IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

THIS THURDAY THE 2ND DAY OF NOVEMBER, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFA

SUIT NO: FCT/HC/PET/543/2022

BETWEEN:

OGUNDEKO OMOLARA TOLUTOPE…….....PETITIONER

AND

ADEREMI ADEYEMI DANIEL…….……...RESPONDENT

JUDGMENT

By a notice of petition for the Decree of Dissolution of marriage dated 11th October, 2022 the petitioner claims the following reliefs against the Respondent as follows:

1. **A decree of dissolution of the marriage between the petitioner and the respondent on the grounds that the Respondent had lived apart from the petitioner for 15 Calendar years i.e. from 2007 to up to date.**

2. **A decree of dissolution of marriage between the petitioner and the Respondent on the grounds that the Respondent has been violent, intolerable, secretive and uncaring. And the petitioners find it intolerable to live with the respondent due to irreconcilable difference between her and the Respondent.**

3. **That the marriage between the petitioner and the Respondent be dissolved forthwith on the further ground that the marriage has broken down irretrievable, despite several interventions and efforts of families of both the petitioner and respondent, respectively to revive it.**

From the record of court, the petitioner first filed a motion expert for an order of this Honourable court granting leave to the petitioner/Applicant leave to serve the petitionfor dissolution of marriage and other court processes in respect of the petition on the Respondent by means of substituted service to wit: pasting same on the Respondent's last known address at No: 122 Peace Village- Lugbe- Airport Road-Abuja.

The motion which was moved on the 8th February, 2023 and the order sought therein was granted and the matter adjourned to 23-3-2023 for hearing. On the 23-3-2023 when this matter comes for hearing none of the parties were in court the court clerk informed the court that the petitioner sent a message through his WhatsApp that she is currently in Lagos and beg the court to adjourned this matter. The matter was adjourned to 4-5-2023.

On the 4-5-2023 one Dayo Ayilere appears for the petitioner, including the petitioner who were in court. The learned petitioner counsel informed the court that the order granting for substituted means on the 27-4-2023 has been complied with and proof of service filed in the court file, and therefore wish to proceed with the hearing of the petition. The court granted his request and order the petitioner counsel to proceed with the hearing of the petition. The petitioner testified in person and only witness. The substance and summary of his unchallenged evidence is that.

That the Respondent is his husband. They got married in November, 16th, 2006, at Abule Egba Marriage Registry Lagos. After the marriage they lived at Ahmadiyya in Lagos State and that after the marriage they did not stayed up to one month before they moved to Abuja. That then stayed up to 5 months together in Abuja. They had a child of the marriage by name Aderemi Jeremiah Olajuwon.

That the parents tried to reconcile the issue being the case of domestic violence, threat to life.

That she saw the Respondent last in December, 2007. On that faithful day she and her terms came for reconciliation and he gave her a shock that she can go on her way and that the marriage is not compatible. Since December, 2007 she had not set her eyes on the Respondent. That the Respondent did not make any effort regarding to the child of the union, she had been the one responsible for the child maintenance, payment of his school fees and all other child's bills are all on her.

That she wants the court to officially dissolve the marriage and grant her custody of the child.

The petitioner tendered the marriage certificate between Adeyemi Daniel Aderemi and Tolulope Omolara Ogundeko conducted at the marriage registry in Lagos dated the 26-11-2006 admitted in evidence as exhibit A.

The petitioner then closed it's case, and the matter adjourned to 14-7-2023 for cross-examination of PW1 (petitioner) by the Respondent.

On the 14-7-2023 both the petitioner and his counsel were in court and as usual the Respondent was absent. The petitioner counsel informed the court that today date is for cross-examination of PW1 and that hearing notice was served by the bailiff of this court and proof of service in the court file. He proceeded that there is no representation from the respondent neither the respondent himself. And in the light of the above asked the court to foreclose the right of the Respondent from cross-examining PW1 and the court discharge the PW1, this which the court granted the petitioner counsel request and foreclosed the respondent from cross-examining PW1 and the matter adjourned for defence to 22-06-2023.

On the 22-June, 2023 when this matter comes up and his counsel Dayo Ayilara Esq were in court, while the Respondent was absent, on this pray the court to foreclosed the right of the respondent from defending this suit. On this date the petitioner counsel applied to the court for a date to file their final written address for adoption.

This matter was then adjourned to 26-06-2023 for adoption of the final written address of the petitioner counsel.

The learned petitioner counsel file it's petitioner's final written address dated the 23-06-2023, filed the same date. Adopted same on the 26-06-2023 and urge the court to enter Judgment infavour of the petitioner as per the relief sought in the petition.

The learned petitioner counsel in it's final written address formulated two issues for determination to wit:

i. **Whether from all the circumstance of this case, it is not one on which it is appropriate for a decree of dissolution of the marriage to be granted by this honourable court?**
ii. **Whether having regard to the welfare and upbringing of the only child of the marriage this honourable court can grant the petitioner custody of the child of the marriage?**

On issue one, the learned petitioner counsel, submitted that, it is trite law, that the court hearing a petition for a decree of dissolution of a marriage shall hold

the marriage to have broken down irretrievably if, but only if the petitioner satisfies the court of one or more of the facts contain in section 15(1) and (2)(a) (e) of the matrimonial causes Act, 1970. That from the facts pleaded by the petitioner and has evidence before the court, the ground upon which this petition is brought is separation and living apart for over fifteen (15) year. That the respondent and herself have separated from each other and lived separately and apart for continuous period of 15 years before the presentation of this petition and having not been in communication with each other for this long period of time, it is only obvious that the respondent is not only disinterested in the union, the petitioner and the child of the union, but also is not objecting to the petition.

That this is a clear case of a broken down marriage with no hope of reconciliation. Referred the court to section 15, reproduced below:

i. **A petition under this Act, by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.**
ii. **The court hearing a petition for a clear of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts:**
    a. **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.**
    b. **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.**

On this, the learned petitioner counsel submitted that, the pleading and evidence by the petitioner that the parties have lived separately and apart from 2007 to present when the petition was presented exceeds the period of three years and is sufficient for this Honourable court to decree a dissolution of the marriage even on that score alone. Referred the court to the case of Dr. Joshua Omotunde V Mrs Yetunde Omotunde (Coram. Onalga JCA Tabai JCA and Adekeye JCA as they then were on CAII/M57/2000 court of Appeal Judgment reported in a selected matrimonial cases' edited by Funmilayo Quadri Revised Edition Vol 1 page 261.

On the duty on court if it finds that couple lived apart for 3 years preceding petition, referred the court to section 15(f) as far as the living apart is concerned in not interested in right or wrong or guilty or innocence of the parties that once the parties have lived apart the court is bound to grant a decree. In the circumstance, submitted that, under issue one, that this is an appropriate case in which this Honourable court can issue a decree of dissolution of the marriage and pray the court to so hold.

Having considered the evidence adduced by the petitioner as well as the document admitted by the court, have this to say.

> **"under Nigerian law, he who assents in the affirmative and would fail if no evidence is called has the burden under section 136 of the evidence Act to prove the assertion. In the instant case the burden of proving whether the marriage has broken down irretrievably has on the petitioner.**

In divorce proceedings, the petitioner must prove one of the facts contained in section 125(2)(a)-(h) of the matrimonial causes that 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 (1988) 7 NWLR (pt. 559) 661. In the instant case therefore, the burden of proof is on the petitioner who is alleging that the Respondent has behaved in such a way that he cannot reasonably be expected to live with the respondent. Unless the petitioner satisfies the court on both these matters the court will refuse to hold that the marriage has broken down irretrievably on this three sets of facts call for proof.

i. **The petitioner and the respondent had lived apart for a period of fifteen (15) years i.e. from 2007 till date.**

ii. **The respondent had since 2007, deserted and abandoned the petitioner and the only child of the union without any legal Justification.**

iii. **That since the marriage, the respondent has been secretively, aggressive and violent towards the petitioner, finds it intolerable to live with the respondent viz:**

    a. **in May 2007, the Respondent requested from the petitioner some money which the petitioner did not have. The respondent**

began raising his voice and referencing the petitioner, family with denigrating words. In the petitioners bid to move away from the heated atmosphere, the respondent started hurling insults and abuses of the petitioner started harassing her, stopped her and even damaged her phone.

b. That on different occasions, the respondent steps out with implausible reasons for days.

c. The respondent stated engaging in shady business dealings, with dreadful persons, thereby endangering the lives of the petitioner and their only child.

In Akinbuwa V Akinbuwa (supra) it was held that beating of a wife and causing her injury amounts to a cruelty or behaviour which she cannot reasonably be expected to bear. Cruelty is not ground set out in grounds of divorce. The facts can be used to show the conduct of the respondent in such a way that the petitioner cannot reasonably be expected to live with the respondent. Thus a marriage can properly be held to have broken down irretrievable on the ground that one spouse has been proved to be guilty of cruelty to the other. It is the cruelty acts meted on her by the respondent that were intolerable.

Cruelty is therefore regarded as a conduct which is grave and weighty as to make cohabitation virtually impossible coupled with a reasonable apprehension of injury physical or mental to health. The accommodation of minor acts of ill-treatment causing or likely to cause the suffering spouse to break down under strain constitutes the offence of cruelty. See William V Williams (1987) 2 NWLR (Pt. 54) 66. In considering what constitute cruelty, the supreme court per Idigbe JSC in William V Williams (1966) 1 ALL NLR36 held at page 41-42, (1996) 1 SCNLR 60-at 57 paragraph B-C as follows:

"the court should consider the entire evidence before it, and although, no specific instance of actual violence is given in evidence it should be able, on an objective appraisal of the evidence before it, to say whether or not the conduct of the respondent is of such a character as is likely to cause or produce reasonable apprehension of danger to life, limb or health (bodily or mental) on the part of the petitioner (per Abba Aji JCA) (p. 55 paragraph A-F.

Inview of the forgoing hold that the petitioner has established and proved before this on issue No: 1, hence deserve the grant of decree of dissolution of marriage in it's favour.

On the second issue, whether having regard to the welfare and upbring of the only child of the marriage this Honourable court can grant the petitioner custody of the child of the marriage?

On this the learned petitioner counsel submitted and referred the court to section 71 (1) of the MCA which enjoins the court in proceedings with respect to the custody, guardianship, welfare, advancement or Education of the children of the marriage that 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 those matters as it thinks proper. See Odusote V Odusote (2013) ALL FWLR (pt. 886) 867 AT 888 page. Where the court held thus:

> **"by the provisions of section 71(1) of the MCA, the court in determining the issue of custody should regard the interests of the children as the paramount consideration. Interest of the children would include their welfare, education, security and overall well-being development.**
>
> **Therefore, the welfare of the children is the prime consideration, in the determination of who should be granted custody. except the conduct of a wife is morally reprehensible. It is better in an estranged marriage for the child of the marriage, to be left in the custody of the wife.**

On this the petitioner counsel submitted that, the evidence before the court clearly shows that neither the respondent nor any of his relations have shown concern for the only child of the marriage from the year 2007 when the petitioner and the respondent started living apart, the child had been in the sole care of the petitioner, who work tirelessly to see that his basic and essential needs are catered for. And that during her examination-in-chief she testified that she has been up and doing towards giving the child the future, security and personal attention he deserves. Also that in paragraph 11 of the respondent testimony to wit:

> **"That the respondent habitually ignored the welfare of the petitioner and the child of the marriage in preference for unholy movement, dealings and companionship"**

Further submitted that, it is also not in doubt that the only child of the marriage is presently living with the petitioner, who has been the person providing the

necessary care and the Education to the child. On this issue pray the court to grant the petitioner custody of the only child of the marriage.

On this the petitioner in it's petition for dissolution of marriage stated that the only child of the marriage Aderemi Jeremiah Olujuwon was born on 3rd January, 2007 and has since birth and till date living with the petitioner and currently at plot 627, Ogwu James Onoja Crescent Wuye Abuja. Further that, the custody of the child should remain with the petitioner who has the means and capacity to provide and can adequately for him, as the respondent has for years, abandoned and refused to check on the child of the union, neither has he ever cared about the child is upkeep, Education health e.t.c.

It is trite law that in divorce proceedings the interest and welfare of the children is of paramount importance in determining custody of the children of a marriage.

In Hayes V Hayes (2000) 3 NWLR (PT. 648) 276, Damulak V Damulak (2004) 8 NWLR (PT. 874) 151, Williams V Williams (1987) 2 NWLR (Part 54) 66 where the court stated thus.

> **"No single parents can adequately take care of the children,"**

The custody of children which includes maintenance, upbringing, and Education advancement among other. In determination of custody a number of facts are taken into consideration which include, the conduct of the petition. In a book, laws of matrimonial causes 1st edition at page 227 by proof S. A. Adensanya it is stated thus:

> **"A court should not grant custody of children in their formative years to man who did not care about the future of such children.**

On this by the conduct of the respondent it appears to the court, the respondent is not a person that this court can grant custody of the child to.

The learned counsel to the petitioner submitted that, neither the respondent nor any of his relative have from the year 2007 when the petitioner and the respondent starting living apart, the child had been in the sole care of the petitioner who worked tirelessly to see that the basic and essential needs are catered for.

And during examination in chief she stated that she has been up and doing towards giving the child the future, security and personal attention he deserves. This he referred to paragraph 11 of the petitioner testimony where he stated thus

> **"that the respondent habitually ignored the welfare of the petitioner and the child of the marriage in preference for unity movement, dealings and companionship."**

And it is also not in doubt that the only child of the marriage is presently living with the petitioner, who has been the person providing the necessary care and the Education of the child. Finally submitted that, this Honourable court can and should grant the petitioner custody of the only child of the marriage.

The above is the testimony of the petitioner upon which she founded her prayer for the custody of the child. Although there is no settled rule that a child of tender age should remain in the custody of the mother, I take the view that custody of a child of the Marriage come along with it the all-important implication of the preservation and care of the child's person, morally physically and mentally. The arrangement of the petitioner put together for the well-being of the child, if same is considered against the back ground drop of the evidence adduced by the petitioner can that be said to be sufficient as to warrant the grant of the custody of the only child to the petitioner.

I think so. On this I totally agree with the Petitioner in view of the antecedent of the respondent during the subsistence of the marriage.

I also find this arrangement made by the only child of the marriage. In view of the only child of the marriage.

Section 70 (1) of the MCA, provides thus:

> **"subject to this section, the court may in proceedings with respect to the maintenance of a party to manage, order as it thinks proper, earning capacity and conduct of the parties to the marriage and all other relevant considerations.**

By virtue of the above provisions, this 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 means, earning capacity and conduct of the respondent to the marriage.

The law has clearly proved for the criteria to be followed, for the determination in the award of maintenance by the courts. A man has a common law duty to maintain his wifeand his children and such a wife and child or children and such a wife and child or children than have a right to be so maintained. The right of a wife and child to maintain is not contractually in nature. The husband is obliged to maintain his wife and child, and may by law be compelled to find them

necessaries, as meat, drinks cloths, ex-central, suitable to the husband's degree, estate or circumstance.

In assessing maintenance, section 70 (1) gives the court the discretionary power to order and asses maintenance of a party. It is not likening to a claim for special damages, where the entitlement to such award before same can be awarded by the court. In addition, the respondent is also responsible to provide, or pay for the school fees, books and other expenses for the child.

In civil case where the parties call evidence, before the trial judge accepts or reject evidence of either of the parties he is enjoined to set up an imaginary scale by putting the evidence of the plaintiff who invariably has the burden to succeed in a civil case by preponderance of evidence on one side of the imaginary scale and weight the two together to see where the court performs it's task of evaluation of evidence by placing the evidence called by either side of the conflict on every material issue on either side of the imaginary scale and weighing them together and whichever out weights the other interns of probative value ought to be accepted. See Whyte V Jack (1996) 2 NWLR (part 431) 407at 574 and Sanusi V Ameyogun (1992) 4 NWLR (part. 232).

In the instant case, I have carefully listened during the hearing of the evidence of the petitioner, I have also read carefully the petition, I have studied the exhibit in this case and also the address of the petitioner counsel and the cases cited.

I have to resolve this issue infavour of the petitioner, as evidence of the petitioner having not been contradicted by the respondent, the court is enjoined to accept it as correct.

Therefore, by confluence of these facts, it is clear that this marriage exists, only in name. the established facts of living apart for period of 15 years show clearly that this marriage has broken down irretrievably and parties have no desire to continue with relationship, this fact alone without more can grounds 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 respect for each other. The unchallenged petition in the circumstance has considered merit.

In the final analysis, and in summation, having carefully gonethrough the petition and the unchallenged evidence, I accordingly made the following order:

i. **An order for Decree Nisi is granted dissolving the marriage celebrated between the petitioner and respondent on the 16th**

November, 2006 at the Abike-Egbe Marriage Registry Lagos State.

ii. **The custody of the only child of the marriage shall remain with the petitioner and have unrestricted right of access at all reasonable times by the petitioner to the only child of the marriage now living with the petitioner.**

iii. **The petitioner and the respondent shall be jointly responsible for the care, welfare and advancement of the only child of the marriage.**

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Hon. Justice A. Y. Shafa

Appearance:

1. Dayo Ayilara for the Petitioner
2. Respondent not in court.