IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 17TH DAY OF FEBRUARY, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: PET/321/2018

BETWEEN:

SARATU ENEHEZEYI OFORDU ---- PETITIONER

AND

ANTHONY EMEKA OFORDU ---- RESPONDENT

JUDGMENT

The Petitioner, who is Caterer Petitions this Court for a decree of dissolution of her marriage to the Respondent. The Petitioner prayed the Court for the following reliefs:

"1. A decree of dissolution of marriage between the Petitioner and the Respondent on the grounds that the marriage contracted on the 2/6/2001 at the Ikeja Marriage Registry has broken down irretrievably and that the parties have lived apart for a continuous period of

over three years immediately preceding the presentation of this petition.

2. *An order of Court granting custody of the children of the marriage; namely: Precious Ofordu, Joy Ofordu and Daniel Ofordu to the Petitioner and having been living with the Petitioner at her address and shall continue to live with her.*
3. *An order of Court directing the Respondent to pay the school fees of the children of the marriage at all levels of their education as well as allowances.*
4. *An order of Court directing the Respondent to pay for the upkeep of the children of the marriage.*
5. *An order of Court granting Respondent access to the children of the marriage at all times."*

The Respondent was duly served with the Notice of Petition and in response he filed an Answer and Cross Petition wherein he also prayed the Court for a decree of

dissolution of marriage. He also prayed for equal custody of the three children of the marriage.

With issues thus joined, the Petitioner proceeded to open her case on the 11/2/2020 when she testified as PW1. Her testimony is that after the marriage, parties cohabited as husband and wife at Airport Road, Abuja from where they moved to Kubwa, Abuja. However, due to the nature of the Respondent's occupation being a Sales Representative with Nigeria Breweries, the Respondent was always on transfer from one part of the country to another, while she remained in Abuja with the children.

The circumstances upon which cohabitation ceased as testified by the Petitioner is that at one time the Respondent was posted to Owerri, that was when the Petitioner said she became aware of a live-in-lover staying with the Respondent. She embarked on an unscheduled trip to Owerri with the children. On arrival at Owerri she called the Respondent that she was in town with the children. The

Respondent never came to pick them until after 4 hours. On arrival at the Respondent's place of abode, she noticed some of the belongings of the lady staying with the Respondent. She confronted the Respondent and this resulted in physical assault meted on her by the Respondent. She left Owerri the following day with the children.

Since that incident, the Respondent put the Petitioner through emotional trauma and had been cruel towards the Petitioner. And parties have lived apart since 2010. The witness further stated that the Respondent still sends school fees for the two girls and has refused to pay the school fees of the boy, because he followed her and converted to Islam. That the Respondent sees the children whenever he wants.

Under cross examination, the Petitioner reiterated the fact that parties have lived apart for over 6 years now. That the Respondent assisted her with some businesses. That

the Respondent pays the school fees for the two girls, while she pays the school fees for the boy.

At the close of the Petitioners evidence, the case was adjourned for defence. After three adjournments for defence, and when it became obvious that the Respondent was not interested in defending the suit, the Respondent was foreclosed from defence.

O.J. Aboje Esq filed written address on behalf of the Petitioner dated 3/11/2020. The written address was duly adopted by **T.A. Osaji Esq.** Learned counsel raised three issues for determination as follows:

"1. Whether the Court will not be justified in dissolving this marriage on the ground that the marriage has broken down irretrievably as the parties have lived apart for more than three (3) years preceding the institution of this petition.

2. *Given the circumstances of this case whether the Court will not be justified in granting custody of the children of the marriage to the Petitioner with reasonable access to the Respondent.*

3. *Whether the Court will be justified in granting an order for maintenance of the children of the marriage."*

On his part **Igah Idoko Esq** who appeared for the Respondent filed his written address on the 4/11/2020. A sole issue was raised therein for determination as follows:

"Whether from the facts presented before this Court, it can be safely said that the marriage has broken down irretrievably."

Both learned counsel argued extensively in support of the issues raised in their written addresses and cited plethora of authorities in support.

It is pertinent to state that the Respondent did not lead evidence in support of the Answer and Cross Petition. Now

what is the implication of this? In Omo – Agege v.s Oghojafor & ors (2010) LPELR – 4775 (CA), the Court held that averments in pleadings are mere paper tigers and are not evidence. A party must lead evidence oral or documentary in support of facts stated in his pleadings. Thus the law is firmly settled that a party who does not give evidence in support of his pleadings, or in challenge of the evidence of the adverse party is deemed to have accepted the evidence of the adverse party notwithstanding the general traverse. See Akinlola vs. Balogun (2000) 1 NWLR (part 642) page 532 at 545. The Supreme Court in Newbreed Org. Ltd vs. Erhomosele (2006) LPELR – 1984 (SC) stated that such pleadings not supported by evidence, oral or documentary is deemed by the Court as having been abandoned. See also Miss Ezeanah vs. Alhaji Attah (2004) 2 SCNJ page 200 at 235. This Court will therefore deem the Answer and Cross Petition filed by the Respondent as

abandoned. The Respondent did not lead evidence in support of his pleadings.

However the trite position of the law in matrimonial proceedings is that, it does not matter whether a Respondent filed an answer or not, or led evidence or not, it is still the duty of the Petitioner at the hearing to satisfy the Court by evidence of witnesses proving her case. Where the Petitioner fails to do that, the petition will be dismissed notwithstanding the fact that the Respondent failed to lead evidence. See Ibeawuchi vs. Ibeawuchi (1966 – 1979) 5 Oputa LR page 41 at 44.

The Matrimonial Causes Act has made provisions guiding dissolution of marriage contracted under the Marriage Act. It provides in Section 15(1) that:

> *"A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented by either party to the marriage upon the*

ground that the marriage has broken down irretrievably".

The Court seized of the petition shall hold the marriage has broken down irretrievably if the Petitioner is able by the evidence adduced satisfy the Court with regard to one of the facts set out under Section 15(2)(a – h) of the Act. Where he/she is unable to satisfy the Court as to the existence of at least one of the facts, the Court will dismiss the petition notwithstanding the desire of either or both parties to opt out of the marriage. See **Ekerebe vs. Ekerebe (1999) 3 NWLR (part 569) page 514.**

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 irretrievably 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."

The paramount consideration when it comes to matrimonial proceedings pursuant to Section 15(2)(f) of the Matrimonial Causes Act, 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

about 6 years now, since 2010. This Petition was filed on the 10/8/2018 a period of more than 3 years immediately preceding the presentation of this petition.

By Section 82(1) of the Matrimonial Causes Act, a matter of fact shall be proved if established to the reasonable satisfaction of the Court. Proof herein is by calling witnesses at trial. The positive evidence given by the Petitioner in support of the petition was not challenged or contradicted by the Respondent who was given opportunity to do so. It is safe therefore for the Court to believe and act on the uncontroverted evidence of the Petitioner. See Ajidahun vs. Ajidahun (1) SMC page 37, Garba & 2 Ors. vs. Zaria (2005)17 NWLR (Part 953) at 55. The position of the law is that minimal proof is required on a person upon whom the burden of proof lies in such circumstances. See Garba & 2 Ors. vs. Zaira (2005)17 NWLR (Part 953) at 55. Unless the Court sees any reason to the contrary in law, it is under a duty to accept and act on it as evidence not denied

or controverted by the adversary is deemed admitted by the party. See Nanna vs. Nanna (2006) 3 NWLR (part 966) page 1, Hayes vs. Hayes 1 SMC page 207.

In this case, to the extent that the Respondent did not put any piece of evidence on the other side of the scale of balance, there is nothing against which the Petitioners evidence can be weighed. It stands unassailed in the circumstances and the Court has no option than to accept it. By the Petitioner's undenied evidence that parties have lived apart for more than 3 years immediately preceding the presentation of this Petition, I hold that the marriage has broken down irretrievably and the petition succeeds under Section 15(2)(f) of the Matrimonial Causes Act.

The Petitioner has prayed for full custody of the three children of the marriage. Generally speaking, custody is defined as essentially concerning the care and control of a child physically, mentally and morally. It also includes

responsibility for a child with regard to his needs like food, clothing and the like. See Otti vs. Otti (1992)7 NWLR (Part 525) 187 at 210.

In granting custody, the Court should take into consideration the best interest of the children which is of paramount importance. It should also be noted that custody is never awarded as a reward or punishment to any of the parties. See Afonja vs. Afonja (1971) 1 UILR Page 105, Williams vs. Williams (1987) 2 NWLR (part 54) page 66.

Now, Precious who is the eldest daughter of the union will be 20 years old this year. The provision of Chapter IV (Four) of the 1999 Constitution is apt in applicability in this instance. Precious like all other citizen's of Nigeria being an adult of full age is entitled, and free to decide where to reside. For the other two children Joy and Daniel the evidence is that the children have been living with the Petitioner. The Respondent did not contest their custody being with the Petitioner. Having lived with the Petitioner, it

will not be in their interest to sever the bond already created between the children and their mother, the Petitioner. **I hold therefore that custody of Joy Ofordu and Daniel Ofordu shall remain with the Petitioner.**

The Petitioner has also prayed for an order directing the Respondent to pay the school fees of the children and for their maintenance. The first daughter is an adult. The evidence before the Court has shown that the respondent has been paying school fees for the two daughters while the Petitioner has been responsible for the school fees of the last boy. The evidence of the Petitioner is that the Respondent has refused to pay the school fees of the last child because he had converted to Islam. This evidence has not been denied by the Respondent.

Section 38(1) of the 1999 Constitution guarantees the right to freedom of thought, conscience and religion. It provides:

"38(1) Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion or belief…."

It is pursuant to the Constitutional right of freedom to change his religious belief that the last child Daniel Ofordu became a Muslim. It is the fundamental right of the child to practice the religion of his choice and not to be discriminated against on that account. Section 42(1) of the 1999 Constitution guarantees the right to freedom from discrimination. It provides:

"42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

(a) Be subjected either expressly by or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions

to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinion are not made subject;…."

The critical question is whether the Respondent was right in refusing to pay the school fees and other needs of Daniel Ofordu? This, I hold is an act of discrimination against the child going by the unchallenged and uncontroverted evidence that the Respondents' action was because the child converted to Islam. The Blacks Law Dictionary Ninth Edition defines discrimination at page 534, inter alia, as:

"Differential treatment; esp, a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

So the right of Daniel to change his religion inheres to him and is inalienable and inviolable. A fundamental right is very significant as it goes to the root of the day to day existence of the citizen and corporate living of the citizens. See Essien vs. Inyang (2011) LPELR (4125) 1 at 24. See also Section 10(1) and (2) of the Child's Right Act, 2003. This is moreso as every parent has the duty to provide the necessary guidance, discipline, education and training for the child such as will equip the child to secure his assimilation, appreciation and observance of the responsibilities set out in the Child's Right Act, 2003.

The Respondent herein shall ensure that the child Daniel Ofordu attends and completes his education. In effect the Respondent shall be fully responsible for the payment of all school fees for his children and also provide for their maintenance according to his means.

In conclusion, I direct that a decree nisi shall issue dissolving the marriage between the Petitioner and the

Respondent celebrated at the Ikeja Marriage Registry on the 2/6/2001. The decree nisi shall become absolute after the expiration of three months.

The Petitioner has asked the Court to grant the Respondent access to the children of the marriage at all times. This is very laudable and commendable. This relief will be granted as prayed, bearing in mind the fact that access to both parents is a basic right of the children.

Signed
Honourable Judge

Appearances:

T.A. Osaji Esq – for the Petitioner

Igah Idoko Esq – for the Respondent