IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

THIS THURSDAY THE 27TH DAY OF OCTOBER, 2022

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFA

PETITION NO: FCT/HC/PET/309/22
FCT/HC/M/7772/22

BETWEEN:

ARINZE NDUBISI NNATUANYA EZE…......PETITIONER/APPLICANT

AND

UGOCHINYERE DAISIRE ARINZE EZE……..................RESPONDENT

JUDGEMENT

By a notice of petition dated 10th June, 2022, the petitioner claims the following Reliefs against the Respondent as follows:

a. **A decree of Dissolution of marriage with the Respondent on the ground that the marriage between the petitioner and the Respondent has broken down irretrievably. The particulars of such breakdown are as follows:**
   i. **The Respondent has deserted the petitioner for a continues period of more than one year immediately preceding the presentation of this petition.**
   ii. **The petitioner and the Respondent have lived apart for a continues period of more than three (3) years immediately preceding the presentation of this petition.**

iii. **The Respondent has behaved in a way and manner that the petitioner finds it intolerable to live with her.**

From the record of court, the petitioner first file a motion experte for an order of this Honourable court granting the petitioner/applicant leave to serve the petition for Dissolution of marriage and other court processes in respect of the petitioner on the Respondent by means of substituted service to wit:Through her valid email address and WhatsApp Number.

The motion which was moved dated the 15-7-2022 and the order sought therein was granted and the matter adjourned to the 26-September, 2022.

On the 26th September, 2022 being the date set for hearing, the petitioner counsel one UcheOgugua-Eze ESQ, Love Chukwumerije ESQ and OgbuChinnagoron all appears for the petitioner where the counsel informed the court that, service was effected on the Respondent and proof of service filed in the court file. The matter was then set down for hearing the processes which were duly served on the Respondent via the Respondent email. The Respondent however never appeared in court or filed any process in opposition despite service of Hearing notices at different times all through the course of this proceeding. The matter then came up for hearing on the 20/9/2022.

The matter therefore proceeded to trial. The petitioner testified in person and only witness. The substance and summary of his unchallenged evidence is that.

This matter is about his wife having left home since 2018 and never returned back home. That they were married on the 12-5-2012 at Florida in USA and there is a certificate of marriage issued to them after the marriage. The said certificate of marriage i.e the certify true copy of the certificate of marriage between Arinze NdubisiNnatuanyaEze and UgochinyereDaisireNwoga conducted at Florida USA dated the 5th December, 2012 at St-Augustine (Cathedral-Besiliea was tendered and admitted in evidence as exhibit A. that after the marriage the lived at Switzerland for about a year and the last four (4) years in Nigeria at No: 5 Cherry courts Richmond gate Estate Lekki Lagos.

That they have three children of the marriage and their names are as follows:

a. **LolomomaFemale, born on 13th September, 2012**
b. **Akonarina, Female born on 29th October, 2014**
c. **Gazielugi, male born on 30-06-2016**

He went further to state that they have never been any proceeding in respect of this case in any court of law and that he did not connive with the Respondent to

bring this petition or action and that they are no more living together with the Respondent.

That the cohabitation between himself and the Respondent seized in their residence in Lekki on the 20-06-2018 that just like in order marriage between husband and wife there must be argument. That in this case they argued over years and that the night between 20th June, the wife disappeared when they had a heated argument. That the Monday morning he left for work and to his surprise when he returns back home his children wasnowhere to be found, his vehicle and his account were all cleared. So he frantically called to know the wellbeing of the children through the relations, and their drivers and also to the family at USA but to no avail.

That it was only two weeks he reached her through the WhatsApp that the wife finally took his call, and that it took the next five or six to convince her and how she can come back home and neither the children to come back home to continue with their schooling. That he then proceeded to let things be to see whether the family will think it over it, and is now 2022 and he did not think or feel that from the conversation the marriage has broken down irretrievably, and that was why he reached out to the court to grant the divorce and give him access to his children.

That he will like the court to consider the situation to grant him the dissolution of the marriage and unrestricted access or reasonable time with his children, that the wife lived in Florida and with all the children of the marriage.

The petitioner counsel upon the evidence of the petitioner closed the case for the petitioner, and that all originating processes have been served on the Respondent, together with the hearing notices. That the Respondent did not send any representation to defend her in court. And that base on the forgoing applied that the Respondent be foreclosed from cross-examining the petitioner. This the court refused the application and adjourned this matter to 26-9-2022 for cross-examination of the Respondent and order hearing notice to be served on the Respondent.

On the 26-9-2022 when this matter came up for cross-examination the petitioner and his counsel were in court while the Respondent was absent, haven been satisfied that the Respondent was duly served with hearing notice proof of service via email dated the 16-9-2022, the Respondent was then foreclosed on the application of the petitioner counsel and the matter was adjourned for defence for 4th October, 2022 with an order of hearing notice to be served on the Respondent.

On the 4th October, 2022 the petitioner and his counsel one UcheOgugua with two others were in court while the Respondent was absent the petitioner counsel then applied to the court to foreclose the Respondent from the defence of this action, the said application was granted and the Respondent foreclosed. Upon being foreclosed, the petitioner counsel then applied to take a date for address and the matter adjourned to 12-10-2022 to enable the petitioner counsel to address the court.

The Petitioner counsel who filed its final written address dated the 11th day of October, 2022 filed dated the same date, and on the 18-10-2022 he adopted same date, and urge this court to grant the relief sought in petition.

In the said written address, the petition counsel gave the background of the petition and summarize the facts of the case as stated in the body of this judgement and formulate, a sole issue for determination to wit:

> **"whether the petitioner is entitled to the twin reliefs sought from this Honourable court as contained in the petition for dissolution of marriage on the ground that the marriage to the Respondent has broken down irretrievably"**

On this he argues that the celebration and dissolution etc. of a statutory marriage such as this one, in Nigeria is governed solely by the M CA and referred this court to 15(1) and submit that arising from the evidence led at the trial of this suit,that the petitioner has showed by his evidence that the parties to the marriage have lived apart for a continues period of three (3) years immediately preceding the presentation of this petition. And that the petitioner, in his petition andalso in examination in chief, informed this court that co-habitation between him and the Respondent started on or about 12th May, 2012 and ceased on 20/6/2018 and that parties have lived apart continuously from each other since June, 2018 that the law is trite that where the parties to the marriage have lived apart for a continuous period of three(3) years preceding to presentation of the petition, the marriage has broken down irretrievably and that the court hearing the petition for a decree of dissolution of marriage shall hold the marriage to broken down irretrievably and referred the court to section 15(2) of the MCA 2004, and also referred this court to the case of Akinlolu V Akinlolu (2019) LPELR-47416 (CA.) he went further to states that the petitioner in his evidence in chief stated that, the period he live apart from the Respondent till the presentation of the petition in June, 2022 is more than the three (3) years provided by section 15(2) F of the MCA.

That in this case, the Respondent was duly served with all the processes but was neither present in court nor was represented by legal counsel of her own choice at trial, therefore hold that the onus of proof on the petitioner will be discharge on a minimal proof. This he referred the court to the following cases

1. **AjidahunVAjidahun (2000) 4 NWLR (PT.654)607 paragraph 5.**
2. **Aria V UBA Plc (1997) 4 NWLR (pt. 498) 181**

Further submitted that, the evidence of the petitioner was unchallenged, uncontradicted and uncontroverted. On this referred the court to the case of Military Governor of Lagos State V Adeyiga (2012) 2 KCR. 839 what the court held as follows:

> **"the position of the law where evidence is unchallenged or uncontroverted is that such evidence will be accepted as proof of fact it seeks to establish. A trial court is entitled to rely on and act on the controverted or uncontradictedevidence of a plaintiff or his witness. In a such a situation, there is nothing to put or weigh on the imaginary scale of justice.**
>
> **In the circumstance, the onus of proof is naturally discharged on a minimum proof"**

And the following cases

a. **Kopak Construction Ltd V Ekisola (2010) LPELR. 1703(SC).**
b. **Emodu&ors V Emodi&ors (2013) LPELR-21221 (CA)** and further more in **Omotunde V Omotunde (2001) 9 NWLR (PT 718) 252** the court held thus:

> **"by section 15(2) F of the ACT, a court hearing a petition for the dissolution of a marriage shall hold the marriage to have broken down irretrievably if the parties to the marriage have live apart for a continuous period of three (3) years immediately preceding the presentation of the petition. The law is that the provision is mandatory and the court has the factor of absence of fault element characteristics of other matrimonial offences, - the law behind the section is section 15(2) F as far the living apart is concerned is not interested in right or wrong or guilt or innocence of the parties. Once the parties have lived to the court is bound to grant a decree.**

Therefore, most humbly submit that the petitioner has established by his evidence that he has lived apart from the Respondent for more than (three) 3 years immediately preceding the presentation of the petition and accordingly hold that the marriage has broken down irretrievably.

That the petitioner has shown by his evidence that the Respondent has deserted him for a continues period of at least one (1) year immediately preceding the presentation of his petition this is the ground under section 15(2)d of the MCA. 2004.

That the petition tender in evidence a certified true copy of the marriage certificate, due to the fact that the Respondent (who is no longer interested in the marriage) has the original copy. Hold that the Respondent deserted the petitioner and accordinglyfind that the marriage has broken down irretrievably.

From the forgoing address of the petitioner, I wish the records has had more than ample time to defend this action if she wanted. She never availed herself of the opportunity.

The principle appears settled that while the right to be heard is of wide application and great importance in any well conducted proceedings, it is however a right that must be confined within circumscribed limit and not allowed to run wild. See London Borough of Houston V Twickenham Garden Development Ltd (1970) 3 ALL ER. 326 at 342. A party certainly does not have till eternity to prove or defend any action as the case may be.

Having carefully considered the petition, the unchallenged evidence led and the address of counsel, the narrow issue is whether the petitioner has on a preponderance of evidence established or satisfied the legal requirement for the grant of this petition. It is on the basis of this issue that I would now proceed to consider the evidence and submissions of counsel.

ISSUE 1

Whether the petitioner has on a preponderance of evidence established/satisfied the legal requirements for the grant of the petition?

I had at the beginning of this judgement stated the claims of the petitioner. Similarly, I had also stated that, the respondent despite the service of the originating court processes and hearing notices did not file anything or adduce evidence in challenge of the evidence adduced by petitioner. In law, it is now an accepted principle of general application that in such, circumstance, the defendant is assumed to have accepted the evidence adduced by plaintiff and the

trial court is entitled or is at liberty to act on the petitioner's unchallenged evidence. **See Tanarewa (Nig)Ltd. V Arzai ((2005) 5 NWLR (PT. 919) 593 AT 636-C-F, OmoregbeLawani (1980) 3-7 SC,108 Agagu V Dawodu (1990) NWLR (PT. 160)169 at 170**.

Notwithstanding the above general principles, the court is however still under a duty to examine the establishedfacts of the case and then. See whether it entitles the claimant to the reliefs he seeks. I fine support for in the case of **NnamdiAzikiwe University V Nwafor (1999) 1 NWLR (pt. 585) 116.at 140-141 where the court of Appeal Per Salami JCA** expounded the point thus:

> **"the plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence--- the mere fact that a case is not defended does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establishes or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant.**

A logical corollary that follows the above instructive dictum is the attitude of court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. The supreme court in **Duru V Nwosu (1989)4 NWLR (pt.113) 24** stated thus:

> **"------ a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is potently unsatisfactory then he had not made out what is usually referred to as a prima-facie case, in which case the trial judge does not have to considered the case of the defendant at all.**

From the above, thepoints appear sufficiently made that the burden of proof lies on the plaintiff or petitioner in this case to establish his case on a balance of probability by providing credible evidence to sustain his claim irrespective of the presence and or absence of the defendant or respondent. **See Agu V Nandi (1999) 2 NWLR (PT. 589) 131 at 142.**

The burden or standard of proof required in matrimonial proceedings in also now no more than that required in civil proceedings. Indeed, Section 82 (1) and (2) of the Matrimonial Causes Act (The Act) provide thus:

1. **For the purpose 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 thisAct require 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**.

Now in the extent case, the petitioner from his petition seeks for dissolution of marriage with the respondent on the grounds that the marriage has broken down irretrievable and essentially predicated the ground for the petition on the fact that since the marriage the Respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. It was further averred as a ground that, the Respondent has constructively deserted the petitioner and has through her behavioural pattern and disposition made living together with the petitioner unbearable, that the Respondent made mental life unbearable, for the petitioner and has for uncountable times verbally and physically abused the petitioner, the Respondent has on a number of occasions, abandoned the three(3) children with the petitioner providing little to no physical support even when the welfare of the children was at stake, and following an argument over the welfare and care for the children on 20 June, 2018, while the petitioner was at work and away from matrimonial home in Richmond Gate Estate, Lagos Nigeria the Respondent moved her property to an unknown place without disclosing her whereabout to the petitioner and on the said date, some cash (about 6000 Euros) belonging to the petitioner other valuables, personal and join + property as well as all three children of the marriage, were taken by the Respondent leaving the Petitioner broke and broken. The petitioner ever since the Respondent left their matrimonial home in 2018, has not set his eyes on their three (3) children till date, and lastly, that the Respondent despite not disclosing the where-about of their children to the petitioner relocated all three?(3) children to the United States of America without obtaining the prior consent and permission of the petitioner.

It is doubtless, therefore, that the petition was brought within the purview of section 15(1) (c) (e) and (f) of the Act.it is equally correct that section 15 (1) of the Act, provides for the irretrievable breakdown of a marriage as the only ground upon which a party may apply for a dissolution of a marriage. The facts that

May however lead to this breakdown are clearly categorised undersection 15(2) (a) to (h) of the Act. In law, any one of these facts of proved by credible evidence is sufficient to ground or found a petition for divorce

Now from the uncontroverted evidence of petitioner, before the court, I find the following essential facts as established, to wit.

1. **That parties got married on 12th May, 2012 at Cathedral Basilica of St-Augustine, Florida in accordance with the Marriage laws of the state of Florida USA, via exhibit A.**
2. **That the cohabitation between the Petitioner and the Respondent ceased in their residence in Lekki on the 20/09/2018.**
3. **That since 20th June, 2018, a period of nearly 4 years now, cohabitation has effectively ceased between parties.**
4. **That even before the Respondent left the matrimonial home, she has behaved in a way and manner that the petitioner finds it intolerable to live with her, and has uncountable times verbally and physically abused the petitioner.**
5. **That the Respondent on the 20/6/2018 took some cash (about 6000 Euros) belonging to the petitioner, other valuables, personal and joint property as well as all three children of the Marriage, were taken by the Respondent leaving the petitioner broke and broken.**

The above pieces of evidenced and or facts have not been challenged or controverted in any manner, by the Respondent who was given all the opportunity of doing so. It is trite that, evidenced that is not successfully challenged or discredited and that is relevance to the issues in controversy ought to be admitted and relied upon, by a trial court for is for all intents and purposes credible and reliable.

See UBAV Fagebe Foods Ltd (1998) 6 NWLR (PT. 554) 380, Morah V Okwuaganga (1990) 1NWLR (pt. 125 225, UBA V Achoru (1990) 6 NWLR(PT.156) 254. The law is also settled, that where evidence given by one party to any proceeding is not challenged by the opposite party who has the opportunity to do so, it is always open to the court seize of the proceedings to Act on the unchallenged evidence before it.

See insurance brokers of **Nig A.T.M. Co Ltd (1996) 8 NWLR (PT. 466) 316 at 327 G-H.**

This is because in civil cases, the only Criterion to arrive at a final decision at all time is by determining on which side of the scale, the weight of evidence felts. Consequently, where a Respondent chooses not to adduce evidence, the suit will be determined on the minimal evidence produced by the plaintiff a petitioner. See A. G. Oyo State V Fair Lakes Hotel Ltd (No:2) (1989) 5 NWLR (PT.121) 225.

Indeed, the failure of the Respondent to respond to this petition confirms in all material particulars the facts that the marriage has broken down irretrievable and that they have lived apart now for 5 years.

On the second order on the unrestricted right of access at all reasonable time by the petitioner to all three children of the marriage who are presumably now living with the respondent. On this the petitioner proposed arrangement for the children thus:

1. **The petitioner and the Respondent shall be jointly responsible for the care, welfare and advancement of the three children of the marriage.**
2. **The petitioner and the Respondent shall be jointly responsible for direct payment of school fees of the three children of this marriage.**
3. **The petitioner does not object to custody of the children by the Respondent**.

On this I will referred to section 71(1) of the Matrimonial Causes Act 1970, the court regards the interest of the children as the paramount consideration in the award of custody of children to a party. Section 71(1) of the Act which relates to custody order provides:

> **"in proceedings with respect to the custody, guardianship, welfare, advancement or education of the children as the paramount consideration, and subject there to the court, may make such order in respect of these matters as it thinks proper.**

The importance of custody of the children of marriage in a matrimonial proceeding. Need not be over emphasised. In Hayes V Hayes (2000) 3 NWLR (pt. 648) 276, the court per Aderemi, JCA, said at 290, thus

> **"throughout the gamut of matrimonial proceedings, the interest of the child of the marriage, as to the custody and welfare is held paramount:**

See (1) Anayo V Anyaso (1998) 9 NWLR(PT.564)150. (2) Oyelowo V Oyelowo (1987)2 NWLR (PT.56) 239 4 S.C.32. That it has been held that a decree shall not be made absolute until the court is satisfied as to arrangement made for the care and upbringing of the child of the marriage, and a decree absolute made on an inadvertent non-compliance with the custody and maintenance of the children shall be declared void"what is paramount in all matters relating to custody and welfare of the child of marriage, and the dominant issue that calls for careful examination and consideration is what is in the absolute interest of that child or those children: **Per ABBA AJI JCA (PP. 42, paragraph B-C)**

Here the children of the marriage as stated are:

1. **LolomomaFemal, born on 13th September, 2012**
2. **Akonarina, Female born on 29th October, 2014**
3. **Gazielugi, male born on 30-06-2016**

From the above it suffices to say that, the 1st child is about 10 years, the Second 8yearsand the 3rd 6 years respectively. I am bold to say that, custody of a child of tender age which ordinarily should remain in the custody of the Mother, more also that the two are all female as such needs the comfort and care of the mother. The all-important implication of the preservation and care of the child's person, morally, physically and mentally. It is trite law that in making an order for maintenance, the court must always have regard to the means, earning capacity and in fact the conduct of the parties to the marriage and other relevant circumstances. Section 70(1) of the matrimonial Act provides thus.

> **"subject to this section the court may in proceedings with respect to the maintenance of a party to a marriage or of the children of the marriage, other than proceeding for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances"**

By virtue of the above provisions, the court seized of a petition has the discretionary power to make an order that it deems proper for the maintenance of a party to the marriage, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. The relevant circumstances must be gathered by the court itself from the pleadings and evidence of the parties at the trial.

In assessingmaintenance section 70(1) gives the court the discretion power to order and asses maintenance of a party. In this case the issue of custody, maintenance and welfare of the children of the marriage has been settled by the petitioner in its pleadings base on the proposed arrangement stated in this judgement.

Therefore, by confluence of these facts, it is clear that this marriage exists only in name. as stated earlier, any of the facts under section 15(2) a-h (supra) if proved by credible evidence is sufficient to ground a petition for divorce. The established fact of living apart for up to 4 years i.e. from 2018, shows clearly that this marriage has broken down irretrievable and parties have no desire to continue with the relationship, this fact alone without more can ground a decree

of dissolution of marriage. If parties to a consensual marriage relationship cannot live any longer in peace and harmony, then it is better they part in peace and without mutual respects for each other. the unchallenged petition in the circumstance has considered merit.

In the final analysis, and in summation, having carefully gone through the petition and the unchallenged evidence, I accordingly make the following order

1. **An order of decree Nisi is granted dissolving the marriage celebrated between the petitioner and Respondent on the 12th May, 2012.**

2. **The petitioner and the Respondent shall be jointly responsible for the care, welfare and advancement of the three children of the marriage.**

3. **The petitioner and the Respondentshall be jointly responsible for the direct payment of school fees of the three children of the marriage.**

4. **The custody of the three children of the marriage shall remain with the respondent and have unrestricted right of access at all reasonable times by the petitioner to all three children of the marriage now living with the Respondent.**

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HON. JUSTICE A. Y. SHAFA

APPEARANCE:

1. **UcheOgugua-EzeEsq.**