IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA

SUIT NO: PET/379/2020

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN:

MR. EKENEM AZIKE……..PETITIONER

AND

MRS. ANGELA IROUSHU AZIKE……DEFENDANT

JUDGMENT

By the petition with No. PET/379/2020, the petitioner seeks for the following reliefs:

a. A decree for dissolution of marriage on the ground that the marriage has broken down irretrievably as the respondent has deserted marriage for over two years at the time of his petition.
b. The five children of the marriage should be allowed to be in the custody of the respondent now that they are still in primary and secondary schools.
c. Unrestricted access to the five children of the marriage at any time the petitioner wants to see them.
d. All the valuable properties that the respondent deserted with including fish processing medicine, ice block making machine and the only car should be given to her.

The petitioner averred that he was a bachelor and got married to the respondent, she is spinster at marriage registry, Abuja on the 8th day of July, 2005 and the surname of the respondent before the marriage was Miss Angela Akwaji or within such extended period as the petitioner of the court may allow, and service of a copy of the answers of notice must be attached in accordance with the matrimonial Course Rule.

The petitioner averred that immediately after the marriage, the petitioner and the respondent were living as people joined together as one with symbolic relationship and this was at early stage of the proceedings. It is that shortly, after their last child, the respondent started exhibiting unquestionable character, to a point she does not take instruction from the petitioner again as her husband and the sudden behavior got the petitioner physically paraplegic and physically traumatized.

The petitioner averred that on the 18th day of February, 2018 the respondent deserted her marital home while the petitioner was out of town for business trip without his knowledge and deliberately refused to return back to their marital home till the time of filing this petition.

It is averred by the petitioner that the petitioner was born on the 24th July, 1973 and the respondent was born on the 5th February, 1980 and the both of them are within the meaning of the Act domiciled in Nigeria and are of Nigeria parents.

That immediately after the marriage, the petitioner and the respondent co-habited at house No. C32A and Aso Hills Estate, Mararaba, Nasarawa State and the date and the circumstances in which co-habitation between the petition and the respondent ceased was on the 18th February, 2018. The respondent deserted the house without any cogent reason that she was fed up with the union and called it quit, but never returned back.

The petitioner averred that particulars relating to the children are:

1. Chisom Azike, Male, born on 14th December, 2005;
2. Anwuli Azike, female, born on 25th April, 2008.
3. Ifealu Azike, female born on 14th May, 2010;
4. Chikasi Azike, female, born on 24th March, 2013.

5. Chidubem Azike, male, born on 6th November, 2017.

The petitioner averred that all efforts were made by him to reconcile by sending members of the church, friends even calling and writing her a letter of reconciliation, but the respondent repudiated of letters of reconciliation and the respondent while going and deserting the marital home went away with ice block making machine and the only car along in which the petitioner made several efforts to resolve the loggerhead with the respondent but all steps ended in a deadlock.

The petitioner averred that since the marriage there has not been any proceedings in court between the two parties and the petitioner has never condoned or connived with the respondent on the ground stated earlier on and that the children should be allowed with their education in the schools and that the petitioner proposed to be paying N40,000 to the respondent as monthly allowance and that the respondent has been in custody of the five children of the marriage, however, the children should be allowed to spend their school holidays with the petitioner and should be allowed to return back if the schools re-open.

The respondent in her answer and the cross-petition averred that she admits paragraph 1 – 5, 8(i) – (v) and 9 of the petition; and denied paragraph 8(b) (c) 6, 7, 8(d) (e), 10, 11 and 13.

The respondent averred that the petitioner and the respondent have lived apart for a continuous period of about three years and the cross-respondent did not object to the decree being granted.

The respondent averred that she lives in her mother's apartment of four bedroom at No. 9 Blackson Street, one man village, Mararaba, Nasarawa State with the children and the children enjoy health benefits under the National

Health Insurance Scheme and are exposed to very relaxed and conducive leaving and learning environments with moderate infrastructure and are settled attending good schools sponsored by the respondent, and that she has never condone or connive with the petitioner and she is not guilty of condemnation.

In the course of the trial, the petitioner put in one witness and the respondent too put in one witness and the DW1cross-examined by their counsel. The respondent tendered the certificate of Marriage as an exhibit. The PW1 testified that she got married to the respondent in 2005 and they have been living apart for more than three years and it was due to the series of events that caused them to live apart and they have children for the marriage who live with the respondent and he sought for the marriage to be dissolved.

The counsel to the respondent took a date for him to cross-examine the PW1.

After several adjournment at the instance of the counsel to the respondent, the respondent could not come before the court for cross-examination and based upon this application of the counsel to the petitioner, the counsel to the respondent was foreclosed the right to cross-examine the PW1.

The DW1 gave evidence that she got married to the respondent in 2005 and they have five children whose names and ages are Chisom 17, years who is in Baze University, Anwuli in SS3 of 15 years, Ifealu Azike in SS1 in the same school with Chikosi Azike and Chidubem Azike in Primary 3 and that she is the one paying school fees. The petitioner as at the time of filing the petition said he would pay the sum of N40,000 and she has been taking care of the children and the school fees is approximately 2.5m and

that she has been paying as the first son is paying the sum of N1,650,000.

The DW1 told the court that it was in 2018 when they were living in Aso Hills Estate, Mararaba and that that time the rent expired and the petitioner said he did not have money to pay and she paid for the rent. At that time she has complication and she was admitted in the hospital and she had to pay the rent.

The DW1 wake up around 5:00am and he told them that separation has started and that was how he left to Lagos.

The DW1 told the court that she learned how to make dry fish and at that time the respondent was not doing anything and she continue to take care of the house. The DW1 told the court that her parents put in some money and she got the drier and she also bought ice making machine and the petitioner had smoke making machine.

In the course of cross-examination, the DW1 told the court that as at the time she left the matrimonial home the petitioner even moved to Lagos and that the petitioner said that the separation has started and he moved to Lagos and that she called him twice to inform him that they were dying and the petitioner did not ask, and the reason of calling him was not from the landlord and she had to leave.

The DW1 told the court that the petitioner has had her ATM Card for eight years and it was just because he said the separation has started but because he was not taking care of the family. The DW1 said that the petitioner never took care of the family and since his brother were sending money to him and he cannot sent to the children.

The counsel to both parties filed their final written address which they adopted.

In his final written address, the respondent's counsel raised this issue for determination, thus:

> **Whether the respondent has proven her case to be entitled to a decree of dissolution of her marriage with the petitioner?**

The counsel submitted that a marriage constructed under the Matrimonial Cause Act may be dissolved upon the ground that the marriage has broken irretrievably under section 15 (1) of the Matrimonial Causes Act and a court will hold that the marriage has broken down irretrievably. The petitioner and the respondent got married on the 18th July, 2005 and the petitioner started to refuse to pick up responsibilities to provide for his family. Section 15(2) of the Matrimonial Causes Act provides a way when the marriage will be dissolved upon the breach of any of the facts that the respondent has willfully and persistently refused to consummate the marriage or that 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 respondent has willfully and persistently refused to consummate the marriage, and also that the respondent has deserted the petitioner for a continues period of at least one year immediately preceding the presentation of the petition.

The counsel submitted that under the above section, the cross petitioner only needs to prove her case in satisfaction of any one of the provisions of section 15 (a) – (h) and he cited the case of **Maru Bunmi Adeparuti V. Charles Adebola Arewa Adefarusi (2014) LPELR – 41111 (CA)** where the court held that from the clear language of the Act, a petitioner needs or is required to prove anyone of the factual situation set out in the provisions for the marriage to be held to have broken down irretrievably and he cited the

case of **Damulak V. Damulak (2004) NWLR (pt 874) p. 151** and **Ibrahim V. Ibrahim (2002) 1 NWLR (pt 1015) p. 383.**

The counsel submitted that the cross-petitioner pleaded and led evidence in proof of willful and persistent refusal to consummate the marriage and desertion and the fact that parties have lived apart for a continuous period of more than two years and had by the very act of refusing to provide for his family and conduct of the cross respondent, her feelings and emotions have been gravely hurt making it intolerable for her to continue to live with the petitioner.

The counsel submitted that the cross-petitioner was cross-examined by the respondent's counsel on issues not touching on the merit of the petition or even cross-petitioner and her evidence stands uncontroverted and is deemed to have been proven under section 133 of the Evidence Act.

The counsel submitted that within the backdrop of the fact that the petitioner deserted the respondent and since then refused to provide for the children of the marriage, the petitioner's attitude was quite heart rendering and under the circumstances, it cannot be expected that the petitioner will tolerate and continue to live with the petitioner in the marriage.

It is the submission of the counsel that the cross-petitioner has proven her case and fulfilled the requirement of section 15(2) of the Matrimonial Cases Act which are separate and independent and that the respondent has also proved that the respondent has also proved that the conduct of the petitioner after the desertion was detestable and condemnable which the respondent found intolerable and he cited the case of **Damulak V. Damulak (supra).**

The counsel submitted that the standard of proof in Matrimonial Causes is as embodied in section 82(1) of the Matrimonial Causes Act where it is provided that prove is

deemed to have been established if it is established to the reasonable satisfaction the court and the respondent has established to the reasonable satisfaction of the court that the legal requirements under section 15(2) of the Act.

The counsel to the petitioner formulated this issue for determination, to wit:

> **Whether from the pleadings and evidence adduced by the petitioner the marriage between the parties celebrated on the 8th day of July, 2005, should be held to have been broken down irretrievably?**

The counsel submitted that under the Matrimonial Causes Act, a petition for dissolution of a marriage can only be obtained upon the ground that the marriage has broken down irretrievably. By section 15(2) of the said Act, the court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably it, but only if, the petitioner satisfies the court of one or more of the following facts:

> **That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition and he submitted further that from the above position of section 15(2) of the Matrimonial Causes Act all the petitioner has to establish is one of these facts, and once he does this, the court is bound to hold that the marriage has broken down irretrievably and the court must grant the decree and he cited the case of Ekerebe V. Ekerebe (1999) 3 NWLR (pt 596) page 514 and according to the counsel cited the case of Ibrahim V. Ibrahim (2007) 1 NWLR (pt 1015) p. 383.**

The counsel submitted that the petitioner pleaded that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of this petition and the evidence before this court is to the effect that the respondent on the 18th February, 2018 deserted her matrimonial home with five children of the marriage and never returned till date and this petition was presented on the 29th July, 2020 a period of two years from the date of desertion.

The counsel submitted that in the light of the foregoing, he urge the court to hold that the petitioner has proved that the marriage has broken irretrievably.

On the issue No. 2, the counsel submitted that section 71(1) of the Matrimonial Causes Act enjoins the court in proceedings with respect to custody, guardianship to regard the interest of the children as the paramount consideration and he cited the case of **Alabi V. Alabi (2008) All FWLR (pt 418) p. 245.**

The counsel submitted that the court in exercising its discretion has to consider the ages of the children, education, welfare and general upbringing arrangement made for their accommodation and the conduct of the parties to the marriage and he cited the case of **Oduche V. Oduche (2005) LPELR – 5975 (CA)** and the case of **Oni V. Oni (1992) NWLR (pt 252) pg – 187** that the court should consider;

(a) The fact that there is no settled rule which says that a child of tender age should remain in the custody of the mother;
(b) The care and supervision that the mother who is not out of work can give to the little children is important factor;

(c) It is right to regard as a principle that a boy on the whole leteris paribus better off with the father.

The counsel submitted that evidence before the court is to the effect that there are five children of the marriage which they lived with the parties under one roof before the desertion until when the respondent abandoned her matrimonial home living the petitioner detangled and traumatized.

The counsel submitted that there is evidence that while the respondent was still cohabiting with him, the petitioner was adequately providing for her upkeep, the children and every other responsibility the petitioner is expected to handle and it is equally the law that in considering custody of children, consideration is taken of the sex and gender of the children involved and he cited the case of **Oyewole V. Oyewole (1987) 2 NWLR (pt 56) p. 239 per Nnaemeka Agu JCA.**

The counsel submitted that presently, all the five children of the marriage live with the respondent and Chisom Azike, the most senior of the children and he needs to be familiar with the petitioner.

The counsel urged the court to grant all the petitioner's reliefs sought.

The petitioner/cross respondent filed a reply to the respondent answer/cross – petition and states that the petitioner refused in its entirety the allegations that the respondent/cross-petitioner was passing through painful experiences as a result of persistent detention from one police to the other on account of various debts set out in paragraph two of the cross-petition and admits that he has never been apprehended and detained by the police on ground of debt.

The petitioner denies the fact contained in paragraph (3) of the cross-petition especially that the allegation that the respondent/cross-petitioner did not desert her matrimonial home and the petitioner has a house before he got married to the respondent (cross-petitioner and the petition has been responsible for everything that has to do with this family since the marriage.

I adopt the issue for determination raised by the counsel to the petitioner as I found it so apt, thus:

> **Whether from the pleadings and evidence adduced by the petitioner the marriage between the parties celebrated on the 8th day of July, 2005 could be held to be broken down irretrievably?**

The respondent tendered the certificate of Marriage in evidence and by this it can be inferred that there is a marriage between the two parties.

After several adjournments to enable the counsel to the respondent cross-examine the PW1 but it turned out that the counsel to the respondent could not be able to and based upon the application of the counsel to the petitioner, the respondent's counsel was foreclosed of the right to cross-examine the PW1. The evidence of PW1 being unchallenged has to be accepted in proof of the case of the petitioner. See the case of **Okegbe V. Akpome (2014) All FWLR (pt 731) p. 1589 at 1615, paras. A-C** where the Court of Appeal Ibadan Division held that the noble act of cross – examination constitutes a lethal weapon in the hands of the adversary to enable him effect the desolation of the case of the opposing party. It is therefore good practice for counsel not only to put across his client's case through cross-examination, he should as a matter of utmost necessity, use the same opportunity to negative the credit of that witness whose evidence is and or fair. It is

unsatisfactory, if not suicidal, had practice for counsel to neglect to cross-examine a witness after his evidence-in-chief in order to contradict him or impeach his credit while being cross-examined. See also the case of **Esene V. State (2017) All FWLR (pt 910) p. 345 at 376, paras. C-E** where the Supreme Court held that where an adversary or a witness called by him testifies in a material fact in controversy in a case, the other party should, if he does not accept the witness's testimony as true, cross-examine him on that fact, or at least show that he does not accept the evidence as true, where he fails to do either, a court can take his silence as an acceptance that the party does not dispute the fact.

Based upon the above authorities, I hold that the evidence of the PW1 is acceptable and it is hereby accepted.

I am more convinced that the evidence of the PW1 is worthy of believe than that of the respondent in proving that it was the respondent that desert from the matrimonial home and I therefore so hold.

Now the respondent left the Matrimonial home since the 18th February, 2018 and this case was filed on the 29th July, 2020 which is barely two years, then the provision of section 15(2) (e) of the Matrimonial Causes Act Cap. M7 LFN, 2004 come into limelight which provides:

> "2. The Court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have been broken down irretrievable it, but only if, the petitioner satisfies the court of one or more of the following facts:
>
> **(e) That the respondent has deserted the petitioner 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".

See the case of **Ibrahim V. Ibrahim (2007) All FWLR (pt 346) p. 478 at 492, paras. A-B** where the Court of Appeal, Kaduna Division held that in order to establish the fact that the marriage had broken down irretrievably under section (2) (e) of the Matrimonial Causes Act, the petitioner is expected to prove the following constituent elements:

(i) 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

(ii) That the respondent does not object to the decree being granted.

It is part of the answer to the petition and cross-petition of the respondent that she seeks for the dissolution of the marriage because it has broken down irretrievably and as such the petitioner has satisfied the court with the two constituent elements to be proved in satisfaction of section 15(2) (e) of the Matrimonial Causes Act Cap. M7 LFN 2004.

In the case of **Alabi V. Alabi (2008) All FWLR (pt. 418) p. 258 at pp. 295 – 297, paras. E-H** the court held that award of custody of the children of a marriage that has broken irretrievably is governed by section 71 of the Matrimonial Causes Act Cap. M7 LFN 2004 which enjoins the court in proceeding relating to custody, guardianship, welfare advancement or education of children of the marriage, to take the interest of the children as paramount consideration and the court in this regard is governs with discretionary powers which it can exercise according to the peculiar circumstances of each case. In the instant case, the petitioner averred that he has no problem with the five children being in the custody of the respondent and the

only thing he like is for the children to be allowed to spend their school holidays with him and they should be allowed to return back when their school re-opens and this forms part of the relief in his petition.

A decree nisi is hereby granted for the dissolution of the marriage on the ground the marriage has broken down irretrievably.

The five children of the marriage will remain in custody of the respondent and they should be allowed to spend their school holidays with the petitioner and they should also be allowed to return back when their school re-opens.

Hon. Judge
Signed
6/06/2024

Appearances:

M.A. Odey Esq appeared for the petitioner.