IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 11TH DAY OF JANUARY, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: PET/204/2014

BETWEEN:

MR. MARCEL INNOCENT MGOGBEHI ---- PETITIONER

AND

MRS. MARY OMOYE AKHIGBE ---- RESPONDENT

JUDGMENT

The Petitioner filed this Petition on the 4/8/2014 praying this Court for decree of dissolution of marriage on the grounds that the marriage has broken down irretrievably in that the parties have lived apart for more than 3 years immediately preceding the presentation of this petition. On the child of the marriage, the Petitioner prayed for an order that the child is entitled to monthly and holiday visits to him and he shall take custody of the child upon completion of her primary school education.

The Petitioner an Engineer and public servant got married to the Respondent Mrs. Mary Omoye Akhigbe on the 25/7/2009 at St. Mathews Anglican Church, Maitama, Abuja. The marriage is blessed with one child i.e. Miss Nmachukwu Marcel Ngogbehei born on the 9/12/2009.

Upon receipt of the Petition, the Respondent filed an Answer and Cross Petition praying for the following reliefs:

"1. A decree of restitution of conjugal rights between the Respondent/Cross Petitioner and the Petitioner/Cross Respondent.

2. An order directing the Petitioner/Cross Respondent to pay on monthly basis the sum of N250,000.00 (Two Hundred and Fifty Thousand Naira) for upkeep of the child.

3. An order directing the Respondent to pay to the Petitioner the sum of N100,000.00 (One Hundred

Thousand Naira) on monthly basis for her upkeep including feeding and general maintenance allowance.

4. *An order directing the Petitioner to pay the sum of N5 Million to the Respondent/Cross Petitioner for her to purchase back the properties that the Petitioner took to unknown destination."*

The Petitioner in turn filed an Answer to the Cross Petition on the 16/3/2017. With issues thus joined, the Petitioner testified on the 17/5/2016 and tendered the following documents:

- Certificate of marriage from the Registry and another from the Diocese of Abuja, Anglican Communion marked as Exhibits A and A1.
- Standing Order by the bank and the Respondents counsel marked as Exhibit A2.

The Petitioner was not cross examined by the Respondent who repeatedly absented herself from Court

and had no legal representation. The Respondent was eventually foreclosed from cross examining the Petitioner and the case was adjourned for defence.

The Respondent testified in defence on the 27/6/2018 and tendered two documents. They are certificate of marriage marked as Exhibit D and a letter dated 24/5/2012 marked as Exhibit D1. The Respondent was duly cross examined.

At the close of evidence, learned counsel to the Respondent D.A. Momoh Esq filed the Respondent's written address dated 29/9/2020. He formulated a sole issue for determination which is:

"Whether the Respondent is entitled to the claims before this Court."

On his part Wilson E. Ivara Esq filed the Petitioner's written address dated 19/5/2020 and formulated two issues for determination. The issues are:

"1. Whether the marriage between the Petitioner and the Respondent has broken down irretrievably.

2. Whether the Petitioner is entitled to the grant of custody of the child (after primary school) of the marriage and the entire reliefs sought."

Marriage is the foundation of a stable society. It is the nucleus of society in that it is the families that make the society. The policy of the law therefore is to preserve the institution of marriage. That is why marriage will not be dissolved on agreement of parties to it. A decree of the dissolution of marriage would therefore only be granted if the Petitioner has proved that the marriage had broken down irretrievably and that the Petitioner has successfully proved one of the facts as provided under Section 15(2) (a – h) of the Matrimonial causes Act. See <u>Olabiwonnu vs. Olabiwonnu (2014) LPELR – 24065 (CA)</u>

The Petitioner in this instance relied on Section 15(2)(f) of the Matrimonial Causes Act which provides thus:

"15(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:

(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."

The evidence of the Petitioner in support of the above fact is that after the marriage parties cohabited at AMAC Estate, along Airport Road, Abuja. The Petitioner then went ahead to narrate series of events that transpired during the marriage for which he felt his life was in danger. He narrated an incident when he woke up one night and saw

the Respondent standing over him with a knife. It was her mother who accosted her from behind and collected the knife. He also narrated an incident when the Respondent alleged that her money was stolen and she accused the Petitioner's mother and sister of stealing the money. This resulted in an altercation that he had to slap the Respondent and locked her in her room. He eventually opened the room when she started banging on the door. The Respondent then got annoyed and started pouring water around and smashing the glass. She said the Petitioners siblings must leave the house or else she would destroy everything. She began to break plates and threatened to burn down the house. He stepped out briefly for 20 minutes only to return and saw the curtains on fire.

After so much drama and fights, he decided to leave the house because the landlord had given him quit notice to pack because they had become nuisance to other tenants. Cohabitation finally came to an end in November,

2010 when the Petitioner left the matrimonial home. He then rented an apartment for the Respondent because of the child. Parties have lived apart since then.

The Petitioner was not cross examined, therefore the testimony of the Petitioner remained unchallenged and uncontroverted. Infact the Respondent during cross examination admitted that the parties have lived apart for up to 7 years now.

Living apart is a state of affairs to establish which it is in the vast generality of cases arising under necessity to prove something more than that the husband and wife are physically separated. For that vast generality, it is sufficient to say that the relevant state of affairs does not exist while both parties recognize the marriage as subsisting.

In Section 15(3) of the Matrimonial Causes Act it is stated as follows:

"For the purpose 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."

Living apart begins to count from the date that one party recognizes and begins to treat the marriage and cohabitation as ended. See Santos v. Santos [1972] Fam. 247, Sullivan v. Sullivan (1958) NZLR 912.

The law is that the provision is mandatory and the Court has no discretion to exercise. The section has the factor of absence of fault element characteristics of other matrimonial offences. Such situations are such that the Court is not called upon to make enquiries as to who is responsible for the present state of affairs. Who among the parties is guilty for bringing about the manifestation of the present state of affairs between the parties.

According to the court in Pheasant vs. Pheasant (1971) 1 All ER page 587, separation or living apart "is

undoubtedly the best evidence of breakdown and the passing of time, the most reliable indication that it is irretrievable".

The law behind the Section 15(2)(f) of the Act as far as the living apart is concerned is not interested in right or wrong or guilt or innocence of the parties. Once the parties have lived apart, the Court is bound to grant a decree. See Omotunde vs. Omotunde (2000) LPELR – 10194 (CA).

I must add that it is immaterial who has between the parties caused them to live apart as it seems to me that Section 15(2)(f) of the Matrimonial Causes Act does not permit the Court to go into a fault-finding expedition. See Uzochukwu vs. Uzochukwu (2014) LPELR – 24139 (CA), Ibeawuchi vs. Ibeawuchi (1974) UILR (103) 67 and Orugoh vs. Orugoh (1974) 4 UILR (1) 120.

This Court therefore has no other discretion on the matter than to dissolve the marriage pursuant to the provision of Section 15(2)(f) of the Matrimonial Causes Act.

Once there is evidence that the parties have lived apart for a continuous period of three years, there is a strong and irrefutable presumption that the marriage has broken down irretrievably. All this goes to one thing, parties are not interested in the continuation of cohabitation and have presented themselves to the Court for a formal separation by law.

What better evidence can be shown of the complete death of a marriage along with all its responsibility, love and affection than the passing of time, without physical cohabitation. I hold therefore that the Petition succeeds pursuant to Section 15(2)(f) of the Matrimonial Causes Act. I therefore order that a decree Nisi for the dissolution of this marriage should issue. It shall become absolute after three months from today.

As for the reliefs relating to the child of the marriage, the Petitioner prayed for an order that the child spends monthly and holiday visit with him. He testified that he lives

in a 3 bedroom apartment with his Aunty who is a nurse, and the child will properly be taken care of. The Respondent did not challenge the evidence of the Petitioner in respect of the above. The right to access of a child to both parents is a right that cannot be interfered with by the Court or any person or organization.

It should be borne in mind that in issues relating to children, the paramount consideration is the best interest of the child/ren. It appears that the Respondent who has custody of the child is not averse to the monthly visits and holidays with the Petitioner. In order to know and bond with her father, the Petitioner, the child should indeed be encouraged to visit him and spend some part of her holidays with him. The above shall continue unhindered until the child is of age and mature enough to choose where she wants to stay.

Now to the Cross Petition. It is pertinent to state that the first relief for restitution of conjugal rights has been

overtaken by events due to the success of the petition and the finding that the marriage had broken down irretrievably.

The Cross Petitioner has prayed for monthly allowance of N250,000 for the upkeep of the child. The Respondent testified that the Petitioner and her family had been supportive with the upkeep of the children, eventhough she shoulders most of the responsibility having been employed and earning N45,000 monthly. Under cross examination, she stated that she did not know the grade level of the Cross Respondent neither did she have a breakdown of how much she spends every month.

The Petitioner/Cross Respondent in his evidence testified that he has placed a standing order with his bank for the monthly transfer of N20,000 to the Cross Petitioner for upkeep of the child. He also pays the child's school fees, medical bills and all her requirements. That the child is now in JSS, 2. He added that he earns between N100,000

and N200,000 depending on what comes his way. He has pledged to continue to provide for the child. The Cross Petitioner did not deny the fact that the Cross Respondent has been paying the child's school fees, medical bills and other requirement, as well as receiving monthly allowance from the Cross Respondent despite the breakdown of cohabitation.

The law is that every child has the right to maintenance by his parents or guardians in accordance with the extent of their means, and the child has the right, in appropriate circumstances, to enforce this right in the Family Court. See Section 14(2) of the Child's Rights Act, 2003.

In the circumstance, the Cross Respondent having been active in the provisions of maintenance for the child, shall continue to do so. The Cross Petitioner has not successfully satisfied this Court that the Cross Respondent has the means to pay the sum of N250,000 monthly maintenance as claimed, eventhough he himself placed his

monthly earning between N100,000 to N200,000. Moreover, it will be outrageous to strip the Cross Respondent dry of all his earnings because he has a child. He also has his life to live and has his own needs as a human being. In the circumstance, I make an order that the Respondent shall pay the sum of N50,000.00 (Fifty Thousand Naira) Monthly for the upkeep and maintenance of the child and he shall continue to provide for the education and medical needs of the child when the need arises.

The Cross Petitioner had informed this Court that she is gainfully employed and earns about N45,000 monthly. As the Petitioner/Cross Respondent is charged with the responsibility of maintaining the child and paying all school and medical bills, the Cross Petitioner can use her income to maintain and take care of herself. The claim for N100,000 maintenance allowance is thus refused.

For the N5 Million for the Cross Petitioner to purchase back her properties that were taken by the Cross Respondent, the Cross Petitioner testified under cross examination that she did not have any receipt of the items that were taken, neither did she have a list of the items that were taken by the Cross Respondent. The relief is not proved and it is hereby refused.

On the whole, the Petitioner succeeds and the marriage between the Petitioner and Respondent is hereby dissolved put to Section 15(2)(f) and a decree nisi shall issue. It shall become absolute upon the expiration of three months from today.

Signed

Honourable Judge

Appearances:

W.E. Ivara Esq – for the Petitioner

D.A. Momoh Esq – for the Respondent