IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY HOLDEN AT ABUJA

THIS THURSDAY, THE 9TH DAY OF JULY 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/GWD/PET/43/19

BETWEEN:

MRS. ANGELA AKOR IKWUJE ..... PETITIONER

AND

MR RAPHAEL AGADA IKWUJE ..... RESPONDENT

JUDGMENT

By a notice of petition dated 14th October, 2019, the Petitioner claims against the Respondents as follows:

1. **An Order of Dissolution of marriage contracted with the Respondent on 18th July, 2009 on the ground of cruelty; the said marriage has broken down irretrievably and that since the marriage, the respondent has behaved in such a way that the petitioner could not reasonably be expected to live with him.**

2. **An Order granting the custody of the Children of the marriage to the Petitioner.**

3. **An Order mandating the Respondent to provide for the upkeep of the Children by depositing a reasonable amount in a domiciliary account to be opened, for safe keeping till the Children attains the age of majority.**

Alternatively

An Order mandating the Respondent to make an annual deposit of a reasonable sum into the Registry of this Honourable Court for the educational and other needs of the Children of the marriage until the Children attain the age of majority.

From the records, the Respondent could not be served personally with the originating court process. The petitioner then brought an application for substituted service which was granted on 21st October, 2019.

The originating process was then duly served on Respondent on 7th November, 2019 together with a hearing notice. The matter then came up for hearing on 27th January, 2020. The Respondent was again not in court despite service of hearing notice on him.

The matter thereafter proceeded to trial. The petitioner testified in person and the only witness. The substance and summary of her unchallenged evidence is that she got married to the respondent on 18th July, 2009 and they were blessed with two Children, a boy and a girl born on 15th January, 2010 and 19th February, 2015. The marriage certificate of parties dated 18th July, 2009 was admitted in evidence as Exhibit P1. The marriage started on a good note even though she had problems with his relatives before the marriage who objected to their having a court supervised marriage. He however stood by her as she was then even five (5) months pregnant. They had a church wedding but that after the wedding the respondent stopped attending church. That she kept hoping he will change but he did not.

PW1 stated that at a point when Respondent got sick, he resorted to visiting herbalist and bringing home "strange things" saying it was a spiritual attack and he needs to fight them back. She counselled him that they should go to GOD but he refused. That whenever the issue of GOD comes up in the house, he usually gets angry and violently beats her and will leave the house.

PW1 further stated that sometime in 2010/2011, he was transferred briefly to Abuja and then Kano and will leave home for long without leaving money for food. That by 2016, the visits of respondent to herbalist became more frequent and

she reported the matter to his parents and her parents but his mother did not object to his visits to herbalist; that he was born into it.

That the Respondent told her that he will not stop her from going to church and that she should not stop him from practicing his own faith. That her father told him that if he knew he was a herbalist, he would have not given her hand in marriage to him. That the respondent then stopped talking to her for ten (10) months even though they were in the same house and this caused her to suffer depression and that she was emotionally down. She further stated that there was this night she had a headache and he told her to take panadol. She stated that she perhaps took an overdose but later in the night her situation deteriorated and she had to call her father to come and take her to the hospital but that he could not come because his car was bad. That her case was bad so she had to call on her neighbours to take her to the hospital. That the Respondent never came to check on her and that when he eventually came, he gave her N7, 000 only and left.

Furthermore that one day in 2017, she observed that her front hair was cut and when she complained, he asked her to leave the house. He then stopped buying her food or giving money for food. He will however buy foodstuff for himself, cook and eat with the kids and leave her alone. That she had no choice but to leave the matrimonial home in July 2017. That the respondent never called even when the topic of peace was raised. That he has refused to call her or even come to see his kids. That in 2018, a strange needle entered the leg of her son and he was taken to hospital and operated on. That the respondent refused to come when he was informed. She equally sent pictures of their son but he did not get in touch.

That she wants the court to dissolve the marriage, as parties have lived apart for nearly three (3) years now and grant her custody of the Children with an order of maintenance for the Children. She stated that the respondent is a businessman and supplies books to universities. That he was formally with Thermocool before he started his own business.

The court, upon application by counsel to petitioner, then gave a considered Ruling predicated on the peculiar facts of this case foreclosing the right of respondents to cross-examine and to defend the petition.

The court then ordered for the filing of final addresses. The Petitioner filed her address dated 10th March, 2020 and same was served on defendant together with a hearing notice on 16th June, 2020 vide proof of service filed by the bailiff of court on the same date. The respondent, again did not respond at all.

In the address, one issue was raised as arising for determination, to wit:

"Whether the petitioner is entitled to the reliefs sought on the evidence before this Honourable Court?"

Learned counsel to the petitioner then addressed the court urging the court to grant the petition since it is undefended and the marriage on the evidence has broken down with no desire on either side to continue with the relationship. The address forms part of the record of court and I shall where necessary in the course of this Judgment refer to it.

I only wish to briefly state here that the respondent from the records has had more than ample time to defend this action if he wanted. He never availed himself of the opportunity. The principle appears settled that while the right to be heard is of wide application and great importance in any well conducted proceedings, it is however a right that must be confined within circumscribed limits and not allowed to run wild. See **LONDON BOROUGH OF HOUNSLOW v. TWICKENHAM GARDEN DEVELOPMENT LIMITED (1970) 3 All ER 326 at 347.** A party certainly does not have till eternity to prove or defend any action as the case may be.

Having carefully considered the petition, the unchallenged evidence led and the address of counsel, the narrow issue is whether the petitioner has on a preponderance of evidence established or satisfied the legal requirements for the grant of this petition. It is on the basis of this issue that I would now proceed to consider the evidence and submissions of counsel.

ISSUE 1

Whether the petitioner has on a preponderance of evidence established/satisfied the legal requirements for the grant of the petition.

I had at the beginning of this judgment stated the claims of the petitioner. Similarly I had also stated that the respondent despite the service of the originating court processes and hearing notices did not file anything or adduce evidence in challenge

of the evidence adduced by petitioner. In law, it is now an accepted principle of general application that in such circumstances, the defendant is assumed to have accepted the evidence adduced by plaintiff and the trial court is entitled or is at liberty to act on the plaintiff's unchallenged evidence. See **Tanarewa (Nig.) Ltd. V. Arzai (2005) 5 NWLR (Pt 919) 593 at 636 C-F; Omoregbe v. Lawani (1980) 3-7 SC 108; Agagu v. Dawodu (1990) NWLR (Pt.160) 169 at 170.**

Notwithstanding the above general principle**,** the court is however still under a duty to examine the established facts of the case and then see whether it entitles the claimant to the relief(s) he seeks. I find support for this in the case of **Nnamdi Azikiwe University v. Nwafor (1999) 1 NWLR (Pt.585) 116 at 140-141** where the Court of Appeal per Salami J.C.A. expounded the point thus:

"The plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence... the mere fact that a case is not defended does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant…"

A logical corollary that follows the above instructive dictum is the attitude of court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. **The Supreme Court in Duru v. Nwosu (1989) 4 NWLR (Pt.113) 24** stated thus:

"**…a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory then he had not made out what is usually referred to as a prima-facie case, in which case the trial judge does not have to consider the case of the defendant at all."**

From the above, the point appears sufficiently made that the burden of proof lies on the plaintiff or petitioner in this case to establish her case on a balance of probability by providing credible evidence to sustain her claim irrespective of the

presence and/or absence of the defendant or respondent. See **Agu v. Nnadi (1999) 2 NWLR (Pt 589) 131 at 142.**

This burden or standard of proof required in matrimonial proceedings is also now no more than that required in civil proceedings. Indeed **Section 82 (1) and (2) of the Matrimonial Causes Act** (The Act) provide thus:

1) **For the purposes of this Act, a matter of fact shall be taken to be proved, if it is established to the reasonable satisfaction of the court.**

2) **Where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.**

Now in the extant case, the petitioner from her petition seeks for the dissolution of the marriage with respondent on the ground that the marriage has broken down irretrievably and essentially predicated the ground for the petition on that fact 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 was also further averred as a ground that due to this state of affairs, the Respondent left the matrimonial home sometime in July, 2017 and that there has been no communication between parties since then. It is doubtless therefore that the petition was brought within the purview of **Section 15 (1) (c) and (e) of the Act.** It is correct that **Section 15(1) of the Act** provides for the irretrievable breakdown of a marriage as the only ground upon which a party may apply for a dissolution of a marriage. The facts that may however lead to this breakdown are clearly categorised under **Section 15(2) (a) to (h) of the Act.** In law any one of these facts if proved by credible evidence is sufficient to ground or found a petition for divorce.

Now from the uncontroverted evidence of petitioner before the court, I find the following essential facts as established, to wit:

1. That parties got married on 18th July, 2009 vide Exhibit P1.

2. That the Petitioner left the matrimonial home sometime in July 2017.

3. That since 2017, a period of nearly three (3) years now, cohabitation has effectively ceased between parties.

4. That even before petitioner was forced to leave the matrimonial home, the respondent completely abandoned his responsibilities as a husband and father to his Children as he has refused to show love, affection and care since 2015.

5. That the Respondent has behaved in an intolerable manner by the violent beatings and untoward behaviour which has caused her to suffer mental torture and depression as a result which she cannot any longer live with him in peace and harmony.

6. That the Respondent engages in practices and beliefs by visiting "herbalist" and "spiritualist" which are all incompatible with her Christian faith.

7. That the Respondent has equally abandoned his responsibilities to the Children as he has refused to come and see them or attend to their physical, mental and emotional needs.

8. That the Respondent has since moved on with his life independent of the petitioner.

The above pieces of evidence and or facts have not been challenged or controverted in any manner by the respondent who was given all the opportunity of doing so. The law has always been that where evidence given by a party to any proceedings is not challenged by the opposite party who has the opportunity to do so, it is always open to the court seize of the proceedings to act on the unchallenged evidence before it. See **Agagu v. Dawodu (supra) 169 at 170, Odunsi v. Bamgbala (1995) 1 NWLR (Pt.374) 641 at 664 D-E, Insurance Brokers of Nig. V. A.T.M Co. Ltd. (1996) 8 NWLR (Pt.466) 316 at 327 G-H.**

This is so because in civil cases, the only criterion to arrive at a final decision at all time is by determining on which side of the scale the weight of evidence tilts. Consequently where a defendant chooses not to adduce evidence, the suit will be determined on the minimal evidence produced by the plaintiff. See **A.G Oyo State**

v. Fair Lakes Hotels Ltd. (No 2) (1989)5 NWLR (Pt .121) 255, A.B.U. v Molokwu (2003)9 NWLR (Pt.825) 265.

Indeed the failure of the Respondent to respond to this petition confirms in all material particulars the fact that the marriage has broken down irretrievably and that they have lived apart now for nearly 3 years.

By a confluence of these facts, it is clear that this marriage exists only in name. As stated earlier, any of the facts under **Section 15 (2) a-h** (supra) if proved by credible evidence is sufficient to ground a petition for divorce. The established fact of living apart for up to 3 years show clearly that this marriage has broken down irretrievably and parties have no desire to continue with the relationship; this fact alone without more can ground a decree of dissolution of marriage. If parties to a consensual marriage relationship cannot live any longer in peace and harmony, then it is better they part in peace and with mutual respect for each other.

Relief (1) on the petition clearly has considerable merit and is granted.

Relief (2) seeks for the custody of the Children of the marriage in favour of the petitioner.

Now in law particularly in proceedings relating to custody, guardianship, welfare etc of Children of a marriage, the interest of the Children is of paramount consideration to the court and whatever order a court makes is guided by these considerations and no more. See **Section 71 of the Act** which provides guidelines the courts are expected to follow in proceedings in respect of custody of Children of a marriage.

It is therefore incumbent on parties seeking custody to help the court in the discharge of this delicate and sensitive responsibility to clearly plead and lead credible evidence on what arrangements they have that will further the physical and mental well-being of the Children.

Now in this case flowing from our consideration of Relief (1), there is again nothing on the other side of the aisle or from the Respondent to help court determine who has the better arrangement for the two Children of the marriage.

In determining the issue of custody of the Children of a marriage, the welfare of the child or Children is the first and foremost of all considerations and the court

usually in such delicate matters, does not proceed on the assumption that the claims of either party is superior or inferior.

Now in this case, on the unchallenged evidence of petitioner, the two Children of the marriage now ten (10) and five (5) years respectively have always been in the custody of petitioner. Indeed on the evidence, sine she left the matrimonial home in 2017, she has solely provided for the Children. She has been responsible for the clothing, accommodation, education and their medical needs. In her proposed plan of arrangement for the Children, she has advanced the position that she will continue to take care of the educational, medical and feeding needs of the Children as she has always done already. She however expects some contribution from Respondent towards the welfare and educational needs of the Children.

Now the supposition is reasonable that the best arrangement for the welfare of any child or Children should be with both parents. In this case, it is however only one of the parents, the petitioner who on the evidence that has provided this fundamental parental need for years for the two Children. It does not appear to me fair or reasonable to disturb this arrangement.

On the evidence, there is nothing before the court impugning the conduct of the petitioner in the exercise of care, control and supervision of the Children or indeed anything disqualifying petitioner from been awarded custody of the Children. In the circumstances, **Relief (2)** has merit and is granted.

The final **Relief (3)** is for maintenance and it was framed or couched in the alternative. In law where there is an alternative claim, the party can rely on either the main claim or the alternative. The court is not shut-out from considering and deciding on the alternative claim because the main claim is not established. The contrary is infact the case, that is, that if and where the main claim fails however miserably, the alternative claim will be considered and the party can succeed on it. See **Ibe Kendu V Ike (1993) 7 SCNJ 50.**

Now for the purposes of an award of maintenance under matrimonial proceedings, the provision of **Section 70(1) of the Matrimonial Causes Act** provides instructive guidelines to wit:

> ***"Subject to this section, the court may in proceedings with respect to the maintenance of a party to a marriage, or of Children of the***

marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper having regards to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances."

The above provision appears to me clear. The court in proceedings with respect to the maintenance of a spouse or Children of a marriage has the discretionary powers to make such orders as it considers proper having regard to the means, earning capacity, conduct of parties to the marriage and all other relevant circumstances:

As a necessary corollary to the above, these factors or relevant circumstances which the court is bound to consider in making an award of maintenance must necessarily be predicated or premised on the pleadings and evidence of parties at the trial.

Now in this case, there is no pleading of these relevant facts and no premise was situated by the petitioner to provide a firm basis to grant the order of maintenance sought for the upkeep of the Children.

All that **paragraph 16** of the petition says is that the Respondent is expected to set up an educational fund for the Children as his contribution to the welfare and well being of the Children. **Relief (3)** then seeks or prays for the order of maintenance. No more. Apart from the evidence of petitioner that respondent is a business man who used to supply books to Universities, there is nothing in the petition or evidence to show what for example is the means and earning capacity of the Respondent.

In law, the "means" of parties on the authorities is not construed restrictively. It has been held to cover capital assets like buildings, equity and shares in a company together with contingent and prospective assets. It also includes pecuniary resources of the parties whether capital or income and whether actual or contingent. See the case of **ROGERS v. ROGERS (1962) 3 FLR 398** referred to by the learned author, **Professor E. I. NWOGUGU** in his book, **FAMILY LAW IN NIGERIA (Revised edition) at Page 242.**

Similarly, earning capacity of a spouse refers not only to what he or she infact earns but the potential earning capacity if that spouse obtained suitable

employment. All these relevant factors are missing in the extant petition. There is also nothing either in the pleadings or evidence on the background and standard of life which the petitioner previously maintained before she parted company with the Respondent etc. All these lapses are fundamental and would obviously affect whatever order of maintenance the court in the exercise of its discretion would ultimately make.

At the risk of sounding prolix, apart from the bare viva voce evidence of petitioner that respondent is a business man, no where was the necessary particulars to do with respondent's means or his earning capacity pleaded or evidence led thereupon. These in the court's considered opinion are material facts which ought to have been properly pleaded in the petition and then established. On the authorities, a material fact is one which is essential to the case without which it cannot be supported. In other words that which tends to establish any of the issues raised. See **WEST AFRICAN PORTLAND CEMENT PLC v MAYINAT ADEYERI (2003) 12 NWLR (PT 835) 317 AT 533.**

It is important therefore to state that while any pleading is not expected to plead evidence, it is expected that all material facts that a party relies on for his claim must be pleaded because a party is only allowed to establish what he pleaded and to obtain only such relief that was prayed for on the basis of his pleadings and creditably established by evidence. See **AJIKANLE v. YUSUF (2000) 2 NWLR (Pt 1071) 301.**

Notwithstanding the obvious flaws in the case of the petitioner as regards the fact that no satisfactory evidence of Respondents means has been adduced in this case, I however recognise the primary responsibility of a father to maintain his Children. In **NANNA v. NANNA (2006) 3 NWLR (pt 966)1 AT 41 B-C** the Court of Appeal stated as follows:

> ***"A man has a common law duty to maintain his wife and his Children and such a wife and child or Children then have a right to be so maintained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and child and may by law be compelled to find them necessaries as meat, drink, clothes etc suitable to the husband's degree, estate or circumstance."***

I am therefore here bound to exercise my discretion judicially and judiciously based clearly on virtually non-existent materials. As stated earlier, there is nothing before me to show the standard of life parties maintained before they parted company. It cannot however be right or fair that the Respondent has abandoned, as it were, his duties towards his wife and Children since 2017 and left the upkeep of his Children to only the petitioner. Whatever the circumstances that led to the failure of the marriage, it is imperative that the Respondent as the father is made to contribute towards the maintenance of his Children. The only challenge here as repeated severally is the absence of a material template to situate the order or orders to make.

The question that has caused me considerable difficulties, is whether the court should simply take the relief as abandoned in the absence of materials to determine a fair order of maintenance to make.

If the court takes this position, the question then is this: will justice have been served in such situation bearing in mind the reality of the existence of the Children, product of the union?

I therefore incline to the view that the court makes or grants an order of maintenance however minimal as a recognition of the right of the Children to be taken care of by their father. That for me is the justice for this Children of the failed marriage.

On the whole, having regard to what is fair and equitable, particularly the difficult economic realities of the present day and indeed also the competing societal realities and expectations of the African Society and or the extended family responsibilities which are all factors that can conveniently come within the purview of "all other relevant circumstances" under **Section 70(1) of the Act**, I am of the considered opinion that the sum of **N20, 000** monthly is reasonable for the maintenance of the two Children of the marriage. With the success of the main arm of the relief on maintenance, there will be no need to consider the **alternative arm** which in substance sounds the same with the main relief on maintenance.

In the final analysis and in summation, having carefully evaluated the petition and the unchallenged evidence, I accordingly make the following orders:

1. **An Order of Decree Nisi is granted dissolving the marriage celebrated between Petitioner and Respondent on 18th July, 2009.**

2. **An Order that the two Children of the marriage shall remain in the custody of the petitioner.**

3. **An Order that the Respondent shall contribute a sum of N20, 000 (Twenty Thousand Naira) monthly towards the maintenance of the Children of the marriage until the age of 18 and to pay the school fees and or provide for the education of the Children and this will be by way of settlement of bills to be presented by Petitioner as and when due.**

4. **No order as to cost.**

……
Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. **Florence F. Aremu, Esq., for the Petitioner.**