

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

DELIVERED THE 14TH DECEMBER, 2021

BEFORE HIS LORDSHIP: HON. JUSTICE ASMAU AKANBI – YUSUF

FCT/HC/PET/470/2020

BETWEEN

HELEN NKEMDILIM UZOMA PETITIONER

AND

JOHN CHIKODILI UZOMA RESPONDENT

JUDGMENT

By a Notice of Petition dated 28th September, 2020 and filed same date, the Petitioner herein seeks the following reliefs:-

- a. A Decree of dissolution of marriage on the grounds of desertion, adultery, intolerance, cruelty and irretrievable breakdown of marriage;
- b. An Order that the Respondent should pack all his belongings from the petitioner's house situate at No. 50, Mai – Uke Road Dakwa – Niger State;

- c. An Order that costs of this Petition, including the legal expenses being in the sum #500,000.00 (Five Thousand Naira) be refunded to the Petitioner by Respondent.

The grounds upon which the Petitioner relies on for court to dissolve the marriage between the parties as can be seen from the pleadings and evidence;

- A. A decree of dissolution of marriage on the grounds of desertion, adultery, intolerance, cruelty and irretrievably breakdown of marriage.
- B. An order that the respondent should not pack all his belongings from the petitioner's house situate pack all the belongings from the petitioner's house situate at No. 50, Mai- uke road Dakwa – Niger State.
- C. An order that costs of this petition, including the legal expenses being in the sum of #50,000.00 [Five Hundred Thousand Naira] be refunded to the petitioner by the respondent.

Upon the service of the Petition on the Respondent, the Respondent filed an Answer to the petition as well as a cross petition on the 22/2/2021. In his cross petition, he seeks the following relief:-

1. A Decree of dissolution of marriage on the ground that the marriage between the Petitioner and the Respondent has broken down irretrievably.

The Petitioner/cross respondent filed an Answer to the Respondent's cross petition on the 19th March, 2021.

The Petitioner/cross respondent [now referred as Pw1] testified on the 24/3/21, she adopted her witness statement on oath filed on the 19/3/2021. The marriage certificate issued to the parties on the 26/02/2007 was admitted as exhibit A.

Under cross examination, she told the court she is now living at No 50 Mai-Uke Road, Dakwa Niger State; that the Respondent only contributed #120,000.00 to build the house; that the Respondent has never come to disturb her in her new place. She admitted under cross examination that she has a medical condition; that she didn't tell the Respondent before they got married.

The petitioner closed her case.

On his part, the Respondent/cross petitioner testified as Dw1. He also adopted his witness statement on oath and on being cross examined he said he had to leave the matrimonial home because after confirming to his wife that he has a child outside the marriage, the pw1 started acting strangely and he felt his life was at stake. He said the pw1 hid her medical report from him before the marriage. He denied committing adultery; that the relationship which produced the child was an act of friendship. He stated that he did not threaten to divorce the Pw1 and further reiterates that

the Pw1 from the beginning of the marriage hid her medical report from him; that she also didn't tell his uncle who introduced them to each other. He stated that they sold the family car [Mercedes Benz] together to one Mallam; that the proceeds from the sale of the car were put into the house project, where the Pw1 is presently occupying.

The Dw1 closed his case and matter was adjourned for adoption of final written address.

Kelvin A. Mejulu on behalf of the Respondent/cross petitioner filed a final written address on the 31/03/2021. The Petitioner was served with the Final written address on the 17/09/2021 but failed to respond to same. Learned counsel for the cross petitioner adopted the final written address on the 22/10/2021 wherein he formulated a sole issue for determination, that is;

Considering the general circumstances of this matter and the evidence before the court, which of the two parties is entitled to judgment?

It is the submission of counsel that where a party alleges adultery as one of the grounds for seeking dissolution of marriage, the law is that the party making such allegation must join the alleged adulterer to the petition; that failure to do so, such ground cannot be a competent ground for dissolution of the marriage. He referred the court to SECTION 32(1) MATRIMONIAL CAUSES ACT 2004; EIGBE V EIGBE (2012) LPELR 19690 (CA) in urging the court to hold that the petitioner failed to prove the ground of adultery.

He submits further that the burden of proof is on the petitioner to prove one or more of the grounds or facts stated in section 15 (2) MCA; that the petitioner failed to prove or tender any document to support the grave and weighty nature of the conduct of the cross petitioner; he argued that there is no single evidence from the petitioner to prove that since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live or continue to co habit with the Respondent. He relied on IBRAHIM V IBRAHIM (2007) 1 NWLR (PT. 1015) 383 and some other authorities. He states that the court must be satisfied that the Petitioner cannot reasonably be expected to live with the cross petitioner before a decree of dissolution can be granted and that the standard of behavior expected of the respondent is objective. He referred to SECTION 15 (2), 82 AND DAMULAK V DAMULAK (2004) 8 NWLR (PT. 874) 15 @ 166.

He argued further that the petitioner did not place any evidence before the court to substantiate her allegations against the cross petitioner; that the petitioner didn't exhibits any of the conducts envisaged under Sections 15(2) & 16 (A-G) MCA. He argued that the standard of proof in matrimonial causes is not on a balance of probabilities or preponderance of evidence; that the matrimonial offence must be strictly proved and once the court is reasonably satisfied of the existence of a ground to grant divorce, then the court can hold that the marriage has broken down irretrievably. He argued that the petitioner has failed to establish to the satisfaction of the court the

grounds upon which the petitioner relied on and urged the court to dismiss the petitioner's case in its entirety.

He argued further that no evidence was led in proof of the claim for legal expenses; that the claim being a claim for special damages, it is trite that same must not only be pleaded by the party claiming same, it must strictly be proved by the party. He relied on *DUMEZ (NIGERIA) LIMITED V OGBOLI (1972) 1 ALL NLR 241* and some others in urging the court to dismiss the claim.

On the cross petitioner's petition, counsel argued that the reply filed by the petitioner was filed out of time thus the reply is incompetent and worthless. He argued that the implication of filing the reply out time means the petitioner/cross respondent did not file any counter process to the cross petition of the respondent and he relied on *MR JOHNSON OBADAIRO KEHINDE V MRS ADEYINKA OLUKEMI ADUKE KEHINDE (2014) LPELR- 24062 (c)*.

He urged the court to deem all the averments contained in the cross petition and the evidence led in support thereof as admitted by the petitioner/cross respondent.

Counsel for the cross respondent stated that it is in evidence that the parties have lived apart for a continuous period of at least six years immediately preceding the presentation of the cross petition; that the petitioner having failed to challenge the evidence of the cross respondent,

the petitioner is deemed not to have objected to the cross petition. He argued that the cross petitioner has led direct, credible and believable evidence in defence of the petition as well as the cross petition. He relied on *IN-TIME CONNECTION LTD V ICHIE (2010) ALL FWLR (PT.543) 1879 AT 1891*. He urged the court to dissolve the marriage between the parties based on the grounds presented by the cross petitioner and dismiss the grounds presented by the petitioner.

I have carefully gone through the evidence before the court as well as the submission of counsel for the cross petitioner; the issues for determination are;

1. Whether based on the evidence adduced by the petitioner, the petitioner is entitled to the reliefs sought
2. Whether based on the evidence adduced by the respondent, the cross petitioner is entitled to the reliefs sought

It is the law that a Petitioner who desires dissolution of a marriage must discharge the standard of proof stipulated by the Matrimonial Causes Act and establish in evidence one of the facts set out under S 15 MCA.

Section 15(1) A petition under this Act by a party to 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 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:

(a) that the respondent has willfully and persistently refused to consummate the marriage;

(b) that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(c) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

(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) That the other party to the marriage has, for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under this Act;

(h) That the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

The evidence before the court shows that the Petitioner relies on the facts contained in section 15 (2) (b), (c) (d) of the Matrimonial Causes Act as grounds for the court to hold that the marriage has broken down irretrievably.

On the issue of adultery, it is the evidence of the petitioner that the cross petitioner committed adultery with another woman which resulted in the birth of a 5 year old child. Section 32 (1) MCA is to the effect that where in a petition for a decree of dissolution of marriage or in an answer to such petition, a party to the marriage is alleged to have committed adultery with a specified person whether or not a decree of dissolution of marriage is sought on the basis of that allegation that person shall except as provided by rules of court be made a party to the proceedings. [Underlined emphasis mine]

In the case at hand, it is not in doubt that the petitioner failed to join the woman she alleged the cross petitioner committed adultery with; this is at variance with SECTION 32(1) MCA. SEE ALSO EIGBE V EIGBE (SUPRA)

Therefore, I find as a fact that the petitioner having failed to comply with section 32(1) MCA the ground of adultery against the cross respondent fails. I so hold.

On the issue of desertion, intolerance and cruelty, the Petitioner stated that the Respondent deserted and abandoned their matrimonial home since 28th August, 2014 without any serious provocation; that the cross petition deprived her of her conjugal rights including sexual intercourse for more than 5 years; that the cross respondent acted unreasonable and also abused her emotionally by failing to communicate with her for months; that the cross respondent rebuffed all efforts and attempts at restoring peace in their home; that she seeks the divorce because of the reprehensible and detestable conduct of the cross petitioner towards her, which she finds intolerable to live with the cross respondent.

Under cross examination, the Pw1 was thus

Q: kindly tell the court where were you living with the Respondent before he left, the matrimonial home

A: we were living at nos 161 Bauchi road, kubwa

Q: since he left the matrimonial home and since you moved into no 50 has he ever come there to disturb you

A: No

By the above evidence, it is not in dispute that the cross respondent left their matrimonial home on the 28th August, 2014. The question here is what were the reasons of the cross petitioner for leaving their matrimonial home? There must be a conduct or act that can be described as a behaviour for which the Court will hold that the cross petitioner cannot reasonably be expected to live with the petitioner.

The cross respondent in his defence said he left their matrimonial home for his own safety due to the attitude and character exhibited by the petitioner. In his words under cross examination he stated *“something happened that one day she called me that I have an issue, a baby outside. I now told her I said yes, so from that her behavior was strange sometimes when I wake up in the night, I would see her staring at me; so I asked her what the problem is. She said I have the mind to go outside the marriage and have an issue. Then at the beginning of this relationship, she hid her medical report from me, even with that we stayed for 7 yrs before the issue so I look at and saw that my life would be at stake; for her to wake up at night and be looking at me, so that is why I left the house for her.”*

In LT. ADEYINKA A. BIBILARI (RTD) v. NGOZIKA B. ANEKE BIBILARI (2011) LPELR-4443(CA)

The Matrimonial Causes Act ascribed a Section to the standard of proof in matrimonial matters or Causes. S.82 (1) and (2) of the Matrimonial Causes Act stipulates as follows: (1) For the purposes of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court. (2) Where a provision of this Act requires the Court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the Court is reasonably satisfied of the existence of that ground or fact, or as to that other matter. From the above provision, the Court will pronounce a Decree of dissolution of marriage if satisfied on the evidence that a case for the petition has been made. Thus the matrimonial offence must be strictly proved once the Court is reasonably satisfied of the existence of a ground to grant the divorce. The Court will then proceed to hold the marriage has broken down irretrievably. The standard of prove is not on a balance of probabilities or preponderance of evidence as in general civil cases. The standard of proof is on the petitioner but taken as discharged once it is established to the reasonable satisfaction of the Court...

In the instant case, I have considered the defence adduced by the cross respondent, he failed to support his assertion with credible and cogent evidence. His reasons that when he wakes up in the middle of the night

and finds his wife staring at him is not enough reason for him to desert his home. The petitioner in her evidence stated that the cross respondent rebuffed all effort and attempt made by her to restore peace in their home; that every attempts by their friends and family members to settle the dispute between them were rebuffed by the cross petitioner; he also refused to see her relations when he was invited. All these assertions were not denied by the cross respondent. It is settled law that where a party fails to cross examine a party on a material evidence, such evidence is deemed admitted as true and correct.

On what may constitute desertion, I place reliance in the case of *NWANKWO v. NWANKWO (2014) LPELR-24396(CA) PER HARUNA SIMON TSAMMANI, J.C.A (PP. 24-26, PARA B-E)* wherein he stated thus;

"Now, the fact of desertion as ground for dissolution of marriage has been stipulated by Section 15(2)(d) of the Act, which provides that: "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: (a) ... (b)... (c)... (d) That the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition." I find it necessary to point out that desertion has been defined as the separation of one spouse from the other with an intention on the part of the deserting spouse of permanently bringing cohabitation to an end without

reasonable cause and without the consent of the other spouse. To constitute desertion therefore, the petitioner must plead and lead credible evidence to prove the following facts: (a) defacto or physical separation; (b) the manifest intention to remain permanently separated; (c) lack of just cause for withdrawal from cohabitation; and (d) absence of consent of the deserted spouse. A defacto or physical separation of the spouses does not necessarily mean living apart from each other. In law, there are two types of desertion to wit: simple desertion and constructive desertion. Simple desertion occurs where the deserting party abandons the matrimonial home while in constructive desertion, the spouse remains in the home but has abdicated all matrimonial responsibility and has thus by his conduct expelled the other spouse. In that respect, desertion remains a matter of fact and law to be determined by the Court hearing the matter. See Mrs. Helen Nwosu v. Hon. Dr. Chima Nwosu (2011) LPELR - 465 (CA); Mrs. Helen Anioke v. Mr. Ben Anioke (2011) LPELR - 3774 (CA). In the instant case, the type of desertion complained of is a simple desertion, as the Appellant had alleged that the Respondent had left the matrimonial home since the 15th day of July, 2011 and now lives with her parents. The Respondent did not deny that fact. It therefore remains proved that the Respondent had left the matrimonial home and no longer co-habits with the Appellant and which cessation of co-habitation had been for a continuous period of more than one year immediately preceding the presentation of the petition. It is not enough for the petitioner to allege that the Respondent has

ceased co-habitation or has physically left the matrimonial home. He must proceed to prove that the Respondent has evinced the necessary intention to withdraw cohabitation with him permanently. This is because, unless the guilty spouse has the intention to remain permanently separated from the other spouse, desertion has not been proved. In other words, there must exist the necessary animus deserendi."

On the strength of the above authority, it is clear that the cross respondent without any provocation deserted the petitioner for a continuous period of five years immediately preceding the presentation of this petition and he never bothered to reconcile with the petitioner. It is clearly not in evidence that the petitioner conducted herself in a way the cross petitioner cannot reasonably be expected to live with her. If anything at all, the conduct of the cross petitioner by deserting the petitioner is enough reason to cause the petitioner mental and psychological injury. Why do I say so? It is in evidence that parties are yet to be blessed with a child. It is of general knowledge that the joy of any married woman is to be blessed with a child or children. No medical report was placed before the court to ascertain the health status of the petitioner, thus this court cannot begin to speculate on what is not placed before it. The cross petitioner chose to abandon the petitioner when she needed him the most; it is clear that he behaved in such a cruel manner that a reasonable person is not expected to live with; he chose to desert her at the time she needed his emotional, psychological

and financial supports. I find the conduct of the cross petitioner reprehensible and intolerable.

Having considered the evidence before the court, it is not in dispute that parties are no longer interested in the marriage. It is also glaring from the conduct of the cross respondent that he is no longer on the same page with the petitioner. It is quite clear from the evidence of the Petitioner before the court that the Respondent has behaved cruelly in such a way that a reasonable person cannot be expected to live with him. Also the cross respondent failed to deem it necessary to settle the issues between him and the petitioner; this shows cruelty, lack of care, love and concern. The established fact here is that the petitioner has proved section 15 (2) c & d Matrimonial Causes Act to the reasonable satisfaction of the court; It is therefore in the interest of the petitioner to dissolve the marriage as same has broken down irretrievably. I so hold

The reliefs 2 & 3 of the petitioner fails as she failed to led credible evidence to support the claims.

Also on issue two, it is trite that a cross petition just like a counter claim is a separate and independent action; it put the cross petitioner in a position of the Petitioner and the reliefs sought must prove in order to be entitled judgment. It can be gleaned from the evidence on record, that the cross petitioner failed to prove his claim with cogent and credible facts; rather that it is shown that he acted in an unreasonable manner towards the petitioner.

The cross respondent admitted in evidence that he has a child outside his marriage, the only reason he was not found liable to have committed adultery is the fact that the petitioner failed to comply with SECTION 32(1) MCA; I further reiterate that he left home without the slightest provocation from the petitioner and as stated earlier the medical report or status of the Petitioner is not before the court; this court cannot begin to speculate on what is not placed before it. The law is that Courts have a duty not to indulge in guesswork or speculation in their adjudication of causes or matters. ***TOAFIC SULE & ORS v. ZAINAB P. SULE & ORS (2019) LPELR-47178(CA)***. It is the duty of the Cross/Petitioner to prove the medical condition of the Petitioner. This he failed to do! See ***SECTION 131 EVID ACT***. Thus, issue two is decided against the cross Petitioner.

In all, I find that the Petitioner led sufficient evidence to the reasonable satisfaction of this court in proof of relief 1 contained in her Petition.

Thus, I hold that the marriage celebrated between the Petitioner Helen Nkemdilim Uzoma and the Respondent John Chikodili Uzoma in Agbor, Nigeria on 26/02/2007 under the Marriage Act has broken down irretrievably.

I hereby pronounce a Decree Nisi dissolving the marriage between the Petitioner and the Respondent. The Order Nisi shall become absolute after a period of three months from today.

ASMAU AKANBI – YUSUF

[HON. JUDGE]