

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA-ABUJA

ON 5TH DAY OF FEBRUARY, 2021

BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI

PRESIDING JUDGE

SUIT NO. FCT\HC\PET/412/17

BETWEEN:

DR. OBINNA CHUKWUEMEKA ONYEKWENA PETITIONER

AND

DR. EBELECHUKWU NWABUOGO ONYEKWENA..... RESPONDENT

PARTIES ABSENT.

CHUMA AJAEGBU, ESQ WITH HELEN DICKSON MRS FOR THE PETITIONER.

INNOCENT DAA'GBA ESQ. WITH DR. ANDREW EKPUNOBI ESQ. AND SIMEON SODO ESQ FOR THE RESPONDENT.

JUDGMENT

By his amended petition filed on 8th October 2020, pursuant to an order of this Honourable Court the Petitioner seeks in paragraph 11 as follows:

“(a) Decree of Dissolution of the marriage between the Petitioner and the Respondent on the ground that the marriage has broken down irretrievably.

(b) An order of the Honourable court granting full custody of the three (3) children (sic) marriage; Obinna, Kenechukwu and Adaugo Onyekwena

to the Petitioner and access to the Respondent. That both Petitioner and Respondent be designated Joint Managing Conservatorship of the children.

(c) And for such further order or orders as the Honourable Court may deem fit to make in the circumstances”.

The Respondent’s answer to the amended petition was filed on 16th October 2020 wherein the Respondent admitted relief 11 (a) of the amended petition and prayed for:

“An Order of the Honourable Court granting full custody of the three (3) children of the marriage; namely

- Obinna Chukuwemeka Onyekwena aged 14 years;
- Kenechukwu Chinedu Onyekwena aged 12 years; and
- Adaugo Mmesoma Onyekwena aged 7 years, to the Respondent and visiting rights to the Petitioner.

And for any other order or order(s) as the Honourable Court may deem fit to make in the circumstances”.

The Petitioner’s reply to the Respondent’s answer to their amended petition was filed on 20th October 2020.

Before the matter proceeded to hearing, both parties had several applications for interim and interlocutory reliefs which they agreed be held in abeyance, pending the determination of the substantive matter wherein all issues raised regarding custody of the children will be determined.

At the hearing, Mr Ajaegbu for the Petitioner informed the court that they were relying only on “grounds” (facts, actually) (a) & (b) of their amended petition, to wit:

- (a) “The Respondent has lived apart from the Petitioner for a continuous period of more than three (3) years preceding the presentation of this petition.
- (b) The Respondent has deserted the Petitioner for a continuous period of three (3) years preceding the presentation of this petition.”

“Ground” (c) was abandoned.

The Petitioner and the Respondent each testified in proof of their case and tendered several exhibits.

Thereafter their respective counsel adopted their final written address wherein each raised two issues for determination. However in determining this matter, I shall adopt the two issues as raised by the Respondent’s counsel, Mr Innocent Daa’gba as follows:-

- (1) Whether the Petitioner has sufficiently proved his petition for a decree of dissolution of the marriage between him and the Respondent, as to be entitled to a decree dissolving the marriage between him and the Respondent?
- (2) Whether as between the Petitioner and the Respondent, who should on the basis of the state of pleadings and available evidence before the Honourable Court be awarded custody of the three (3) children of the marriage; with visitation rights to the other party.

ON ISSUE 1

Mr Daa’gba submitted that it is not in dispute that the parties have lived apart from each other since April 2014 to date; a period of over 6 years and 6 months. See paragraph 7 (d) of the amended petition; grounds (a) and (b) thereof and paragraph (xiii) of the facts in support of the petition.

That the Respondent on her part admitted the above paragraphs and “grounds” as pleaded by the Petitioner either by her silence or specific admission as captured in her paragraphs 6, 9 and xv of facts in answer to the Petitioner’s petition.

It is therefore clear that the Petitioner wants the marriage dissolved and the Respondent is not opposed to the dissolution.

It was submitted that the marriage ought to be dissolved as the provisions of Section 15 (2) (e) and (f) of the Matrimonial Causes Act CAP M7 LFN 2004 have been met.

Section 123 of the Evidence Act 2011, and judicial authorities were relied upon.

On his part Mr Chuma Ajaegbu for the Petitioner agreed with him.

He urged the court to dissolve the marriage between the Petitioner and the Respondent, the Petitioner having satisfied Section 15 (2) (e) and (f) of the Matrimonial Causes Act. Judicial authorities were cited in support of his submission.

RESOLUTION OF ISSUE 1

It is the Petitioner's evidence before this court that he and the Respondent were married at the AMAC Registry on 21st July 2005, as evidenced in Exhibit P1, the certified true copy of the marriage certificate.

That cohabitation between them ceased in March 2014 when the Respondent left Switzerland for Nigeria with the children of the marriage and never returned.

The Respondent in her evidence in chief stated that she left Switzerland where the parties had been cohabiting in April 2014 for Nigeria and never returned to Switzerland.

The Petitioner first filed this Petition No: PET/412/17 on 12th October 2017 which was subsequently amended on 5th October 2020 by order of court. It is thus abundantly clear that as at 12th October 2017, the Petitioner and the Respondent had lived apart for about 3 years and 6 months.

Section 15 (1) and (2) of the Matrimonial Causes Act CAP M7 LFN 2004 on grounds for dissolution of marriage provides:

“(1) 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.

(2) The court hearing a petition for a decree of dissolution of marriage shall hold that the marriage to have broken down irretrievably if, but only if, the Petitioner satisfies the court of one of the following facts:

a)

b)

c)

d)

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.

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;

g)

h)

(Emphasis is mine)

The standard of proof required in matrimonial causes is proof to the reasonable satisfaction of the court. See Section 82 (1) & (2) Matrimonial Causes Act.

The parties having admitted that they have lived apart since March or April 2014 a period exceeding 3 years immediately preceding the presentation of the petition, and the Respondent showing no objection to the decree being granted, the facts required to prove Section 15 (2) (e) & (f) of the Matrimonial Causes Act Cap M7 LFN 2004 have been established by the Petitioner to the satisfaction of this court. The court is therefore bound to hold, that the marriage between the Petitioner and the Respondent has broken down irretrievably. And I so hold.

See **NWANKWO V NWANKWO (2014) LPELR – 24396 (CA) PAGE 18-19 PARAGRAPHS A TO A** per Tsammani, JCA and **BAKARE V BAKARE (2016) LPELR – 41344 (CA) PAGE 7-9 – PARAGRAPHS E TO E** per Abiriya JCA.

Accordingly, I hereby issue a decree nisi dissolving the marriage between the Petitioner and the Respondent contracted on 21st July 2005 at AMAC Registry Abuja.

The decree nisi shall be deemed absolute 3 months from today except the court orders otherwise.

ON ISSUE 2

I now address the issue in dispute between the parties, which is custody of the children of the marriage:

- Obinna Chukwuemeka Onyekwena, male born on 16th June 2006.
- Kenechukwu Chinedu Onyekwena, male born on 16th September 2008.
- Adaugo Mmesoma Onyekwena, female born on 20th March 2013.

The Petitioner and the Respondent both seek full custody of the 3 children of the marriage with visitation rights to the other party.

Mr Daa'gba for the Respondent in his final written address submitted that the Respondent had shown that she is a better candidate to be granted the full custody of the children of the marriage from the exhibits she tendered showing receipts for payment of school fees, healthcare, upkeep and maintenance of the children and the emails Exhibit R1 bundle she sent to the Petitioner begging him for the school fees, welfare and general upkeep of the children.

He submitted that the Petitioner paid fees sparingly for the period April 2014 till date and has done nothing about maintenance and upkeep of the children, notwithstanding that his office affords him a grant for 75% of the children's education. See Exhibit P5 bundle. Learned counsel urged that there is nothing in Exhibit P5 bundle to substantiate the Petitioner's claim that the grant was only accessible if the children schooled in Geneva, Switzerland.

The Respondent on the other hand, he submitted, had continued to provide for the school fees, upkeep and maintenance of the children.

Indeed she had to report the Petitioner to the Ministry of Women Affairs and Social Development to compel the Petitioner to effect payment of the children's school fees and maintenance of the Respondent, which the Petitioner did not abide by. See Exhibit R2.

Furthermore it was submitted that the Petitioner in cross examination admitted he lives alone in Switzerland and only has helps who come to do chores, and go; and by the Respondent's evidence, that the Petitioner travels a lot due to the nature of his job.

Furthermore, the Respondent has lived with the children from April 2014 till date and has secured a better paying employment in the United Kingdom with good living environment and has secured admissions in schools for the children in the United Kingdom.

He urged that in an application for custody, the interest of the children is of paramount consideration. See Section 71 (1) in Matrimonial Causes Act; as well as the opportunity for their sound education, and physical and mental welfare.

See **TOBIAS C OKORO V MRS BENADIN NKECHI OKORO (2011) ALL FWLR (PT 572) P 1749 AT PAGE 1780 PARAGRAPH D-G** per Kekere-Ekun, JCA (as she then was) **ODUSOTE V ODUSOTE (2013) ALL FWLR (PT 668) PAGE 867 AT PAGE 888 PARAGRAPH F- H** were relied upon.

He urged the court to grant full custody to the Respondent with access to the Petitioner.

Conversely, Mr Ajaegbu for the Petitioner urged the court to grant full custody to the Petitioner with access to the Respondent.

He conceded that in matters of custody that the welfare and best interest of the children are paramount; See Section 71 (1) Matrimonial Causes Act, Sections 1 and 2 Child Right Act Cap C 50 LFN 2004, **ANYASO VS ANYASO (1998) 5 NWLR (PT 564) 150** and other authorities.

He urged that the Petitioner by evidence has established that he has continued to take responsibility for the school fees and welfare of the children of the marriage since they left Switzerland except in 2016 which he had financial difficulties. See particularly Exhibit P3 bundle; and will pay 100% of their school fees in Geneva, Switzerland without help from the Respondent except she renders same willingly.

Further that the children had lived and schooled previously in Geneva, Switzerland and would be returning to familiar territory and that it is in the best interest of the male children of the marriage to be raised by their father for needed guidance and tutelage. He added that there was no hard and fast rule that custody of a daughter should always be given to the mother.

Finally, he submitted that the Respondent has not proved her employment in the United Kingdom by documentary evidence, whereas the fact of the Petitioner's employment has been proven and admitted by the Respondent. See Exhibits P5 bundle.

Neither has the Respondent proved that the children have admission in school and her accommodation in the United Kingdom.

In his reply on point of law, Mr Innocent Daa'gba for the Respondent urged the court to take judicial notice of its proceedings, particularly documents in the Respondent's motion no M/10065/2020 seeking temporary custody with its attachment of relevant documents.

That the said motion was incorporated under paragraph 16 of the Respondent's answer to the amended petition which should be read together with paragraph 15 of the Respondent's answer upon which the Respondent led evidence.

Further, it was submitted that the Petitioner himself stated he had knowledge that the Respondent now worked in the United Kingdom and lives in Stoke-on-Trent. Therefore facts admitted need no proof.

Learned counsel also denounced the derogatory language employed by the Petitioner's counsel in reference to the Respondent and called for caution.

RESOLUTION OF ISSUE 2

Let me begin by stating that I agree with Mr Daa'gba that Mr Ajaegbu crossed the line when he referred to the Respondent in his final written address as manifesting wickedness of the heart and having suicide bomber mentality. That was totally uncalled for.

Counsel, as admonished by his Lordship Georgewill, JCA in **P.M.S UNITED V UMARCO NIGERIA LTD (2017) ALL FWLR (PT 894) 14-15 AT 1439 PARAGRAPH D-E** cited by Mr Daa'gba must "refrain from joining the fray when matters of disputed or contentious facts are involved and allow the litigants who are masters of the facts to hold of the facts and do the stating of their own facts while counsel remains masters of the law to argue the case of their clients. A word I believe is enough for the wise and prudent counsel to heed".

I trust that Mr Ajaegbu will heed the wise counsel of his Lordship and avoid such pitfalls henceforth.

With reference to the issue of custody at hand, Section 71 (1) of the Matrimonial Causes Act provides:

“(1) In proceedings with respect to custody, guardianship, welfare, advancement or education of the children of a marriage, the court shall regard the interests of those children as the paramount consideration, and subject thereto, the court may make such order in respect of those matters it thinks proper”.

By Order V Rule 5 of the Matrimonial Causes Rules, for the purposes of custody, a child of the marriage is one under 21 years of age.

It is correct that what constitutes the interest of a child is not capable of a precise definition. It is however not limited to material possessions but includes those things which assist the psychological, physical and moral development of the child. Things that would promote the happiness and security of the child.

See **ODOGWU V ODOGWU (1992) LPELR – 2229 (SC); Matrimonial Causes in Nigeria - Law and Practice by Nasiru Tijani page 125.**

In the instant case, both parties are medical doctors in paid employment capable of seeing to the needs of their children. However the undisputed evidence before this court is that the three children of the marriage have been with the Respondent since 2014. There is no evidence that they have not been taken good care of whilst under her care.

There is no evidence that she is an unfit mother or that she has neglected her children, in any manner whatsoever.

There is undisputed evidence before this court that the Respondent has secured employment in the United Kingdom as a medical doctor, and lives at Stoke-on-Trent, and has a 3 bedroom accommodation with a garden in a conducive environment for the children, with access to free healthcare for the children.

I do not accept the submission of Mr Ajaegbu that the Respondent's employment or abode in the United Kingdom was not proved.

Her pleading in paragraph XIII (b) of her answer to the amended petition that she has secured a job/employment with St. Helens and Knowsley Teaching Hospital, Stoke-on-Trent, United Kingdom was not denied by the Petitioner.

Her proposed arrangement for the children in paragraph 15 of her answer to the amended petition was also not denied by the Petitioner.

Further, I agree with Mr Daa'gba that the court can utilise all processes duly filed before it in its case file so long as it can duly assist the court in the proper adjudication of the issues before the court.

SEE OLOKUN V AIYELABEGAN (2004) FWLR (PT 192) PAGE 153 AT 162 (as cited by Mr Daa'gba); **ABIODUN V A.G FEDERATION (2007) LPELR – 8550 (CA) PAGES 79 – 81 PARAGRAPH F-A.**

Exhibit EBELE 1 attached to the affidavit in support of the said motion No: M/10065/2020 lends credence to the claim of the Respondent as to her employment. In any event, the Petitioner having admitted that the Respondent is employed in the United Kingdom as a medical doctor, the said fact needs no further proof. See Section 123 Evidence Act 2011.

Having stated the above, I do not think that it will be in the best interest of the children of the marriage to remove them from the custody of the Respondent with whom they have lived for the past 6 years and 10 months, to place them in an environment in Switzerland which by now, will be unfamiliar territory to the children, especially Adaugo Mmesoma Onyekwena who was barely a year old when she was last in Switzerland in 2014.

I am not unmindful of the submission of the Petitioner that Obinna Chukwuemeka Onyekwena and Kenechukwu Chinedu Onyekwena are now about 14 and 12 years old and who need the guidance of their father for their rounded development. But nothing has been placed before me to indicate that the Respondent is not doing a good job raising these boys in a proper and acceptable manner. The Petitioner as their father however, is entitled to access to his children as they need the nurture of both parents for their healthy development and growth.

It is therefore my considered view that the Respondent be and is hereby granted custody of the three children of the marriage till they attain 21 years of age; with access to the Petitioner.

The children shall spend their school vacations with the Petitioner and if spent in Geneva, Switzerland, the Respondent shall be responsible for their travel expenses as volunteered by her. Where such vacations are to be spent elsewhere, the Petitioner shall be responsible for their travel expenses.

The Petitioner and the Respondent shall collaborate/co-operate on major decisions concerning the children of the marriage.

The Petitioner's claim for custody is therefore dismissed.

Parties to bear their own costs.

Hon. Judge