

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT 29 GUDU - ABUJA
ON THURSDAY THE 24TH DAY OF JUNE, 2021.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO -ADEBIYI

SUIT NO. PET/307/2020

BETWEEN

MR. SIMBABI JOSEPH OGBEHA-----PETITIONER

AND

MRS. IBITORU AKUNNABIYA OGBEHA -----RESPONDENT

JUDGMENT

The Petitioner filed this petition for a decree of dissolution of the marriage between the Petitioner and the Respondent, seeking the following order:

1. A decree of 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 Respondent was duly served with the Petition and filed her response. Trial in this case commenced on the 26th day of January 2021. The Petitioner opened his case and testified in proof of his petition as PW1. The evidence of the Petitioner in this case are as follows; That the Petitioner and the Respondent got married on the 20th day of August 2005 at the Lagos Archbishop Vining Anglican Church and were issued a marriage certificate which was tendered and admitted into evidence as Exhibit A. That Petitioner and Respondent have different religious beliefs which has affected their marriage. That the marriage between Petitioner and the Respondent has become toxic as they barely communicate. That as a result of Petitioner's religious belief, he does not administer any medical treatment on himself, but the Respondent goes against his belief to the hospital. That over the years, parties had tried fertility treatment as they have been to several hospitals which confirmed that he had zero sperm

count and the only way Respondent can conceive will be through a sperm donor. That Petitioner is opposed to having a sperm donor as he considers that adultery, however, the Respondent is insistent on this fertility option and accuses him of opting out of the fertility treatment and preventing Respondent from having a child. That parties both have irreconcilable differences and find it intolerable to live with each other and urged the Court to dissolve the marriage as it is in the best interest of both parties.

At the close of Petitioner's evidence, the Court adjourned the case for the Respondent. To cross examine the Petitioner. The Respondent's Counsel intimated the Court that they do not intend to cross examine the Petitioner neither do they have any witness to field in support of the Respondent's case and applied to close their case. The Court obliged the Respondent Counsel's application and adjourned the case for final Court address.

The Petitioner's Counsel in the written address filed as argument raised a sole issue for determination, which is:

"Whether in the peculiar circumstances of this case, the Petitioner is entitled to a decree of dissolution of marriage between the Petitioner and the Respondent"

Counsel arguing the sole issue submitted that the primary function of the court is to ensure that substantial justice is done between parties to a case, and in this regard, substantial justice to the parties in this suit will mean that the marriage is dissolved between the parties herein and urged the court to so hold. Submitted further that in this instant case, it is obvious that the couple are no longer willing to remain together as husband and wife and the law should not make them for cases abound of a spouse killing the other or even committing suicide as a result of depression occasioned by being forced remain in a union in which the spouse is mentally and emotionally out of, because he/she is no longer happy in the marriage.

Counsel submitted finally that by the uncontroverted and unchallenged evidence of the Petitioner, the Petitioner is entitled to the prayer sought this honourable Court as that the Petitioner has made out a case for the invocation and provisions of Section 55 of the Matrimonial Causes Act 1970, Cap M7,

LFN, 2004 to enter a Decree of the marriage between the Petitioner and the Respondent based on the evidence of the Petitioner.

Counsel relied on the cases of;

- 1) Chairman EFCC v. Littlechild (2016) 3 NWLR (Pt. 1498) 72 at page 9 paragraphs F-H
- 2) Ugwuegede v. Asadu (2018) 10 NWLR (Pt. 1628) 460 at page 482, paragraphs F-G
- 3) OGBIRI V N.A.O.C. LTD. (2010) 14 NWLR (PT 1213)208 AT PAGE 224 PARAS. D-E

I have considered the evidence of the Petitioner, the final address of Petitioner's Counsel as well as the answer filed by the Respondent in this Petition and the issue to be determined is "whether the Petitioner has proved that the marriage between the parties has broken down irretrievably to warrant this Court to pronounce a decree of dissolution of the marriage celebrated between the parties."

Before delving into the issue for determination, I must state that the Respondent was duly served with the Petition and although the Respondent filed an answer to the Petition, however, the Respondent chose not to lead any evidence in support thereof.

The Court in IDESOH & ANOR v. ORDIA & ORS(1997) LPELR-1421(SC) held that it is not enough for a party to make averments in pleadings. Averments which on the face of them appear impressive are useless if no evidence is led to prove them. Mere averment in pleadings without proof of the fact pleaded is no proof if the averment is not admitted and failure to give evidence in support of an averment means that the averment in question has been abandoned. In this instant case, the Respondent did not lead evidence in support of her answer to the Petition therefore, the fact so stated in the Response will be deemed to have been abandoned. This Petition will therefore be resolved solely on the evidence of the Petitioner.

The law is now settled that, there is only one ground upon which the Court could be called upon to decree for dissolution of marriage, i.e, that the marriage

has broken down irretrievably; and the Court on hearing the petition can hold that the marriage has broken down irretrievably if the Petitioner can satisfy the Court of one or more of certain facts contained in Section 15 (1) and 15 (2) (a) – (h) of the Matrimonial Causes Act, 2004.

The fact upon which the Petitioner is seeking for a decree of dissolution of the marriage celebrated between the Petitioner and the Respondent under the ground that the marriage has broken down irretrievably as the Petitioner has behaved in such a way that the petitioner cannot reasonably be expected to live with the Respondent which falls under Section 15 (2) (c) of the Matrimonial Causes Act, 2004. The said section provides thus; *c) that since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent;*

Therefore, the petitioner must prove firstly that the respondent has behaved in a particular manner and secondly, the court has to consider whether, in the light of the Respondent's conduct, it will be reasonable to expect the petitioner to continue to live with the respondent. Furthermore, the standard of detestable behavior that the petitioner is expected to resent or not tolerate must be weighed on the objective scale and not subjective in terms of the behavior, trait or character of the party. In *KATZ VS. KATZ* (1972) 3 ALL ER 219, SIR GEORGE BAKER, P. stated thus:

"Behaviour is something more than a mere state of affairs or a state of mind, such as for example, a repugnance to sexual intercourse, or a feeling that the wife is not reciprocating his love, or not being as demonstrative as he thinks she should be. Behaviour in this context is action or conduct by the one which affects the other. Such conduct may either take the form of acts or omissions or may be a course of conduct and in my view it must have some reference to the marriage."

In other words, 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. However, before the Court will

come to that conclusion, the entire history of the marriage has to be considered. From the evidence of the Petitioner, the parties had been married for 15 years without a child and in the process of seeking for a result, medical experts suggested the use a sperm donor via IVF as an alternative means to conceive as a result of the Petitioner's lack of sperm Count. That there is irreconcilable differences over the method of the InVitro Fertilization. That the Petitioner has accepted that it is medically impossible for him to father a child, but he is vehemently opposed to the suggestion and medical advice that parties should resort to the use of donated sperm while the Respondent on the other hand accepts the suggestion and fully intends but for the Petitioner's objection to accept a sperm donation in order to have a child. That the Petitioner's opposition to resort to a sperm donation is based on deep religious conviction especially as the Petitioner believes that, spiritually, a donor sperm introduced into the Respondent's body amounts to adultery and that any child resulting from the use of that procedure, is in the Petitioner's belief, an offspring of an adulterous event. That as a result of the sharp difference in opinion between the Petitioner and Respondent, intimate relationship and ability to communicate amicably between the couple has broken down irretrievably, so much so that the Petitioner and Respondent are hardly on talking terms, unable to maintain sexual relations and at the moment are no longer cohabiting together.

Now the question to be answered is would any right-thinking person come to the conclusion that this Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her? This Court would, taking into account the whole of the circumstances and the characters and personalities of the parties? The Petitioner in his evidence stated that he is against the use of administering medical treatment as it goes against his religious belief for the Respondent to be inseminated with a donor sperm as he considers same adultery. This conduct of the Respondent, that is, her insistence to be inseminated via a sperm donor has led to a breakdown of the marriage between the parties as parties no longer communicate, have intimate relations and in fact, the Respondent has moved out of the matrimonial home. Looking at the

marriage through the eyes of both parties, the conduct of each party amount to unbearable behaviour which has had a bearing on the marriage. In my view, the marriage between the parties has broken down irretrievably and ought to be dissolved and is accordingly dissolved.

Consequently, it is hereby ordered as follows;

1. A Decree Nisi is hereby ordered dissolving the marriage celebrated between the Petitioner, MR. SIMBABI JOSEPH OGBEHA, and the Respondent, MRS. IBITORU AKUNNABIYA OGBEHA, on the 20th day of August 2005 at the Lagos Archbishop Vining Anglican Church.
2. That the decree Nisi shall become absolute upon the expiration of three months from the date of this order, unless sufficient cause is shown to the court why the decree nisi should not be made absolute.

Parties: Absent

Appearances: H. T. Nuhu (Mrs) appearing with G. A. Maxwell for the Petitioner. Benjamin Alabi for the Respondent.

HON. JUSTICE MODUPE R. OSHO-ADEBIYI
JUDGE
24TH JUNE, 2021