IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 4TH DAY OF NOVEMBER, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: PET/018/2019

BETWEEN:

GIFT CHIDUBEM AHIZE ---- PETITIONER

AND

DONATUS KENECHUKWU AHIZE ---- RESPONDENT

JUDGMENT

The Petitioner got married to the Respondent on 14/8/2009 at the Bwari Area Council Marriage Registry and a certificate of marriage was issued to that effect. The certificate was tendered and admitted in evidence as Exhibit A. The parties cohabited after the marriage at Block 122, Flat 2, Phase 2, Site 2, Kubwa, Abuja. The marriage was blessed with children, they are:

1. Malvin Ahize (male, 13 years)

2. Jason Ahize (male, 9 years)
3. Princess Bella Ahize (female, 8 years)
4. Prince Ahize (male, 6 years)

The Petitioner testified that she had been solely responsible for the upkeep, maintenance and education of the children all through the marriage. She tendered receipts to evidence the payment of school fees as Exhibit A1. It is the Petitioners further testimony that it was the continuous deprivation, wanton abuse and lack of love and dishonesty suffered at the hand of the Respondent, which she found intolerable to live with. And in 2015, cohabitation was brought to an end.

The Petitioner has therefore filed this Petition on the ground that the marriage has broken down irretrievably on the fact of living apart for more than 4 years preceding the presentation of this petition. She prayed this Court for the following reliefs:

"1. A decree of dissolution of marriage between the Petitioner and Respondent contracted on the 14/8/2009 at Bwari Area Council Marriage Registry, Abuja.

2. *Custody of the children of the marriage be granted to the Petitioner.*
3. *The Respondent be granted access to the children without any hindrance, at will or as may be determined by the Court.*
4. *And any order or further order as the Court may deem fit to make in the circumstance."*

The Respondent was served with the Notice of Petition and hearing notice on the 22/9/2020 but he elected not to file any process in response to the Petition or cause an appearance to be entered on his behalf. The Respondent was thus foreclosed from cross examination and defence.

Learned counsel to the Petitioner **Gabriel Eseghine Esq** waived his right to address the Court and urged the Court to proceed to enter judgment for the Petitioner in the absence of any defence from the Respondent. The case was thus adjourned for judgment.

Basically, in divorce proceedings, the onus of proof with regards to the facts set out in Section 15 (2), (a) – (h) of the Matrimonial Causes Act, lies on the Petitioner. Success or otherwise of the Petition depends largely on how diligently and adequately this burden is discharged. Failure in this regard will entail a dismissal of the Petition. See **Anioke vs. Anioke (2011) LPELR – 3774 (CA).** Thus, by virtue of the said provision of the law, a Petitioner at the hearing in a matrimonial causes proceeding, must satisfy the trial Court of the fact or facts alleged or relied upon.

Again, by virtue of Section 82 (1) and (2) of the said Act, such matter or fact shall be established to the reasonable satisfaction of the Court. Put differently, the

matter or fact as alleged shall be sufficiently proved once the Court is reasonably satisfied of the existence of the ground, fact or matter as alleged . It is noteworthy, that the phrase reasonable satisfaction, has not been defined in the Act. Nevertheless, it connotes adducing all available relevant and adequate evidence in support of the averments before the trial Court, reasonably and satisfactorily too. See Anioke vs. Anioke (supra).

Section 15(1) of the Matrimonial Causes Act provides:

> *"A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the Court by either party to the marriage upon the ground that the marriage has broken down irretrievably."*

The Petitioner has relied on Section 15(2)(f) of the Matrimonial Causes Act. The section provides:

"15(2) The Court hearing a petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievable if, but only if, the petitioner satisfied the Court of one or more of the following facts.

f. That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition."

On when parties to a marriage will be treated as living apart, Section 15(3) of the Matrimonial Cause Act provides:

"For the purposes of Subsection (2)(e) and (f) of this section the parties to a marriage shall be treated as living apart unless they are living with each other in the same household."

For dissolution of marriage pursuant to Section 15(2)(f) of the Matrimonial Causes Act, the paramount

consideration is for the reasonable satisfaction of the Court by the Petitioner of the fact relied upon. The evidence of the Petitioner is that parties have lived apart for 4 years now, since 2015. This Petition was filed on the 23/10/2019 a period of more than 3 years immediately preceding the presentation of this petition. Within this period of living apart, it is evident that a lot of water has passed under the bridge, and there is no evidence of any attempt at reconciliation. It is paramount in situations like this to consider the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. See **Enekebe vs. Enekebe & anor (1964) LPELR – 25146 (SC).**

It is the law where it is established that parties have lived apart for more than 3 years immediately preceding the

presentation of the Petition, the Court will hold a non fault position. See Agunwa vs. Agunwa (1972) 2 E.C.L.R. 20 at 22, McDonald vs. McDonald (1964) 6 FLR 58. In the circumstance, I am satisfied that this petition succeeds pursuant to Section 15(2)(f) of the Matrimonial Causes Act.

The Petitioner has prayed for custody of the children. In issues relating to custody, the welfare of the children is of paramount importance and a vital factor, though not alone, to be taken into account. See Nana v Nana (2006) 3 NWLR (966) 1; Williams v Williams (1987) 2 NWLR (54) 66; Odogwu v. Odogwu (1992) 2 NWLR (225) 539. In deciding what the welfare of a child is, factors which have been considered relevant by the courts include:-

a) degree of familiarity between the child and each of the parents respectively,
b) the amount of affection between the child and each of the parents,

c) the respective income and position in life of each of the parents

d) the arrangements made by the parties for the education of the child

e) the fact that one of the parents now lives as man and wife with a third party who may not welcome the presence of the child,

f) the fact that young children should as far as practicable, live and grow up together

g) the fact that in cases of children of tender ages should, unless other facts and circumstances make it undesirable, be put under the care of the mother,

h) the fact that one of the parents is still young and may wish to marry and the child may become an impediment.

These factors are only some to be considered and so each case is to be decided on the peculiar facts and circumstances placed before the court in the proceedings.

See Eluwa vs. Eluwa (2013) LPELR – 22120 (CA), Lafun v Lafun (1967) NMLR, 401, Alabi v Alabi (2007) 9 NWLR [1039) 297; Afonja v Afonja (1971) 1 U.I.L.R. 105.

The Petitioner has testified that she has been solely responsible for the maintenance and education of the children of the marriage all through the marriage and the children are presently schooling and residing with her in the United States of America. The evidence of the Petitioner is not challenged or controverted by the Respondent. The law is that in such situation, minimal proof is required. See Ajidahun vs. Ajidahun 1 SMC 24 at 28.

Certainly it will not be out of place to state that there already exist a high degree of familiarity and affection between the children and their mother, the Petitioner. There is no evidence from the Respondent to be put on the other side of the scale of justice. It is preferable in my view for the children to grow up together and bond as siblings under the care of their mother, the Petitioner. This is

further considering the fact that they are minors and the presumption of law that they will be better off with the mother enures in the Petitioner's favour.

It is noted that the Petitioner is not averse to unhindered access given to the Respondent. This relief will thus be granted bearing in mind that the right of access is a basic right of the child as against that of the parents.

In the circumstance, the marriage between the Petitioner and the Respondent be and is hereby dissolved. A *Decree Nisi* shall issue to that effect. It shall become absolute after the expiration of three months.

The Petitioner shall have custody of the four children of the marriage, while the Respondent shall have unfettered access to the children.

Signed

Honourable Judge

Appearances:

Gabriel Esegine Esq with him Usman Joseph Esq – for the Petitioner

Respondent absent and not represented