilari vs. Bibilari (2011) LPELR - 4443 (CA) cited by both learned counsel is also apt. The Court of Appeal held in that case;

“When there is injury or a reasonable apprehension of injury whether physical or mental meted out to a partner, that is sufficient to be described as a behaviour unacceptable in marriage.”

From the domestic history of the parties in this instance, there is a behaviour pattern of violence exhibited by the Cross Respondent leading to the inference that cohabitation can no longer subsist between the parties. I find the evidence of the Cross Petitioner regarding the dissolution of the marriage cogent and compelling, I believe her. The test is whether it is reasonable to expect the Cross Petitioner to put up with the behaviour of the Cross Respondent. My considered opinion is that it is not reasonable for anyone to expect the Cross Petitioner to continue to put up with such violent and detestable behaviour from the Cross Respondent. Habitual drunkenness, physical violence, ungovernable temper are conducts which the Cross Petitioner cannot reasonably be expected to bear. It is unacceptable in marriage, and I hold that the Cross Petitioner cannot reasonably be expected to continue to live with the Cross Respondent.

For the fact of desertion relied upon by the Cross Petitioner in the Supplementary Cross Petition, Section 15(2)(d) provides:

“(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:–

(d) that the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.”

The evidence of the Cross Petitioner is that on the 6/1/2016 the Cross Respondent threw her belongings out of the matrimonial home at No. 52 Yedseram Street Maitama Abuja and since then deserted her and the children of the marriage. During cross examination, PW3

stated that she came to the house to pick a few things for herself and the children and found her belongings being moved out. PW1 however under cross examination stated that she and the Cross Petitioner were thrown out on the 7/1/2016. She said the Cross Petitioner called her from Wuse 2 and she went to pick the children's clothing but was chased out by the Cross Respondent with an object which looked like a brown wood.

The Cross Respondent denied these allegations. He testified that on the 7/1/2016, he left the house but forgot something and he returned around 12pm. He discovered that the Cross Petitioner had parked her things and that of the children and loaded into a black Corolla. He went to the mother in-laws place to see her but she (Cross Petitioner) asked him to leave the house.

Learned counsel to the Cross Respondent submitted that the Cross Petitioner having moved out of the

matrimonial home since 7/1/2016 and refused all attempts at reconciliation, is guilty of desertion. Learned counsel to the Cross Petitioner submitted that the Cross Petitioner has satisfied the requirements of Section 15(2)(d) of the Matrimonial Causes Act based on the evidence before the Court.

Desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse. See Oghenevbede vs. Oghenevbede [1973] UILR 104. The Court in the case of Nulley vs. Nulley (1970) 1 All ER page 450, stated that in order to establish the offence of desertion, the Petitioner or Cross Petitioner must prove the physical separation, the intention to remain permanently separated and the absence of the spouses consent and justification. See also Sowande vs. Sowande (1960) LLR page 58.

The Court has to inquire into who deserted whom, into who was the guilty party, the party who was instrumental to the separation with the intention of bringing cohabitation permanently to an end and that, without reasonable cause and without the consent of the other spouse. See Nulley vs. Nulley (supra), Dunn vs. Dunn (1948) 2 All ER page 822, Anioke vs. Anioke (2011) LPELR - 3774 (CA).

In this case, I do not believe that the Cross Respondent threw the Cross Petitioner out of the matrimonial home. She herself said she was taken to her parents home on the 6/1/2016. I do not believe her story also when she said she returned on the 7/1/2016 and in the presence of one Magaji Lawal a Policeman, the Cross Respondent went for her neck and attempted to strangle her. This is because, the said Magaji Lawal who witnessed the incident was not called to give evidence. It was the Cross Petitioner who left the matrimonial home on the 6/1/2016 together with the children after being treated at the hospital due to the injury

she sustained by the conduct of the Cross Respondent. Legal desertion should be desertion without reasonable cause. If the party who left had reasonable cause to leave, then the opposite party becomes the constructive deserter. Looking closely at the domestic history of the parties, it is safe to state that the Cross Respondent was the constructive deserter as desertion was attributable to his conduct. See Nanna vs. Nanna (cited supra), Olagundoye vs. Olagundoye (1996) 2 FNL R 255 at 261.

Therefore on the issue of dissolution, I am satisfied that cohabitation can no longer subsist between the parties without personal danger to the Petitioner. The Cross Respondent also said he is not averse to an order dissolving the marriage. And in situations such as this, the marriage can even be dissolved at the discretion of the Court as rightly posited by Mr. Anumudu of counsel to the Cross Respondent. I am satisfied that the Petitioner succeeded in proving that the marriage has broken down irretrievably

pursuant to Sections 15(2)(c) and (d) of the Matrimonial Causes Act and it will be idle to pretend otherwise. In the circumstance, I order that a *Decree Nisi* shall issue dissolving the marriage.

ISSUE TWO

“Whether the Court can grant sole custody to the Cross Petitioner.”

The Cross Petitioner has asked for sole custody of the three children and proposed that limited access be awarded to the Cross Respondent between 1 to 3 hours every month in the presence of a welfare officer(s) from the welfare department of the Abuja Municipal Area Council (AMAC), or supervised visit to the children in the presence of law enforcement officer(s) until such a time that the children are old enough to defend themselves from harm or danger.

On his part the Cross Respondent made the following proposal:

1. The Cross Respondent and the Cross Petitioner shall have joint legal custody. The children shall reside with the Cross Petitioner whilst the Cross Respondent shall have unlimited access to the children.
2. The children shall spend three weekends out of four in every month with the Cross Respondent until they each turn eighteen (18) years of age.
3. The three children of the marriage who are boys will live with the Cross Respondent when they attain the age of 18 years until they attain full maturity.
4. The Cross Petitioner must inform and request consent in writing from the Cross Respondent before traveling out of the country with the children on holidays or otherwise.

This Court has taken a cursory look at proposal put forward regarding custody and access to the children of the marriage. The evidence of the Cross Petitioner centers on the fact that the Cross Respondent is a violent person. That

it will be unsafe for the children to be left in the hands of a father who returns home violent and perpetually drunk. That it will not be in the interest of the children to leave them in the hands of the Cross Respondent.

‘Custody’ essentially concerns the control and the preservation and care of the child’s person physically, mentally and morally; responsibility for a child in regard to his needs, food, clothing, instruction and the like. See Otti vs. Otti (1992)7 NWLR (Part 252) 187 at 210.

The Court has a delicate jurisdiction when it touches on the exercise of the Courts discretion in awarding custody of children of broken marriage. Even where one of the parties to a marriage has been adjudged the guilty party, yet still the discretion in awarding custody ought not to be exercised as a punishment of the party at fault. See Williams vs. Williams (1987) 4 SC at 32, Afonja vs. Afonja (1971) 1 ULR page 105.

The law is settled that in proceedings relating to the custody, guardianship, welfare and education of children of a marriage, the paramount consideration is what will best serve the interest of the children. See Sections 70 and 71 of the Matrimonial Causes Act and the cases of Odogwu vs. Odogwu (2006) 5 NWLR (part 972), Nanna vs. Nanna (supra), Tagbo vs. Tagbo (1966 - 1979) Vol. 5 Oputa LR page 138, Allen and Allen (2010)1 LLR 97 A at 108, Alabi vs. Alabi (2008) All FWLR (part 418) page 245 at 258.

In Section 71(1) of the Matrimonial Causes Act the Courts are enjoined in proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, to regard the interests of those children as the paramount consideration, and subject thereto, the Court may make such order in respect of those matters as it thinks proper.

The welfare of the children should be the only, and in fact the sole and paramount consideration. See Falobi vs. Falobi (1976) 9 – 10 SC Reprint.

It is noted that the Cross Respondent in his pleadings and witness statement stated that he is amenable to any arrangements imposed by the Court in the best interest, welfare and advancement of the moral and educational benefit of the children.

It is further noted that the three children of the marriage have lived with the Cross Petitioner from January, 2016 till date which is a period of over 4 years. The Cross Petitioner had been the one taking the children to school and back. The Cross Petitioner has always been the person who travelled with the children and took care of their upkeep. She has become so familiar with them. The children at this age require the close care and attention of their mother, especially regarding their health and

dispensing of drugs. This is more so as the 1st child has a special medical condition. It is my view that a strong bond has been formed between the children and their mother, the Cross Petitioner.

This is not so with the Cross Respondent who constantly travelled outside Abuja and outside Nigeria leaving the Cross Petitioner and the children. When this Petition was filed, the first child was about 8 years. He is now about 12 years. The youngest child is now about 7 years. They are all young children and as far as practicable should live and grow up together.

It is not the law that custody of a child of tender age must in all cases be awarded to the mother. However, there is a presumption which is supported by the fact that there is a natural bond and affection between a child of a tender age and his mother; that a child of tender age (male or female) will be happier with the mother. It is a presumption

rebuttable only by evidence of insanity, immorality, infectious disease or cruelty of the mother to the child or lack of reasonable means. See Odogwu vs. Odogwu (supra), Oduote vs. Oduote (2011) LPELR – 9056 (CA) at 25 – 26, Anoliefo vs. Anoliefo (2019) LPELR – 47238 (CA), Eziaku vs. Eziaku (2018) LPELR – 46373 (CA).

As earlier noted, the three children have lived with the Cross Petitioner for about 4 years. It is important that the Court should avoid moving them about. Where a child has been with a parent for a considerable period of time, care must be taken in change of custody. This may result in psychological harm to the child. 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 co – existence is the prime consideration in granting custody. To disturb the bond which had developed between the children and the Cross Petitioner at this stage may be very devastating to them.

There is no evidence whatsoever from the Cross Respondent that the Cross Petitioner was cruel to the children or exhibited any immoral conduct which might affect the upbringing of the children who have been living with her since 2016.

The amount of time and energy that a parent can devote to the children's care and upbringing is of considerable importance. This may mean that a mother who can spend the whole of her time with her children will necessarily have an advantage over a father who will be out to work all day, whatever alternative arrangements he can make to have them looked after. See Re K (1977) 1 All ER 647.

The children have settled down and established a pattern of living. Without cogent, credible and substantial reason, taking them away from the Cross Petitioner will be a serious disruption to their life and will not be in their best

interest. In Ayemoba vs. Ayemoba (2018) LPELR – 45385 (CA) the Court held Per Ogbuinya JCA, that:

“In granting custody, the interest/welfare must rank foremost on the list of items for consideration. It has to supercede/hold dominion over the parochial/selfish interest of the parents.”

The Cross Respondent has not given any favourable reason to sway the mind of the Court in granting custody to him. For all these reasons, this Court is satisfied that the interest of the children will best be served if left with their mother, the Cross Petitioner. I so find and hold.

Upon awarding custody to the Cross Petitioner, this Court must ensure that the children are not denied the love, care and affection of either parent. In Olowofoyeku vs. Olowofoyeku (2010) LPELR – 11865 (CA) the Court held:

“Where one of the parents deliberately placed obstacle towards the attainment of such parental

love and affection, he will be in violation of the right of the child.”

Section 1 of the Child’s Right Act, 2003 also provides:

“In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, Court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.”

See also Section 69(1) of the child’s Right Act (CRA) 2003.

Learned counsel to the Cross Respondent submitted that the Cross Respondent by his conduct and applications for access brought before the Court has proved that there is a high degree of familiarity and affection between him and the three children which he has been intentionally starved of by the Cross Petitioner. While learned counsel to

the Cross Petitioner posited that the three children are infants needing the very close watch and attention of their mother.

The Court also noted that the Cross Respondent stated that he saw the children only three (3) times in 2018. Having decided the custody of the children, proper access is of paramount importance. It is an important factor in the children's emotional development. Section 4 of the Child's Right Act, 2003 provides that;

“Every child has a right to survival and development”

In the case of M vs. M (1971) 1 WLR page 1486 the Court held that:

“access can be regarded as a basic right of the child rather than that of the parent”

The Court also recognizes that both parents bear the primary responsibility for the upbringing and development of their children and that this is a social function for which

even the State has secondary responsibility. In the case of Hayes vs. Hayes (2000) 3 NWLR (part 648) page 280 the Court held:

“No parent or party to matrimonial proceedings dares trifle with or politicizes the interest and welfare of any child, no matter what personal interest or personal hurt of the parents or party.”

This Court however is concerned and aware that the children of the marriage during cohabitation of the parties witnessed some violent outburst of the Cross Respondent. The Cross Petitioner highlighted some instances for example; where she alleged the Cross Respondent threw an Ipad which landed on the lips of the 1st child and also the incident which happened at the park where the Cross Respondent got angry and sped off in his car leaving the first child in the middle of the road.

Be that as it may, to attain wholesome and balanced development, children of a marriage need the father and mother figure presence around them. Neither parent can all alone provide that. In line with this, the Court considers that it will be a proper exercise of discretion if an order is made allowing the Cross Respondent access to the children of the marriage.

ISSUE THREE

“Whether this Court can grant the reliefs sought by the Cross Petitioner.”

By Relief g(a - e) of the Cross Petition, the Cross Petitioner is praying for the refund of monies paid as medical bills during the delivery of the three children of the marriage, and other monies borrowed by the Cross Respondent.

- ✓ For Chukwudumeme Chukwuka Moghalu, the Cross Petitioner is asking for the refund of \$9,810 USD, £4,338, £220, £100, another £220, £193 pounds as delivery and medical fees.
- ✓ For the second child, Somtochukwu Daniel Moghalu the sum of \$29,600 USD as cost of delivery
- ✓ For the third child, Chukwudubem Victor Moghalu, \$26,775.68 USD as medical and delivery fee.
- ✓ The sum of N1 Million collected by the Cross Respondent from the Cross Petitioner sometime in 2007.
- ✓ The sum of N1 Million being the balance of 50% cash gift to the parties during their marriage after repayment of N2 Million by the Cross Respondent.

The evidence of the Cross Petitioner is that the Cross Respondent only paid the sum of N2 Million eventhough he has agreed to refund all the monies.

The Cross Petitioner further stated that the Cross Respondent neglected and refused to pay the medical bills, and she was therefore forced to pay from her personal resources. That the first child was born with a medical condition that required surgery costing £4,338 pounds, anesthetic fee £220, other ancillary payments £665.50 pounds. The Cross Petitioner also said she had to shoulder the cost of the ante natal and post natal delivery bills for the second child from her personal resources. For the third child, she said he was delivered through caesarean section and the Cross Respondent only showed up at the Hospital 2 days after the surgery, but did not pay for the medical bills or bills related to her maintenance.

Under cross examination, the witness stated that she paid the commitment fee with her American Express Card and did not make a demand for repayment of the money when she returned.

On his part, the Cross Respondent testified that he gave the Cross Petitioner \$10,000.00 USD before she travelled for the delivery of the first child and also sent more money to her while she was in the US. He also testified that he had given monies in cash to the Cross Petitioner to pay into her foreign account and then use her foreign card to settle the medical bill and other ancillary bills/fees. He admitted that the bills mentioned were settled by the Cross Petitioner with the monies he gave to her in cash before each of those travels. That the Cross Petitioner had convinced him that such payments through her would aid her visa applications for further medical trips. That he always provided cash which the Cross Petitioner would pay into her account either in the USA or UK.

Under cross examination, the Cross Respondent testified that he sent money to the Cross Petitioner while she was in the USA and he did not keep records because she is his wife. He also said he transferred money through

her bank but he did not have any evidence of the transfer. He sometimes sent money through the Cross Petitioners colleague in Stanbic IBTC, but he did not call the colleague because there was no need, and the colleague did not give him an acknowledgment. The Cross Respondent stated that the cost of the first delivery was \$9,900 USD and he gave the Cross Petitioner \$10,000 USD in cash. He stated that nobody gives his wife money and writes it down.

It is elementary as contained in the Evidence Act, 2011 that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts has the burden of proving that those facts exist. See Sunmonu vs. Sapo (2001) LPELR-9954(CA), Tallen & ors vs. Jang & ors (2011) LPELR-9231(CA). In this instance, the Cross Petitioner is the person who is making claim, and where she fails to discharge the burden she must fail. Thus, the Cross Petitioner in this case has the

burden of proof of her assertion. See A.G. Bayelsa State vs. A.G. Rivers State (2006) 18 NWLR (part 1012) page 625.

Learned counsel to the Cross Respondent submitted that the Cross Petitioner in her evidence averred extensively that she has never received any sort of funds or financial support from the Cross Respondent from the inception of the marriage till she moved out, and yet she did not produce any document showing her income and expenditure in proof of how she solely bore the burden single handedly. That the Cross Respondent in his evidence has shown that he has been financially responsible for the Cross Petitioner and the children. He tendered his bank statement showing transfers of funds to the Cross Petitioner, and his rent receipts showing that he was responsible for the payments of rent. That the Cross Respondent has also proved that he was financially supportive during the birth of his children abroad contrary to the claims of the Cross Petitioner.

In his submission, J.U.K. Igwe SAN submitted that the Cross Respondent ought to be held to perform his legal responsibilities which he neglected and or failed to do since the delivery of the children and all through their growth.

The Cross Petitioner tendered Exhibits A2, A3 and A7. On Exhibit A2, there is what looks like a Flyer with a small teller attached. It is headed follow up appointments. It has no connection whatsoever with the reliefs on record. The 2nd document is headed 'Your Admission Agreement'. I note that it is an 'Agreement' as stated with patient name Chuka Moghalu. Total funds required to be paid on the document prior to admission is £4,338 pounds. There is no evidence that the stated amount was paid. The invoice was not tendered.

The 3rd document is from the Portland Hospital for Women and Children Your Admission Agreement. It showed that the sum of £25,500.00 pounds was paid, but this

amount was not claimed before the Court. The amount claimed is \$26,775.68 USD and there is no evidence that it was paid as no invoice was tendered also. The last document on Exhibit A2 is from Cedars Sinai Medical Centre with patient name Juliet Anohu. The Cross Petitioner said she paid this amount for delivery of the second child Somtochukwu Daniel Moghalu. The total amount shown is \$29,600.00. It is boldly written at the bottom of the document that:-

“I agree to pay the above charges in accordance with my cardholder agreement.”

There is no document tendered to show that this amount was paid by the Cross Petitioner. The payment receipt was not tendered in evidence.

For Exhibit A3, it was admitted conditionally. A cursory look at the document will reveal that it is a photocopy of payment teller. Section 88 of the Evidence

Act, 2011 requires that documents shall be proved by primary evidence except where the original copy is not available or cannot be brought to Court as provided in Section 89 of the said Act. See Ngadiukwu vs. Moghalu & ors (2014) LPELR – 24366 (CA). Now there was objection on the admissibility of Exhibit A3 on the grounds that no proper foundation was laid as it is a photocopy. From the records, it is seen that indeed no foundation was laid and the position of learned counsel for the Cross Petitioner was that it was signed. Being in truth a photocopy of a bank teller (a private document), to render it (Exhibit A3) admissible in evidence is to lay the relevant foundation. See Anatogu vs. Iweka 11 (1995) LPELR – 484 (SC), Kayili vs. Yilbuk (2015) LPELR – 24323 (SC).

Having not done so, Exhibit A3 which was admitted conditionally is hereby expunged from the records of the Court. The Cross Petitioner has not shown her income or her personal resources which she claimed is her source in

financing and payment of the medical bills for the children. It is further noted that some invoices though frontloaded in the Amended Cross Petition, were not tendered in evidence. Thus the claims stated in relief g(a - e) for refund of medical bills having not been proved are accordingly refused and dismissed.

The Cross Petitioner also seeks the sum of N1 Million alleged to have been borrowed by the Cross Respondent and the sum of N1 Million being balance of the amount received as gift by the parties after the refund of about N2 Million to her. In her evidence, the Cross Petitioner stated that it was upon the intervention of a close family member who spoke extensively to the Cross Respondent that he accepted to refund part of the money to her. The Cross Respondent denied these averments.

Surprisingly, the said close family member was not called to corroborate this assertion. The Cross Petitioner

has not led any credible evidence to show that the Cross Respondent borrowed the sum of N1 Million from her. And from the account statements referred to by the Cross Petitioner, there is nothing indicating that the lodgments were refunds made to her by the Cross Respondent. These claims are hereby refused.

REFUND OF SCHOOL FEES

By reliefs (f) – (h), the Cross Petitioner is praying this Court for a refund of the amounts paid as school fees and other charges for the three children of the marriage from inception of their school years. She testified that the Cross Respondent only paid school fees in 2015 and 2016 in anticipation of this suit. The Cross Respondent stated in paragraph 21 of the witness statement as follows:

“...That the Cross Petitioner had been financially dependent on me throughout the period of our cohabitation in marriage. That I have always borne

the payment of school fees of our children and the recent payments made on the 9/8/2015 and 4/1/2016 could not have been made in anticipation of this suit, as I could not have had foreknowledge that the Cross Petitioner' intolerable conduct will re-occur or that the Cross Petitioner will attack me and willfully/forcefully move out of our matrimonial home on the 7/1/2016. That payment for our children school fees in Regent School, Maitama, Abuja were normally stated in the pupil's name. That most of the school fees were paid by me in dollars as the school had an excellent foreign exchange conversion policy allowing parents to pay the school fees in dollars. That even the receipt dated 9/7/2015 for the payment of N34,500 annexed to the Cross Petition as if she paid the money was actually based on the sum of N34,500 transferred by the Cross Respondent from my UBA

Account in favour of the Regent School by bank transfer on the 10/7/2015.”

Under cross examination, the Cross Respondent testified that he did not pay school fees for 2017, 2018 and 2019 because he was denied access to the children.

The Cross Petitioner on her part under cross examination testified thus:

“I tendered the school fees receipt but none bear my name. It bears the name of the child the fees are meant for. My signature is not on any of the receipts. There is nothing on the receipt to show who paid. We sign in the school at the point of collection of these receipts. I made enquiry, (not written) if the document where I signed could be given to me, but that was refused. The fees were paid by me.”

The burden of proof in this instance is again on the Cross Petitioner to prove her entitlement to these reliefs.

Exhibits A4 and A5 were tendered in support of the claim for school fees. Exhibit A5 contain two receipts admitted conditionally. The receipts are photocopies and no explanation was made as to the whereabouts of the original. As the relevant foundation was not laid, I adopt my earlier reasoning in this judgment and hereby expunge Exhibit A5 from the records of the Court.

For Exhibit A4 the bundle of receipts, the Cross Petitioner in her evidence under cross examination stated that there is nothing on the receipts to show who paid the fees. That the document which will show who paid is with the school. No attempt was made by the Cross Petitioner to subpoena any staff of the school to produce the document which may reveal the name of the parent who actually paid the school fees.

The fact that Exhibit A4 was admitted in evidence is not automatic proof of the evidence of payment of school

fees by the Cross Petitioner. The trite position of the law is that admissibility of evidence and evaluation of same are different compartments in a judicial proceedings. See Dalek (Nig) Ltd vs. Ompadec (2007) 7 NWLR (part 1033) page 402 at 441. The fact that a document has been admitted with or without objection does not necessarily mean that the document has established or made out the evidence contained therein, and must be accepted by the trial judge. It is not automatic. Admissibility of a document is one thing and the weight the Court will attach to the document will depend on the circumstances of the case as contained or portrayed in evidence. Reliance and weight are in quite distinct compartments in our law of evidence.... Per Tobi, JSC in Abubakar vs. Chuks (2007) 18 NWLR (Part 1066) page 386 at 403 - 404, Surakatu vs. Adekunle (2019) LPELR - 46412 (CA)

The Cross Petitioner has not debunked the assertion by the Cross Respondent that he had been the person

responsible for the payment of the school fees which he sometimes paid in dollars. This Court has noted that some of the claims for refund do not even reflect the amount on the receipts. For example, claim for the refund of £12,132.46 paid as school fees in London.

In this instance, I do not believe the Cross Petitioner when she said she was the one who had been paying the school fees of the children. Contrariwise, I believe the Cross Respondent when he stated *“that nobody gives his wife money and writes it down”*. I also believe that he provided the funds for the payment of school fees except for the period 2017 – 2019 which he did not pay. I say this because though the Cross Petitioner filed a Reply to the Cross Respondent’s Answer, no evidence was led on same. This Court however is quite aware that it is the duty of the Cross Respondent being the bread winner to cater for all the educational needs of his children. See Section 15(2) Child’s Right Act, (CRA) 2003 which states:

“Every parent or guardian shall ensure that his child or ward attends and completes his,

(a) Primary school education; and

(b) Junior secondary education.”

Therefore the relevant claims for refund of school fees for the period between 2017 – 2019 admitted not to have been paid by the Cross Respondent, will be granted as prayed. The claims are in reliefs G(g)(v) for N893,400.00 being school fees for the 1st child in 2017 and G(h)(ii) for N589,950.00 for the 3rd child also in 2017.

It is noted that School fees for 2018 and 2019 have not been claimed and this Court is confined only to the reliefs claimed. The decision of the Supreme Court per Tobi, JSC in A.G. Abia State vs. A.G. Federation (2006) 16 NWLR (part 1005) 265 is instructive:

“It is elementary law that a Court of law is confined to the relief or reliefs of the plaintiff. It does not go

outside the relief or reliefs to grant what the plaintiff does not ask. A Court of law can grant all the reliefs sought by the plaintiff. It can also grant part of the reliefs. But it cannot grant reliefs not sought by the plaintiff.”

A Judge is not a Father Christmas and as such cannot grant reliefs not sought. See Arab Contractors (O.A.O) Nig Ltd vs. Umanah (2012) LPELR – 7927 (CA), Makonjuola & anor vs. Balogun (1989) LPELR – 1827 (SC). All other reliefs for refund of school fees which are unsubstantiated are hereby dismissed.

Before I conclude this judgment, it is important for this Court to drum it into the ears of both parents that children are just a gift and trust given to them, and they both will be held accountable for this trust. When parents fulfill their responsibility, they will be free of the consequences. Parents are essentially responsible for the moral, physical,

social, mental and essential religious teachers of their children. It is my belief that no mother should be harmed through her child, and no father through his child.

In Williams vs. Williams (supra) Oputa JSC, opined–

“The divorce mentality...reveals an intrinsic consideration. As long as the marriage subsists no issue as to custody will arise. Both parents are ex debito justitia entitled to the love, affection and company of their children. That is their natural and moral right. These parents break up their marriage and start a fight to finish battle for that which was theirs as of right – the custody of children of the marriage. If all the time, energy, money and effort put in fighting custody cases are expended in saving the marriage, Nigeria will surely be better for that.”

Furthermore in Ajiboye vs. Ajiboye (2005) 2 SMC 1 at 21 – 22 Onnoghen JCA (as he then was) stated:

“Perhaps it is important to remind ourselves that children play no role in their parents’ decision to be married and bring them to the world, which decision is usually said to be based on love for each other. I agree that at times mistakes are made by the parties involved but it should not be the children that must suffer for it. I believe that matured and reasonable adults who decide to marry but later discover that they are incompatible ought to be encouraged to go their separate ways and start afresh without the extra luggage of bitterness and rancor which sometimes associate with prolonged divorce proceedings. I believe that partners who come together in love should part in peace and not in pieces moroso where there is an issue of the marriage. The child should be a unifying force, but

some parents use that as a weapon of warfare in the continuation of the bitterness resulting from a failed marriage...It is my view that we all owe a duty to the society to encourage reconciliation, peaceful co-existence or cordial relationship for a more accommodating future.”

Therefore the parties should not allow any of their skirmishes affect the wellbeing and emotional development of the children. For the children to be protected, they need good parental upbringing which will be a legacy worth investing. *A word is enough for the wise.*

In the light of the foregoing, I enter judgment for the Cross Petitioner in the following terms:

- 1) **The marriage solemnized on the 27th August, 2007, at the Abuja Municipal Area Council (AMAC) Marriage Registry, between Juliet Moghalu, the Cross Petitioner and Maduakonam Moghalu, the Cross**

Respondent, be and is hereby dissolved. A *Decree Nisi* shall issue to that effect.

2) Custody of the three children of the marriage namely:

(1) *Chukwudumeme Chukwuka Moghalu*

(2) *Somtochukwu Daniel Moghalu*

(3) *Chukwudubem Victor Moghalu*

Shall reside with the Cross Petitioner. When the children attain the age of 18 years, they are at liberty to live with any of the parents.

3) The Cross Respondent shall have SUPERVISED access to all the children twice a month (alternate Saturdays) for three (3) months between the hours of 12 noon to 4pm in the presence of an Officer from the Social Welfare Office, Abuja Municipal Area Council (AMAC) commencing Saturday 10/10/2020 to Saturday 19/12/2020.

- The Cross Respondent or his representative shall be responsible for picking the children from the Cross Petitioner and bring them back at the stated time, in company of the Welfare Officer.
- No party is allowed to travel with the children for the duration of this Order and pending its review.
- Both parties shall bear in equal parts the transportation cost/fare of the Officer.
- The Welfare Officer shall render a Report to the Court after the expiration of the period.

For reliefs 4, 5 and 6 the Cross Respondent has proposed to be solely responsible for the children's school fees and medical bills. To that extent therefore;

- 4) The Cross Respondent shall continue to pay in full the school fees of the three children as assessed, and as may be reviewed or required by their educational institution. This shall include cost of lessons, textbooks and other extra curricula activities, uniform, clothing and vocational activities of the children of the marriage.
- 5) It is further ordered that the Cross Respondent shall pay the cost of the specialist medical attention of the first child of the marriage Chukwudumeme Chukwuka Moghalu, and the other children of the marriage as may be required from time to time.
- 6) The claim for refund of medical bills and sums of money borrowed is dismissed.
- 7) The Cross Respondent shall refund to the Cross Petitioner the sum of N863,400 as stated in relief

- G(g)(v) and the sum of N589,950 in relief G(h)(ii) being school fees for 2017.
- 8) Eventhough the Cross Petitioner has not asked for maintenance funds for the children in terms of their feeding and clothing e.t.c, the Cross Respondent is at liberty to provide maintenance allowance for his children as he deems fit.
 - 9) The Cross Petitioner shall inform the Cross Respondent whenever she is travelling outside the country with the children.
 - 10) The Cross Respondent is hereby restrained by an order of perpetual injunction from harassing, beating or threatening the life of the Cross Petitioner, or in any way exhibiting any violent behaviour against the Cross Petitioner, the children or her domestic staff.

- The *Decree Nisi* shall NOT become absolute until all the arrangements regarding the children are put in place.
- Based on the Report from the Social Welfare Office, the Order for supervised access will be subject to review with a return date being 14/01/2021.

Hon. Justice M.A. Nasir

Appearances:

J.U.K. Igwe SAN – with him U.K. Ewurum Esq and Philip Francis Esq for the Cross Petitioner

Isaac Anumudu – with him Emmanuel Okorie Esq and Miss Chiamaka Anagu for the Cross Respondent

