

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

MONDAY 18TH SEPTEMBER, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/PET/251/2023

BETWEEN:

DEPIVER-OLUBASUSI ADEYINKA QUEEN..... PETITIONER

AND

OLUBASUSI OLUYINKA GBENGA..... RESPONDENT

JUDGMENT

By a notice of petition dated the 20th day of February, 2023, filed dated the 17-3-2023 the petitioner seeks the following orders.

- a. A decree of dissolution of marriage celebrated between the petitioner and the Respondent on the 17th day of October 2009, on the ground that the marriage has broken down irretrievably as the Respondent has deserted the home for a period more than twelve (12) years.**
- b. An order granting sole custody of the only child of the marriage Depiver Olubasusi carries (Female) to the petitioner.**
- c. An order directing the Respondent to pay the sum of #3,000,000.00 (three Million Naira) only to the petitioner per annum to be paid**

quarterly for the maintenance of the only child of the marriage Depiver-Olubasusi Carrie until she becomes 18years of age.

From the record of court, the petitioner first filed a motion expert dated the 15th February, 2023 for an order of this Honorable court granting the petitioner/Applicant leave for an order for substituted service of the originating processes in this suit and all other processes in this suit by posting them at the entrance door of the usual address of the respondent plot D198 Doboys District Abuja, FCT. The motion was moved by C.D.M Izonobi the petitioner counsel, dated the 27th March, 2023 and the order sought therein was granted, and the matter adjourned for 8-05-2023.

On the 8-05-2023 when the matter comes up for hearing, the petitioner counsel one Dim Izunobi informed the court that the respondent was duly served against today's date for trial, and that in the absence of any written explanation why they were not in court pray the court to allow them proceed with the hearing of this suit.

This court having closely gone through the process of the court and having been satisfied that the respondent was duly served with the order of this court granted to the petitioner counsel to proceed with the hearing.

The matter therefore proceeded to trial, the petitioner testified in person and one other witness. The substance and summary of this unchallenged evidence of facts relied upon by the petitioner as constituting the grounds for the petition for dissolution of marriage is as follows.

That the parties got married on the 17th of October, 2009 after their wedding cohabitation at No:9 Oyaide Street off Benoni Road GRA Benin City Edo state. Upon the parties living together in marriage the respondent began to exhibit cruel character. That within the first 2 months of 2010, the respondent threatened that he will move out of the matrimonial home and abandon the petitioner in her pregnant condition when the sex of the baby was discovered to be female.

On the 20th day of March, 2023 while the petitioner was five (5) months pregnant, with the only child of the marriage, the respondent deserted the home and relocated to Abuja without the consent of the petitioner. The petitioner visited the respondent family in Benin to inform them about the ugly step their son has taken and that he

should be called to order especially with her condition. The respondent parents called the petitioner's parent to fix a date to resolve whatever issue that made their son abandon his marriage, but on for the parent of the respondent to inform the petitioner's parents on the said date to return the dowry they paid on their daughter as their son is no longer interested in the marriage. The petitioners parent respectfully returned the bride price and also wash off their hands in the marriage traditionally.

After the petitioner put to birth, she visited the respondent in Abuja, in his new place of abode at plot D198 Duboyi district, Abuja FCT to show him the new born female child and whether he will change his mind about the marriage and continue but instead he bless the child and informed the petitioner that he is no longer interested in the marriage because he wants a male child as his intention was to give birth to only one child.

The petitioner on returning to Benin has no other option than to relocate to her parents' house in Lagos to begin a new life.

Further, since 2010 the respondent deserted the home and never visited the petitioner to inquire about the child nor contribute to her welfare since she was born and a result of the respondent's continuous absence for over a period of 12years, the petitioner has been in custody of the only child of the marriage.

The petitioner wishes to have the child completely in her custody, enrolled in a school of her choice until she is 18 years of age. That the petitioner is a good Christian with a good home background and well-grounded family values, and that the relief sought of dissolution became necessary and inevitable as since the marriage, the respondent has deserted the home for over 12years. That the relief of custody is in the interest of the welfare of the child of the marriage Depiver-Olubasusi Carrie, equally the relief of maintenance is in the interest of the welfare of the child of the marriage Depiver-Olubasusi Carrie.

On the 8th May, 2023 PW1 Depiver Olubasusi Adeyinka Queen gave evidence and its testimony before the court testified that she is an entrepreneur and a student, lived at 16 Gbangbale Street Ikale-elegushi Lagos state. That on the 20-2-2023 deposed to the witness statement on oath, the said witness statement on oath which

she identified through her signature and her picture pray the court to adopt same as her evidence in this petition of the dissolution of the marriage.

The petitioner counsel referred to clause 1 and 2 where mention was made on certificate of marriage and the birth certificate. This she identified the marriage certificate by her name and signature and the name on the birth certificate as the mother of the child. The marriage certificate was admitted in evidence as exhibit A and the birth certificate as exhibit B. in summary pray the court to grant all her reliefs, the matter was adjourned to 12-05-2023 for cross-examination.

On the 12th May, 2023 Dim Izunobi the petitioner counsel was in court, where he stated that, it appears that the respondent was not present in court. That he was duly served against this date. That today's business being set down for cross-examination of the petitioner and the petitioner present in court for that purpose. That in the absence of any written explanation from the respondent while he is not in court or represented by a counsel apply to the court to foreclose the respondent from cross-examining the petitioner. This prayer was granted and the respondent foreclosed from cross-examining the petitioner and the petitioner formerly closed the case of the petitioner and the matter adjourned for defense to the 22-05-2023.

On the 22-05-2023 when this matter came up for defense, the petitioner counsel and the petitioner were in court, while the respondent was absent. This the petitioner counsel applied to the court to foreclose the defendant from defending this petition as there is no written explanation for the absence of the respondent.

This, the court granted the petitioner counsel request, and the respondent was foreclosed from the defense of this suit (Petition). The matter was adjourned to enable the petitioner counsel file and adopt its final written address.

The petitioner counsel filed his final address dated the 2nd June, 2023 filed the same date.

In the final written address, raised a sole issue for determination to wit:

“Whether the petitioner has been able to prove that her marriage to the respondent had broken down irretrievably as to be entitled to a decree of Dissolution of the marriage and other ancillary Reliefs sought”

In arguing the sole issue submitted that, the circumstances relied upon by the petitioner to substantiate that her marriage to the respondent has broken down irretrievably was that provided under section 15(2)(f) of the matrimonial causes Act, on this refer the court to section 82 (1) of the Matrimonial Causes Act the level of proof required under this section is to the reasonable satisfaction of the court which has been defined as preponderance of probability on the petitioner evidence was correct. Similarly order V rule 27 of the matrimonial causes rules which provides that the existence of a valid marriage may be proved by either the production of the original marriage certificate or the certified true copy thereof, in the instance case, the petitioner tendered the original marriage certificate.

Furthermore, submitted that the petitioner has led evidence as to when the respondent deserted the home which is over a period of twelve (12) years before proceeding with this petition thereby providing one of the grounds for dissolution of marriage as enumerated in section 15(1) and (2) of the matrimonial causes act, thus:

- 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 cannot reasonably be expected to live with the respondent.**
- c. That since the marriage, the respondent has behaved in such a way that the petitioner cannot be reasonably 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 of restitution of conjugal rights under this Act.**
- h. That the other party to the marriage has been absent from the petitioner for such time and in such circumstance as to provide reasonable grounds for presuming that he or she is dead.**

On this submitted that, this evidence of the petitioner as regard to when the respondent deserted the home has remained unchallenged and uncontroverted by the respondent who though served with the processes in this suit failed and or refuses to respond to it. On this referred the court to the case of IJEBU ODE LG V ADEDEJI (1991) LPELR-SC 221 1989 at page 39 Para A-D where Karibi Whyte JSC stated that:

“Where there is evidence to support a claim, as here which remains unchallenged or uncontroverted by the other party, the court is bound to accept the evidence in support of the claim”.

Submitted that, in the circumstance, this court is bound to accept the petitioner evidence of the respondent deserted the home for period of over twelve (12) years and since she has been taking care of the only child of the marriage all alone. Furthermore, submitted that, in the instance case, the respondent was served with the process of this honorable court by substituted means i.e. pasting at entrance door of his usual residence.

On the unchallenged evidence submitted that, the law is trite that the unchallenged and uncontroverted evidence of the petitioner ought to be accepted by the court as establishing the facts therein contained. On this placed reliance on the case of Ogunyade V Oshunkaye 92007)12 MJSC 157 (a) 160. On this the learned petitioners counsels submitted that the petitioner had led unchallenged evidence to the effect that the respondent has deserted the home for a period of more than 12 (Twelve) years before proceeding with this petition for dissolution of marriage, which is a specie of the conduct grounding the dissolution of marriage under section 15(2) (f) of the matrimonial causes Act and that the court should dissolve the marriage as the petitioner has satisfied all necessary requirement for the order to be made and grant sole custody of the only child of the marriage Depiver-

Olubasusi Carrie to the petitioner as well as cost of maintenance, her evidence in respect of same having remained unchallenged.

Having considered the evidence of the petitioner, as well the documents admitted by the court, I hold that the evidence of the petitioner stands unchallenged as the evidence was not controverted while the document tendered fully supports the case of the petitioner.

The respondent though properly served with the notice of the petition by substituted means, chose to do nothing, stayed away from the defense of this suit, did not enter appearance and did not file any statement of defense, every allegation of facts contained in the petitioner's claim must be taken as established even without further proof. See *Arimi V Basharun* (1979) 1 FNR 226 also the case of *Okoebor V Police Council* (2003) 12 NWLR (pt. 834) 444 at 472-473 the supreme court per Tobi JSC said

“Where the defendant fails to file a defense, he will be deemed to have admitted the claim or relief on the statement of claim.”

In this case, the relief is one seeking for three reliefs as stated from the beginning of this judgment.

In fulfillment of this requirement the petitioner led evidence in support of his case, which has not been contested, challenged or controverted. The law is trite that where evidence is unchallenged or uncontroverted and manifestly credible a reasonable court or tribunal is at liberty to accept it and indeed act on it. See *Ikwuka V Ananchuna* (1996) NWLR (Pt. 424) 355 at 366.

Under Nigerian Law, he who asserts in the affirmative and would fail if no evidence is called has the burden under section 136 of the evidence to prove the assertion in the instance case the burden of proving whether the marriage has broken down irretrievably lies on the petitioner. In divorce proceedings the petitioner must prove one of the facts contained in section 15(2)(a)-h of the matrimonial causes Act before he can succeed and where the petitioner fails to prove that, the petition for the dissolution of the marriage will be dismissed, Notwithstanding the fact that the divorce is desired by both parties. See *Akinbuwa V Akinbuwa* (1998) 7 NWLR (Pt. 557) 661. In the instant case therefore, the burden of proof is on the

petitioner who is alleging the respondent has behaved in such a way that he cannot reasonably be expected to live with the respondent. Unless the petitioner satisfied the court on both of these matters, the court will refuse to hold that the marriage has broken down irretrievably.

In the instant case, the petitioner has proved to the satisfaction of this court that the respondent has for the past 12 years deserted the petitioner, this evidence which was not challenged nor controverted by the respondent. I am therefore prepared to accept the evidence of the petitioner to hold that the marriage has broken down irretrievably as the respondent has deserted the home for a period of more than twelve years hence I shall grant a decree of dissolution of marriage celebrated between the petitioner and the respondent on the 17th day of October, 2009.

On the second relief being granting sole custody of the only child of the marriage Depiver Olubasusi Carrier 9Female) to the petitioner.

On this I wish to state that by virtue of section 71(1) of the MCA 1970, the court regard the interest of the children as the paramount consideration in the award of custody of children to a party. Section 7(1) of the Act which relates to custody order provides:

“In proceeding with respect to the custody, guardianship, welfare advancement or education of the children of a marriage, the court shall regard the interest of those children as the paramount consideration, and subject thereto, 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 emphasized 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”

It is the duty of a man to maintain his wife and his children. A man has a common law duty to maintain his wife and children (child) and such a wife and child then

have a right to be so maintained. The right of a child to maintenance is not contractual in nature. The man is obliged to maintain his child, and may by law be compelled to find the child necessaries as meats, drink cloth etc. suitable to the husband's degree. In answer to relief two follows from the position as in the relief one. There is nothing placed before the court to deprive the petitioner the grant of the custody of the only child. From the above it suffices to say that, the child is still in the tender age which ordinarily should remain in the custody of the mother, more also that the child is a female as such needs the comfort and care of the mother.

The all-important implication of the preservation and care of the child person, morally, physically and mentally.

It is trite law that in making an order for maintenance, the court must always have regards to the means, earning capacity and in fact the conduct of the parties to the marriage and other relevant circumstance. Section 70(1) of the maintenance Act proceeds thus:

“Subject to this section, the court may in proceeding with respect to the maintenance of a party to the 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 regards to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstance.”

By virtue of the above provision, 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 regards to the means, earning capacity and conduct of the parties to the marriage and all relevant circumstance. The relevant circumstance must be gathered by the court itself from the pleadings and evidence of the parties at the trial.

In assessing maintenance, section 70(1) give the court the discretionary power to order and assess maintenance of a party. In this case, the issue of custody as stated by the petitioner, to take custody of the only female child, while on the issue of

maintenance urge the court to order, directing the respondent to pay the sum of #3,000,000.00 (Three Million Naira) only, to the petitioner per annum to be paid quarterly for the maintenance of the only child of the marriage Depiver-Olubasusi Carrie until she becomes 18years of age.

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 the respondent on the 17th day of October, 2009.**
- 2. The petitioner shall have the custody of the only child of the marriage Depiver-Olubasusi Carrie.**
- 3. The Respondent is ordered to pay the sum of #500,000.00 (Five hundred thousand naira) only annually for the maintenance, payment of school fees, welfare and advancement of the only child of the marriage until she becomes 18years of age.**

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HON. JUSTICE A. Y. SHAFI

APPEARANCE:

1. C. Dim Izunobi for the Petitioner.
2. No representation for the Respondent.