

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT NO. 4, MAITAMA ON THE

3RD DAY OF JULY, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE U. P. KEKEMEKE

SUIT NO. FCT/HC/PET/118/2016

COURT CLERKS: *JOSEPH ISHAKU BALAMI & ORS.*

BETWEEN:

SAMUEL OSAWE IDAHOSA PETITIONER

AND

IDAHI MERCY IDAHOSA RESPONDENT

IN RE: DORCAS OGHRE

(alias MRS. DORCAS OSAWE) PARTY CITED/RESPONDENT

JUDGMENT

The Petitioner’s Petition dated and filed on the 18th of February 2016 is for:

A decree of dissolution of marriage on the grounds of intolerance and cruelty.

The Petition was served on the Respondent. The Respondent/Cross-Petitioner filed an Answer under protest and a cross-petition.

The Respondent/Cross-Petitioner is praying for:

- (1) An Order striking out/dismissing the Petitioner/Cross-Respondent's Petition.

- (2) A decree of dissolution of the marriage on the ground that the marriage has broken down irretrievably on the following grounds:
 - (a) That since the marriage the Petitioner/Cross-Respondent has committed adultery and the Respondent/Cross-Petitioner finds it intolerable to live with the Petitioner/Cross-Respondent.
 - (b) That since the marriage the Petitioner/Cross-Respondent has behaved in such a way that the Respondent/Cross-Petitioner cannot reasonably be expected to live with the Petitioner/Cross-Respondent.
 - (c) That the parties to the marriage have lived apart for a continuous period of 14 years immediately preceding the presentation of the Cross-Petition.

- (3) An Order for a maintenance allowance of ~~₦~~40,000.00 monthly to the Respondent until she remarries.
- (4) ~~₦~~30,000.00 and ~~₦~~20,000.00 monthly allowance respectively to Samuel Osawe and Grace until they conclude tertiary institution or secures a job or marry.
- (5) An Order for Petitioner to handover/transfer one of the properties particularly the bungalow at No. 26, Euka Lane, Zone 1, Saigabagyi, Bwari Road, Abuja to the Respondent and children of the marriage as shelter and source of income for payment of the Respondent/Cross-Petitioner's accommodation and that of the children.

The Petitioner/Respondent to Cross-Petition filed a Reply to Answer to Cross-Petition. The Respondent/Cross-Petitioner filed a Rejoinder dated 25/03/2019. The Party Cited also filed an Answer to Cross-Petition dated 3/07/2018.

The Petitioner opened his case and gave evidence for himself. He said he contracted this marriage in 1989. That the marriage was blessed with three children but they lost one.

By 2002, the relationship broke down and she parted way with him. The second born was born as an imbecile. That was the basis of their disagreement and every day quarrel.

The children of the marriage are Grace, Adesuwa and Samuel. Grace was born in 1992, Adesuwa 1994 and Samuel 1998.

He lost his job in November 2001. His wife left in April 2002. He took custody of the last two surviving children. By 2003, he could not combine taking care of the children and his business. He was advised to take a house help called Dorcas Oghre. She came into the house with an 11 year old baby on a salary of ₦10,000.00.

That between 2003 - 2012, the Respondent visited his house. That he introduced Dorcas to his wife. In the process of Dorcas living with him he got her pregnant. She delivered her first baby in October 2003, while her second baby was in 2005.

That during the period, the Respondent visited, she bought gift for the children of Dorcas. He sold his uncompleted building and the plot of land in Zuba to start a pure water business. He operated the said business between 2010 - 2012.

When the business collapsed, he went into estate development. He sold his house in Dutse to start the estate development business.

He tendered Exhibits A, B, C - C2. That the remaining two children are with the Respondent. They are now 23 and 30 years old, i.e. Grace and Osawe.

Under Cross-Examination, he said the last child, Osawe left his house in 2011. He was 13 years then. He was responsible for his upkeep. He has sickle cell anaemia. That up till September, 2021 he rendered help. That the relationship between him and the Respondent broke down in 2002.

To a further question, he answered that he impregnated Dorcas in 2003. That the document of the Benin House was prepared at the time it was sold. That the document of the house in Dutse was also prepared the same time it was sold in 2015.

That he pleaded with the lawyer in 2015 to prepare the document of sale made in 2009 in respect of the Madalla land. He admitted that the stamp carries 2016 date. That he is still living in the said property. To a question, he answered that Dorcas has a shop in the house but sleeps in her mother's house.

The Respondent opened her case and gave evidence for herself. She is Idahi Osawe Idahosa. That she is a petty

trader. She made a Witness Statement on Oath on 15/05/2020. She adopted same as her oral evidence.

In the said Statement, she stated as follows:

That her name at all material times is IDAHI OSAWE IDAHOSA and not IDAHI MERCY IDAHOSA. That she is the wife of the Petitioner/Cross-Respondent. He drove her out from the matrimonial home since 2nd April 2002.

That she married the Petitioner under Bini traditional custom on the 10th day of June 1989 at her father's residence. She also got wedded to the Petitioner under the Marriage Act at Christ Apostolic Church, Benin City, Edo State on the 11th of June 1989. That Christ Apostolic Church of God Mission is a licensed place of worship.

That in the process of cohabitation with the Petitioner, he tore the original of the said Marriage Certificate. That he caused her mental anguish by raining different accusations on her, beating her constantly and finally drove her out of her matrimonial home and brought in a woman called Dorcas Osawe with whom the

Petitioner/Cross-Respondent have cohabited at No. 26, Euka Lane, Zone 1, Saigbagyi, Bwari Road, Abuja, and committed adultery in the name of a second marriage purportedly celebrated in their Church in clear violation of the Marriage Act.

That her residence attracts a subsidized rent of ₦150,000.00 per annum and consist of one room and parlour self-contained apartment which was arranged by her younger brother, Osaze Ogedengbe since 2009 after several attempts to go back to her matrimonial home proved abortive.

That she is a petty trader. She does not go to different parts of the country. She never exhibited contempt and disdain towards or subjected the Petitioner to threats and insults.

That it was the Petitioner who subjected her to severe beatings with wires and other objects, accusing her of being a witch and a prostitute as a result of the sickle cell disease which afflicted two children of the marriage

namely Samuel Osawe and Adesuwa Osawe. That the Petitioner abandoned the Respondent in Benin.

All medical explanations and pieces of advice given for the misfortune of the sickle cell status of the children as being product of the joint AS genotype of parents simply fell on deaf ears.

The Petitioner also tore her West African Examination Council Certificate. She did not move out of her matrimonial home on her own volition but was driven out by Petitioner since 2/04/2002.

That on 2/04/2002, Petitioner tricked her into believing that they were travelling to Benin City for reconciliation by members of both families, only for the Petitioner to take her to her family members and abandoned her there. She stayed in her father's house from 2002 to 2006. That all efforts to settle the matter proved abortive.

In 2006, she came back to Abuja to live with another of her younger brother till 2009 when he arranged a room and parlour apartment for her. That she had lived on the support of her family since 2nd of April 2002.

That Petitioner brought in the said Dorcas Oghre with him, he has been cohabiting and committing adultery with her in the name of second marriage. The adultery produced two children.

That it is the Petitioner that has behaved in such a way that the Respondent cannot be reasonably expected to live with him. That they built together the two wing 3-bedroom bungalow at No. 26, Euka Lane, Zone 1, Saigbagyi, Bwari Road, Abuja which they built together while in Lagos.

They lived in one wing while they converted the other to one bedroom flats and let same to tenants and a room for shop which is presently occupied by Dorcas Oghre for saloon business. That the Petitioner was providing for the family.

The Petitioner travelled back to Abuja with the children till January 2011 when Samuel Osawe came to live with her and in August 2012, Grace Osawe also joined after her secondary education.

That the children were forced to leave their father as a result of maltreatment. That she has been feeding, clothing and taking care of their medical bills through the support of family members. She has been singlehandedly paying school fees of their son who has been in and out of school due to ill-health.

That their daughter who passed WASSC and JAMB has not been able to further her education because the Petitioner failed to contribute to her education but has been spending money on the children of the Party Cited who are all in school. The Petitioner established a Hair Dressing Saloon for the said Dorcas.

That Samuel Osawe and Grace Osawe are in dire need of support, upkeep and maintenance. That the Petitioner has the financial capacity to maintain the Respondent and his children.

That custody should be with her while the Petitioner should be made to contribute to their upkeep, welfare, medicals and educational needs. The Petitioner is a businessman, also operates a taxi cab services. He owns houses in Zuba, Abuja and Benin City from where income flows from.

She asks for ₦90,000.00 monthly allowance for the general welfare of herself and children. That Petitioner should undertake to handover one of his properties, particularly No. 26 Euka Lane, Zone 1, Saigbagyi, Bwari Road, Abuja to the Respondent and children.

She urges the Court to dismiss the Petition and or grant same on the Cross-Petitioner's grounds.

The Respondent tendered Exhibits D, E and F which are:

- (1) Rent Receipt.
- (2) Four (4) Receipts of payment of school fees.
- (3) Two (2) medical reports.

Under Cross-Examination, witness said she separated with the Petitioner on 2nd April 2002. She has two children for the Petitioner. They are 30 and 22 years old.

On a further question, she answered that they have separated for 20 years now. He was not allowing her to visit the children. He was pursuing her to the street.

That she used to see the party cited. That she parked in about 7 months after she left in 2002. She came back in 2006. The Petitioner was then taking care of the children. They were with the Petitioner and Dorcas, the party cited.

That when she left the house, Samuel was 4 years while the other daughter was 11 years. To another question, she said she brought people to come and beg and he refused.

The Party Cited, Dorcas Oghre gave evidence on 17/05/2022. She lives in Dutse Makaranta, Police Signboard. She is a hairdresser. She knows the Petitioner and the Respondent. She said she knows why she is in Court. That the Respondent sued her for adultery.

That she was introduced to the Petitioner as somebody who needed a house help. They met and bargained and she started work in 2003. He was paying her ₦10,000.00 per month. They later had affection for each other. In the process, she had two children for him.

He did not marry her. In 2006 they ended all relationship. In 2012 she stopped living with him.

During the period of the relationship, he built a shop in the compound for her. In 2015 he sold the place. She started paying her rent to the new owner in July 2016.

She denied maltreating the Respondent's children. That she intervened when Petitioner refused to send his

daughter to school as a result of poor result. That she used to take care of them. That when the Respondent came to the house, she used to buy gift for the children.

On being cross-examined by Respondent's Counsel, she said it is only her shop that is in the compound. That the Petitioner is not taking care of her. That at a time he was taking care of his children born by her but he has no money to take care of them now. The above is the case of the Party Cited.

I have read and considered the Written Addresses of Counsel. The issues thrown up for resolution are:

- (1) Whether or not the parties have proved their entitlement to the dissolution of their marriage.
- (2) Whether or not the Respondent and her children are entitled to maintenance.
- (3) Whether the Respondent is entitled to the payment of damages.

The Respondent/Cross-Petitioner raised a preliminary issue which is: *Whether in the circumstance of this case, the Petition filed on the 18th day of February 2016 failed to comply with the mandatory requirement of the Matrimonial Causes Rules and therefore not competent before this Court.*

The Learned Counsel to the Respondent/Cross-Petitioner's argument is that the Petitioner failed to comply with Order V Rule 10 (1) of the Matrimonial Causes Rules as well as Order XI Rules 28 & 29.

Learned Counsel canvasses that the above provisions are mandatory and a condition precedent to the exercise of the Court's discretion. That failure to comply with the above provisions is fatal.

That the Verifying Affidavit did not verify anything. That the failure renders the Petition fundamentally defective, incompetent and liable to be struck out.

Learned Counsel to the Petitioner on the other hand canvasses that he complied with the provisions of Order V Rule 10 (1) and Order XI Rules 28 & 29 of the Matrimonial Causes Rules. That Respondent's objection is a matter of semantics.

That paragraph 2 of the Petitioner's Verifying Affidavit complied with the duties imposed on him as regards personal knowledge. That failure to comply with Order XI Rules 28 of the Matrimonial Causes Rules by filing a Discretion Statement does not in any way render the Petition incompetent.

That the provision calls for the discretion of the Court where the Petitioner approached the Court for an Order Nisi for dissolution inspite of adultery.

Order V Rule 10 (1) of the Matrimonial Causes Rules states:

“10(1) A Petitioner shall by an Affidavit written on his Petition and sworn to before his Petition is filed.

- (a) *Verify the facts stated in his Petition of which he has personal knowledge, and*
- (b) *Depose as to his belief in the truth of every other fact stated in his Petition.”*

The Verifying Affidavit in support of the application is sworn to by the Petitioner, Samuel Osawe Idahosa. It is a 4-paragraph Affidavit. I shall produce same.

- “1. That I am the Petitioner in the substantive Petition.*
- 2. That by virtue of the aforesaid, I am conversant with the facts of this Petition.*
- 3. That the facts stated in the Petition are true and correct to the best of my knowledge.*
- 4. That I make this Affidavit conscientiously and in good faith believing same to be true, correct and in accordance with the Oaths Act.”*

The question is, whether the above depositions in the Verifying Affidavit of the Petitioner satisfies Order V Rule 10 (1) of the Matrimonial Causes Rules.

To verify means to make sure, demonstrate that the depositions are true, accurate and justified. It is to confirm the facts contained in the said Petition.

The deponent in this Affidavit states that he is conversant with the facts. That the facts stated in the Petition are true and correct to the best of his knowledge. That he made the Affidavit conscientiously and in good faith believing same to be true, correct and in accordance with the Oaths Law.

The above in my view satisfied Order V Rule 10 (1) of the Matrimonial Causes Rules. The facts in this case particularly the Verifying Affidavit accommodates and verifies the facts unlike the case of UNEGBU vs. UNEGBU cited by Respondent/Cross-Petitioner's Counsel. The facts of the case are therefore not the same as the facts of this case.

Order XI Rule 28 (1) states:

*“A Petitioner or Respondent in proceedings who
(a) is seeking a decree of dissolution of marriage
on a ground specified in any of paragraphs (a) -*

(g), inclusive of Section 15 (2) of the Act or a decree of judicial separation under Section 39 thereof on a ground specified in any of paragraphs (a) - (g) inclusive of the said Section 15 (2) (a) and (b) has committed adultery since the marriage shall file a discretion statement if the adultery was committed

- (i) before the filing of the Petition or Answer as the case may be by which the proceedings for the decree are instituted at the time when the Petition or Answer is filed, or*
- (ii) after the filing of that Petition or Answer but before trial of the proceedings as soon as practicable after committing the adultery.”*

I have gone through the Petition. The Petitioner seeks for dissolution of marriage on the ground that since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

The Petitioner did not allege adultery. The Respondent/ Cross-Petitioner on the other hand in her Answer and Cross-Petition urges to dissolve their marriage on the ground of adultery and that the Respondent finds it intolerable to live with the Petitioner.

The Respondent/Cross-Petitioner did not file a discretion statement since the adultery alleged was committed before the filing of the Answer/Cross-Petition, which would have given the Petitioner/Cross-Respondent an opportunity to respond appropriately.

It is true the language used in Order XI Rule 28 (1) of the Matrimonial Causes Act is “shall”. By Order XI Rule 29, the discretion statement shall set out the particulars of the acts of adultery committed by the Petitioner or Respondent as the case may be, since the marriage (other acts stated in any other discretion statement filed by him for the purposes of the proceedings), the circumstances giving rise to the commission of the act of adultery and the grounds upon which the Court shall be asked to make a decree of dissolution notwithstanding the adultery.

(2) Where the Respondent or Petitioner alleges that an act of adultery set forth in the discretion statement has been condoned, he shall state in the discretion statement particulars of the facts that are alleged to constitute condonation of the adultery.

For fair trial and justice, it is mandatory for a discretion statement to be filed by a party alleging adultery, in this case, the Respondent/Cross-Petitioner. However, I shall ignore the non-compliance since the Petitioner/Cross-Respondent who knew he committed adultery with his maid as admitted by him and the party city failed to file a discretion statement.

Pleadings are filed, issued are joined, I shall therefore dispense with the need to comply with the above rules pursuant to Order XXI Rule 3 (a) & (b) of the Matrimonial Causes Rules.

Now to the main issues. Both Petitioner and Respondent are seeking for dissolution of their marriage. The Petitioner's relief is anchored on Section 15 (2) (c) of the

Matrimonial Causes Act that since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

The evidence of the Petitioner is that they were having quarrel every day. The basis of the disagreement was the sickle cell child they had with the second child that was born an imbecile.

By virtue of Section 15 (2) (c) of the Matrimonial Causes Act, a Petitioner is entitled to a decree of dissolution of his or her marriage if he or she can show that since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. The behaviour must be such that a reasonable man cannot endure.

The fact that a spouse appears to be fed up with the other spouse does not necessarily constitute a behaviour which may warrant the inference that the other spouse cannot reasonably be expected to live with him.

Thus, the conduct of a Respondent that a Petitioner will not be reasonably expected to put up with must be grave and weighty in nature as to make further cohabitation virtually impossible.

I have read the pleadings and the facts relied upon by the Petitioner in the Petition even though scanty. The Petitioner failed to lead evidence to prove the said facts. In the circumstance, the Petition fails for lack of merit and it is dismissed.

The Respondent/Cross-Petitioner's Petition also seeks for dissolution of marriage on:

- (i) Adultery - Section 15 (2) (b),
- (ii) Intolerable behaviour - Section 15 (2) (c),
- (iii) Desertion - Section 15 (2) (d) of the Matrimonial Causes Act.

I had earlier copiously enumerated the evidence of the Respondent/Cross-Petitioner. Succinctly she stated that she separated from the Petitioner on 2nd April 2002. She used to see the party cited. She came into the house 7 months after she left.

She said the Respondent drove her out of the matrimonial home. That the Petitioner subjected her to barrage of threats and insults, beatings with wires, accusing her of being a witch and a prostitute as a result of the sickle cell disease that affected the two children.

The Respondent/Cross-Petitioner made a sharp U-turn and said the Petitioner took custody of the three children of the marriage upon abandoning her in Benin City, Edo State.

In paragraph 25, the witness states that she did not move out of the matrimonial home on her own volition rather it was the Cross-Respondent that drove her out of the matrimonial home on 2/04/2002.

She further said Petitioner tricked her into believing that they were travelling to Benin City for reconciliation by members of both families only for Petitioner to take her to her family house and abandon her in Benin City.

There is contradictory evidence of how she left the matrimonial home. The Court cannot pick and choose which of the evidence to believe. I shall be weary of the Cross-Petitioner's evidence as it relates to desertion. The ground for desertion therefore fails.

There is abundance of evidence that the Petitioner/ Cross-Respondent impregnated the Party Cited and have two children with her during the pendency of the marriage. The Petitioner admitted it in evidence. The Party Cited, Dorcas Oghre also admitted committing adultery with the Cross-Respondent.

Adultery is a consensual sexual intercourse between two persons of opposite sexes at least one of whom is married to a person other than the one with whom the intercourse is had.

See **ALABI vs. ALABI (2007) 9 NWLR (PT. 1039) 297.**

ERHAHON vs. ERHAHON (1997) 6 NWLR (PT. 510) 667.

To establish adultery, there must be: (1) Sexual intercourse; (2) It must be voluntary; (3) One of the parties must be married; (4) Penetration.

The evidence is that the Cross-Respondent and Party Cited were cohabiting. The Cross-Respondent and Party Cited confessed and or admitted adultery. There is also evidence that the Party Cited had two children born to the Cross-Respondent. In the circumstance of this case, adultery is presumed between them.

The Cross-Petitioner further states that she finds it intolerable to live with the Cross-Respondent. The adultery was committed with the house girl who came to take care of the matrimonial home and the children of the marriage. They already have two children.

The circumstances in which the adultery was committed and the person with whom it is committed may be enough to make it intolerable for the Cross-Petitioner to live with the Cross-Respondent.

It is my view and I so hold that Section 15 (2) (b) of the Matrimonial Causes Act is proved. The marriage between the Respondent/Cross-Petitioner and the Petitioner/Cross-Respondent has broken down irretrievably.

The children of the marriage are adults. They have challenges. Both are sickle cell patients while one is also an imbecile. They need medical care. None of them is employed.

Before a Court makes an Order for maintenance, it must take into consideration these facts:

- (1) The parties' income.
- (2) Earning capacity and properties owned.
- (3) Financial resources.
- (4) Financial needs and responsibilities.

The evidence is that the Cross-Respondent is doing very well. The properties he owned in Zuba, Dutse and Benin City, the Cross-Respondent tried in his evidence to persuade the Court that he has sold some of the properties.

I have looked at some of the transfer documents, Exhibits A, B and C-C1 tendered as exhibits. I do not believe the evidence. The claim for maintenance succeeds.

Judgment is entered in favour of the Cross-Petitioner against the Cross-Respondent as follows:

1. A decree Order Nisi is hereby ordered dissolving the marriage between the Cross-Petitioner, IDAHI MERCY IDAHOSA and the Cross-Respondent, SAMUEL OSAWE IDAHOSA celebrated on the 11th day of June, 1989.
2. The Cross-Respondent shall pay a monthly allowance of ₦90,000.00 (Ninety Thousand Naira) each to Samuel, Grace Osawe and Idahi until they secure jobs or get married respectively.
3. The Cross-Respondent is further ordered to provide accommodation for the said two children of the marriage who are now adult pending the time they will be able to stand on their own.
4. ₦1 Million as damages against the Cross-Respondent/ Party Cited for adultery.

HON. JUSTICE U. P. KEKEMEKE
(HON. JUDGE)
03/07/2023

Parties present.

A. G. Inyadu, Esq. for the Petitioner/Cross-Respondent
and Party Cited

David I. Okorie, Esq. for the Respondent/Cross-Petitioner

COURT: Judgment delivered.

(Signed)
HON. JUDGE
03/07/2023