IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT MAITAMA ABUJA

DATE: 20TH DAY OF JANUARY, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 5
SUIT NO: PET/267/2017

**BETWEEN:**

MRS. OLAYEMI ECHE ---- PETITIONER

**AND**

MR. HARRISON ECHE ---- RESPONDENT

# JUDGMENT

The Petitioner Mrs. Olayemi Eche filed the instant petition on the 12th June, 2017 seeking for dissolution of marriage to the Respondent Mr. Harrison Eche celebrated on the 19th December, 2002 at the Abuja Municipal Area Council, Marriage Registry Abuja. The Petitioner also prayed this Court for an order granting her access to the children of the marriage.

From her pleadings, the Petitioner has relied on three grounds in presenting this petition which are: unreasonable

behavior, living apart for continuous period of two years and desertion by the Respondent.

Upon service on the Respondent of the Notice of Petition, the Respondent filed his Answer to the Petition on the 5th December, 2017.

The Petitioner testified on the 19th February, 2018. Her evidence in support of the petition is that immediately after the marriage their problem started with the Respondent. She testified that the Respondent beat her on several occasions that she could not concentrate at work. The Petitioner stated that she is separated with the Respondent and since 2nd July, 2015 they have not lived together as husband and wife.

She further stated that their marriage is blessed with three children, namely:

i. Deborah Amarachukwu Eche born on the 27th June, 2003,

ii. Justus Nkechukwu Eche born on the 16th March, 2005,

iii. Joshua Eche born on the 22nd January, 2008.

The Petitioner finally stated that she does not want the custody of their children, but only prayed this Court to grant her access to the children of the marriage.

Under cross-examination, the Petitioner confirmed that she has been staying away from the Respondent since she was transferred to Lagos but she always visits her children anytime she came to Abuja. She reiterated the fact that she is tired of the union and want the marriage to be dissolved.

On his part, the Respondent testified on the 20th November, 2019 as DW1. DW1 denied ever maltreating the Petitioner who is the mother of his children. The Respondent stated that he received the news of this divorce proceeding initiated by his wife with surprise. He further testified that on the fateful Thursday when he came back

from church his children ran to him and were asking whether he saw their mum. That when he entered he met the children crying and they told him that mummy came together with another woman and they packed all her properties.

It was not until 10.00pm that day that the Respondent received a message from the Petitioner saying that she is sorry for not informing him earlier that she was on her way to Lagos. According to the Respondent that was the last time they lived together as husband and wife. That he has made several attempts to reconcile with the Petitioner which were all in vain.

The Respondent finally stated that he is not in support of this divorce proceeding, but urged this Court to save their marriage or else let nature take its course.

Learned counsel to the Petitioner informed the Court that he was not cross examining the Respondent, thus DW1 was discharged.

At the close of evidence parties were directed to file their final written addresses. **Chikezie Uwakola Esq** filed the Respondent's written address dated 20/1/2020. Counsel submitted that the onus of proof is on the party that alleges. That the Petitioner alleged that the Respondent was in the habit of ill-treating, battery and abusing her but without any form of corroboration. He added that not only Section 15(2)(e) of the Matrimonial Causes Act but also Section 15(2)(f) of the Act was proved by the Respondent. On the issue of the custody of the children, counsel submitted that the Respondent has been in custody of the children and wishes to continue to do so, as the Petitioner has been coming to the Respondent's residence to visit the children without obstruction which she confirmed in her

evidence. Reference was made to **Omotunde vs. Omotunde (1) SMC.**

**Chinazakpere E. Enwere Esq.** filed the Petitioner's written address on 20th February, 2020 and Counsel formulated a sole issue for determination as follows:

> *"Whether the Petitioner has proved that the marriage between the Petitioner and Respondent have broken down irretrievably by proving facts to show that, the Respondent has behaved in such a way that the Petitioner cannot be reasonably expected to live with the Respondent, the Respondent has deserted the Petitioner for a continuous period of at least, one year immediately preceding the presentation of the petition and that the Petitioner and the Respondent have been living apart for a continuous period of two years immediately preceding the presentation of the petition."*

Generally, for every petition for dissolution of marriage to succeed, the Petitioner must plead and prove that the marriage has broken down irretrievably, the Petitioner would then proceed to give evidence of any of the facts contained in Section 15(2)(a)-(h) of the Matrimonial Causes Act 1990. See: **Ekerebe vs. Ekerebe (1999)3 NWLR (Part 596) at 514.**

One of the grounds relied upon is, unreasonable behavior which 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. This ground is provided for in 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 respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent."*

From the above provision therefore, it is not sufficient to adduce evidence showing that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The Court has the onerous duty to consider the matrimonial history to come to a conclusion, while analysing the conduct that is complained of, whether same is grave and weighty enough to warrant the Court holding the marriage to have broken down irretrievably. See Livingstone - Stallard vs. Livingstone - Stallard (1974) 2 All E R page 766 at 771, Nanna vs. Nanna (2006) 3 NWLR (part 966) 1, Katz vs. Katz (1972) 3 All ER page 219.

The provision has two separate requirements. Firstly, the Petitioner has to establish the fact that the Respondent has behaved in a particular manner. Secondly, the Court has

to consider whether, from the conduct the Respondent complained upon, it will be reasonable to expect the Petitioner to live with the Respondent.

In the instant case, the only evidence pointing at unreasonable behavior is the testimony of the Petitioner to the effect that right from day one the marriage has been a disaster. She further testified that the Respondent beat her on several occasions to the point that she cannot concentrate at work. That was the only evidence relating to unreasonable behavior and nothing more.

The Respondent on the other hand, testified that he had never maltreated the Petitioner. That he cannot maltreat the woman that gave birth his children. The Respondent was not cross-examined by the Petitioner though she had opportunity to do so. The Respondent's evidence therefore remains valid and uncontroverted.

Having said that, by the provision of Section 82(1) of the Matrimonial Causes Act, *"a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court."*

See: **Bakare vs. Bakare (2016) LPELR – 4034 CA.** Thus, the proof required under Section 82(1) is proof orally by witnesses at the trial in open Court.

From the scanty evidence presented by the Petitioner in this case, I am not satisfied that the conduct of the Respondent is grave and weighty and such that a reasonable person cannot endure. Thus, it is my opinion that this petition cannot succeed on this ground.

Secondly, the Petitioner herein also relied on the fact of living apart for more than two years as a ground in presenting this petition. As stated earlier in this judgment, for every petition for dissolution of marriage to succeed, the Petitioner must plead and prove that the marriage has

broken down irretrievably, he would then give evidence on any of the facts contained in Section 15(2)(a)-(h) of the Matrimonial Causes Act.

By Section 15(2)(e) of the Matrimonial Causes Act which is relevant in this instance, it provides thus;

*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-*

*(e) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent does not object to a decree being granted."*

For the purpose of the above provision, parties to a marriage shall be treated as living apart unless they are

living in the same house hold. Once it is established that parties have lived apart for a continuous period of at least two years before the presentation of the petition, and the Respondent does not object to a decree being granted, then the Court is bound to grant a dissolution as there is no discretion in the matter. See Santos vs. Santos (1972) 2 WLR Page 289, Fuller vs. Fuller (1973) 1 WLR page 730.

From the evidence of the Petitioner, parties went their separate ways i.e. they stopped living together as husband and wife on the 2nd July, 2015. This petition was filed on the 12th June, 2017 which is not up to the period envisaged in Section 15(2)(e) of the Matrimonial Causes Act. The period of living apart between the parties in this petition is less than two years before presentation of this petition. Thus, the petition also fails on this ground.

Finally, the Petitioner has also relied on the fact of desertion as a ground in filing this petition. If desertion is to succeed as a ground for dissolution of marriage under

Section 15(2)(d) of the Matrimonial Causes Act, there must be convincing evidence of the withdrawal by one party to the marriage, a withdrawal from the matrimonial bond, its duties and obligations. Desertion is also a matter of fact and law as well. See Nwosu vs. Nwosu (2011) LPELR – 465 (CA).

In considering whether one party has good cause for leaving the other much depends on whether the conduct complained of is of grave and weighty character or not. See: Ugbofor vs. Ugbofor (2007)35 WRN page 147 at 164.

In the instant case, the evidence before this Court is that it was the Petitioner who left the Respondent without formally informing the Respondent. In fact, the Petitioner confirmed the fact that she stayed away from the Petitioner since the period she was transferred to Lagos but she visits her children anytime she came to Abuja.

Generally, in order to establish the allegation of desertion, the Petitioner must prove the following:

a. Physical separation
b. Avowed or manifest intention to remain separated on a permanent basis.
c. Absence of consent from the other spouse.
d. Absence of any good, just cause or justification.

See: Anioke vs. Anoike (2011) LPELR – 3774 (CA).

The uncontroverted evidence before this Court is that the Petitioner left the matrimonial home on the 2nd July, 2015 and has since then not returned. The Petitioner also said she is tired of the union. The Respondent has testified that he made several attempts to reconcile with the Petitioner but all in vain. It is clear from the attitude and testimony of the Petitioner that she has no intention of coming back to the union.

Section 15(2)(d) of the Matrimonial Causes Act, provides that a decree of dissolution of marriage may be granted where the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.

I have reviewed the evidence led in this petition and I am of the firm belief that the fact of desertion has been established. However, from the available evidence before this Court, the Petitioner is the one guilty of constructive desertion having abdicated all her matrimonial duties and has the animus deserendi to remain permanently separated from the Respondent. See Nwankwo vs. Nwankwo (2014) LPELR – 24396 (CA). I hold that the marriage has broken down irretrievably pursuant to Section 15(2)(d) of the Matrimonial Causes Act. A Decree Nisi shall issue dissolving the marriage which shall become absolute after the expiration of three months from today.

For custody, the Petitioner's testimony is that the children are with the Respondent and she has conceded custody to him, while she gets the right to access. This relief is thus granted. Custody of all the three children shall remain with the Respondent and unhindered access given to the Petitioner.

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**Hon. Justice M.A. Nasir**

**Appearances:**

Enwere Chinazakpere E. Esq – for the Petitioner

Chikezie Uwakola Esq – for the Respondent