

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

DATED THIS TUESDAY 7TH DAY OF MARCH, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/GWD/PET/16/2022

BETWEEN:

OGUNWUYI PATIANCE..... PETITIONER/APPLICANT
AND

OGUNWUYI OLUSEGUN RESPONDENT

JUDGEMENT

The petitioner before this court filed a notice of petition with suit No: FCT/HC/GWD/PET/16/2022 DATED THE 29TH June, 2022 file the same day, seeking the following orders from the court as follows:

- 1. An order of the honorable court dissolving the marriage celebrated between the petitioner and the respondent on 4th day of April, at the marriage Registry, Abaji Area Council FCT.**
- 2. An order directing the Respondent to paying the school fees of the two Children.**
- 3. An order directing the Respondent to pay the Petitioner N50, 000.00 for maintenance of the two (2) children.**
- 4. An order of full custody to the two children.**

File alongside with the notice of petition is a verifying affidavit of 3 pages of 16 paragraphs deposed to by one OgunwuyiPatiance of LEA Gwagwalada Abuja, Accompanying the affidavit is a certificate relating to reconciliation pursuant to order II of the MCR, 1983.

The petitioner counsel filed a motion ex parte seeking the order of the court for a leave to serve the petition and other processes in this suit on the Respondents through substituted means by pasting the petition and other processes in this suit on the Respondents through substituted means by pasting the petition and other originating processes on the door of the Respondent's last known address of HSE 39, Kekeshi Villa, Abuja via the Respondent WhatsApp Platform- the said motion was dated the 12th September, 2022 same was moved and the order granted dated the 13th September, 2022 and same saved on the whatsapp of the Respondent dated the 22-11-2022 proof of service filed in the court's file. Upon service of the order on the Respondent's whatsapp Platform, together with the hearing notice, the Respondent responded through the same whatsapp message.

“I don't have a dime to give to patience or anybody, whatever evidence she has let her use it against me.. I don't care. I know I have sons with her and my sons know that they have a loving Father, even though I scolded them, whenever they are wrong. They both know that I don't joke with them.

So Mr. Stanley, I can't afford to lose my own life to bandits and cannot afford a lawsuit.

The suit was then fixed for hearing after service on the Respondent and reply from the Respondent in his whatsapp message.

Before proceeding to the merit of this case, I wish to state as follows. That service of court process is a pre-condition to the exercise of jurisdiction by the court. This is based on the principle of law that a party should know or be aware that there is a suit against him so that he can prepare a defence. Also service on Respondent is for him to know the claims against him so that he may be aware of and be able to resist, if he so desires, that which is claimed against him. See *Kida V Ogunmola* (2006) 13 NWLR (pt. 997)377.

Upon service by whatever means, evidence of proof of service is conclusive where a bailiff deposes to an affidavit to the effect. An affidavit of service deposed to by the person effecting the service, setting out the facts, place mode and date of service and describing the process or document served shall be Prima facie proof of the matters stated in the endorsement or affidavit. see *Estate of late Chief N. I. S. Idisi V Ecodril (Nig) Ltd* (2016 12 NWLR (PT. 1527). Upon service it is not the duty of the court to wait for a party who is duly served with the processes of court

and fails to show up. The court is free to begin hearing any matter when it is satisfied that the party to the case was duly served with hearing notice Reference will be made in this Judgment.

All these were complied with by the petitioner hence this court proceeded to hearing.

On the 24-10-2022 the first witness gave his evidence as PW1, the testimony which this court will re-produce below:

PW1, one OgunwuyiPatience resident at Kwali Back of Ismail Filling Station, a teacher by profession at LEA Dagiri Primary School.

That she is in court for the dissolution of marriage between her and the Respondent who abandoned them for over 3 years. That whenever she calls the Respondent, he does not pick nor respond to her text messages.

She went further to state that, there was a time she was in the hospital and she called the Respondent, he did not pick and the next thing he said

“Anything that happens to the baby she should not disturb him.

That the Respondent does not feed the baby or do anything like maintenance. That the Respondent only sends her SMS message that she was disturbing him. That in the marriage, they have two boys,

1. Philemon Ogunwuyi 13 years of age.

2. David Ogunwuyi 4 years of age.

That the two children are in school and presently living with her.

That in paragraph one of the petition it is true that she said she married under the Act and in the said marriage, a certificate of marriage was issued where both of them signed. The witness who identified the said marriage certificate, No. 018 conducted at AMAC Abuja between Ogunwuyi O. and PatianceDauda dated the 14-4-2018, and same was admitted in evidence as exhibit A.

That she wants the court to dissolve the marriage and to grant her the custody of the children since she has been the one taking care of the children for the past 3 years.

This matter was adjourned for cross-examination upon the PW1's testimony and the matter adjourned to 31-10-2023 with an order of hearing notice to be effected or served on the Respondent. On this date parties were absent in court and the matter adjourned to 22-11-2022.

On the 22-11-2022 when this matter came up for cross-examination the petitioner and her counsel were in court while the Respondent was not in court neither was he represented. This court upon being satisfied that the Respondent was served with hearing notice proof of service filed in the court. The petitioner counsel who then stated that fair hearing is not whether the person is not in court, but whether the party has taken the opportunity given and that in the light of the above, apply that the Respondent be foreclosed since he had refused to take the opportunity given to him this oral application for the foreclosure order he or she seeks. I find support for this in the case of *NmandiAzikiwe University V Nwafor* (1991)1 NWLR (PRT. 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 defendant does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of enduring 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 (Part. 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 under the Act and in the said marriage, a certificate of marriage was issued where both of them signed. The witness who identified the said marriage certificate, No 018, conducted at AMAC Abuja between Ogunwuyi O. and

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On the 8th December, 2022 one EzeNwa-Emamka held the brief of Owobo Godday for the petitioner while no representation from the Respondent.

The petitioner counsel then applied that the right of the Respondent be foreclosed for defence since the defendant has been served with hearing notice and he is aware of the pending suit before this court.

This court has to go back to his record from the beginning of this case, and was satisfied that the said Respondent had never made any appearance despite hearing notice served on him. The oral application made for the foreclosure of the rights of the Respondent from defendant in this matter was granted and this matter was adjourned for adoption of the final written address by the petitioner's counsel.

On the 17th January, 2023 the petitioner's counsel who was represented by one EzeEmeka, holding the brief of one OwobohGodday, adopted it's final written address which said was dated the 13th January, 2023 and filed on the same date.

On the petitioner counsel's final written address, if he has not so led evidence and if the evidence led by him is so patently 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 consider the case of the defendant at all"

Under Nigerian law, he who asserts in the affirmative and would fail if no 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 lies on the petitioner.

In divorce proceedings as in this one, 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 (part. 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 away hat he cannot reasonably be expected to live with he Respondent. Unless the petitioner satisfied he court on both of these matters the court will refuse to hold that the marriage has broken down irretrievable. Here two sets of fact call for proof under section 15(2)(c) of the Act. There are

1. The sickening and detestable behavior of the Respondent.
2. That the petitioner finds it intolerable to live with the Respondent.

These two facts were deduced from section 15(2) (c) of the Act, are severable and independent. The petitioner must prove he detestable act or such condemnable conduct hat he petitioner find intolerable and their proceed to prove that he finds it intolerable *Damulak V Damaulak* (2004) 8 NWLR (pat.874) 151 Per ABBA AJI JCA, (pp 32-33, paragraph F-E).

From the above, the point appears sufficiently made that the burden of proof lies on the petitioner in this case to establish her case on a balance of probability by providing credible evidence to sustain her claim irrespective of the presence and/or absence of the Respondent. See *Agu V Nnadi* (1999) 2 NWLR (pt. 589)131 at 142.

This burden or standard required in matrimonial proceedings is also now no more than that required in civil proceedings. Indeed section 81(1) and (2) of the matrimonial causes (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 this Act, requires 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.**

In the instant case the petitioner from her petitioner from her counsel seeks for the dissolution of the marriage with Respondent on the grounds that the marriage has broken down irretrievably and essentially predicated he ground for the petition on the fact that

- a. The Respondent after three years Chatted the petitioner on WhatsApp that he has no business with the petitioner whatsoever, the Respondent only promised to come and take her two(2) children from the petitioner.**
- b. The petitioner and the Respondent have lived apart for more than three years without conjugal relationship.**
- c. Sexual intercourse took place last between the parties sometimes in early December, 2018.**
- d. The Respondent abandoned the petitioner sometimes in December, 23rd 2018 for no just cause he packed out and has refused to return back home, and says he is no longer interested in the marriage.**
- e. The Respondent after he moved out ordered the petitioner to begin divorce proceedings as the marriage was over.**
- f. Seeking that the Respondent was no longer interested in the marriage, the petitioner family refund the bride-price of the petitioner back to the Respondent's family which they accepted.**
- g. The petitioner is not in doubt that the marriage ended sometimes in 2018....”**

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 therefore correct that section 15(1) of the Act provided for the irretrievable breakdown of a marriage as the only ground upon which a party may apply for dissolution of marriage. The section provides thus:

“a petition under this act by a party to a marriage for a decree of dissolution of marriage may be presented to the court by either the party to the marriage upon the ground that the marriage has broken down irretrievably”

But the fact that may however lead to this breakdown are clearly categorized under section 19(2) (a) to (h) of the act. In any one of these facts if proved by credible evidence is sufficient to ground or found a petition of divorce.

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

- 1. That the parties got married on 14th day of April, 2018.**
- 2. That he Respondent after the wedding left the matrimonial home leaving the petitioner and the two children behind.**
- 3. That the petitioner and the Respondent have lived apart for more than three years without conjugal relationship.**
- 4. That sexual intercourse took place last between the parties sometimes in early December, 2018.**
- 5. That the Respondent abandoned the petitioner sometime in December, 23rd 2018 for no just cause. He packed out and has refused to return back home and says he is no longer interested in the marriage.**

The above pieces of evidence and or facts have not been challenged or controverted in any manner by the Respondent who was given all the opportunity of doing so.

However, the legal implication of the failure of a party to controvert any affidavit evidence is clear. It is that the averment in an affidavit which has not been challenged and/or controverted are deemed admitted. Therefore the court will be entitled to believe and act on any averment stated in an affidavit that has not been answered or controverted.

There is no saying that silence is golden” however such does not hold water, in matters where evidence is the holy grail. In circumstances in which a party is faced with devastating averments and he chooses to remain silent, that is, by not responding to the deposition by submitting evidence at his disposal to controvert such facts, then he will reap the consequence of his golden silence” which is that he would be deemed to have admitted those grave allegations against him. See the following cases.

- a. **Zamfara State Govt V Greenwich Trust Ltd (2019) LPELR-49787 (CA) 2, B-E Per Tobi JCA.**
- b. **DanaAirlines Ltd V Amaka (2017) LPELR-43050(CA) 24-25 A-E PerGeorgewill JCASelo-Ojemen (2013) 8 NWLR-(PART1356) 211.**
- c. **Indeed the failure of the Respondent to respond to this petition confirms in all material particulars the fact that the marriage has broken down irretrievably and that they have lived apart for nearly (3) years.**
- d. **On the second, third and fourth prayers or order i.e. B, C, &D on the reliefs sought therein deals with the welfare of the two children of the marriage that's Philemon and David.**

Here the petitioner prays for the following order:

- a. **An order directing the Respondent to be paying school fees of the two children**
- b. **An order directing the Respondent to pay the petitioner N50,000.00 for maintenance of the two children.**
- c. **Full custody of the two (2) children.**

On this by virtue of section 71 (1) of the matrimonial causes Act, 1970 the court regard 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 relate to custody order provides:

“In proceedings 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 irrespective of these matters as it thinks proper.

The important of custody of the children of marriage in a matrimonial proceedings need not be over emphasized. In Hayes Hayes (2000) 3 NWLR (PT 648) 276, this 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”

In Anyaso V Anyaso (1998) 9 NWLR (part 150) 150 and OyelowoVsOyelowo (1987) 2 NWLR (pt. 56) 239 4.SC 32: such is the paramount 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 child 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. 41-42 paragraph B-C)

Under the matrimonial causes 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 his children and such a wife and children or children then have a right to be so maintained. The right of a wife and child to be maintained is not contractual 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, clothes etc, suitable to the husband degree, and state or circumstance.

In making this order, for maintenance the court must always have regard to the means, capacity and in fact the conduct of the parties to the marriage and other relevant circumstances. Section 70 (1) of the matrimonial causes Act provides:

“Subject to this section, the court may in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings 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 party to the marriage, having regard to the means, earning capacity and conduct of the parties to the marriage and other relevant circumstance” the relevant circumstance must be gathered by the court from the

pleadings and evidence of the parties at trial the petitioner pleaded and testified as to his/her earnings capacity.

I am saying this because of the nature of the claim or order sought therein by the petitioner, even though the Respondent did not appear to defend this action on its merit.

From the notice of petition it is clear that the petitioner is a civil servant of LEA Gwagwalada and the petitioner had two children from the marriage, Philemon Ogunwuyi born 29th October, 2009 while David Ogunwuyi was born 12th July, 2018 meaning that Philemon is 14 years and David is 5 years. From the verifying affidavit clause 6 (8) it was alleged by the petitioner, after the wedding left the matrimonial home leaving the petitioner and the two children behind and clause (16(1)(a) of the verifying affidavit it states:

“The Respondent abandoned the petitioner sometimes in December, 23rd 2018 for no just cause, He packed out and has refused to return back home, and says he is no longer interested in the marriage.

Apart from the above there is a chart messages exchanged between the petitioner and the respondent. In the chart message, the respondent state that he wants Philemon to come stay with him and want to take personal care of him and let David stay with you. That please we need to reach a conclusion about these and anytime you want to see him, I could bring him over or you could come visit him in Kaduna, he concluded that he was happily married since past two (2) years now living Happily with my family and anybody that will try to come between as will be destroyed. Fire and thunder will join hands to strike the person.

From the above text messages it is clear that the passport is not reasonable enough to take care of the two children named above the aged 14 and 5 years respectively.

The petitioner in its oral submission when asked what she wants from the court he stated as follows:

- 1. That she wants the court to dissolve the marriage.**
- 2. That the court to give her custody of the children since she has been the one taken care of the children for the past 3 years.**

This as I have stated in this Judgment that the respondent despite service of the petition did not show any appearance to counter the assertion made by the petitioner. Instead the failure of the Respondent to respond to this petition confirms in all material particular the fact that the marriage has broken down irretrievably, and it is clear that the marriage exist 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 five (5) years is from 2018 shows clearly that this marriage has broken down irretrievably 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 piece and with mutual respect for each other.

In the address of the petitioner counsel he stated that, the children are minor and have been living with the petitioner. The petitioner has been solely responsibly for the children welfare in terms of Education, health, etc since the Respondent deserted the petitioner and the two children four years ago. That the petitioner is a Federal Civil servant and therefore has the means to take care of her children, the petitioner has been doing that since the Respondent deserted the petitioner and her two (2) children.

The unchallenged petition in the circumstances has considerable merit.

In the final analysis and having carefully evaluated the petition and unchallenged evidence, I accordingly make the following orders:

- 1. An order of Decree Nisi is granted dissolving the marriage celebrated between OgunwuyiPatiance (the Petitioner) and OgunwuyiOlusegun (Respondent on the 14th day of April, 2028.**
- 2. An order that the Respondent should be paying the School of the two children.**
- 3. An order that the Respondent is to pay the petitioner N50,000.00 monthly for maintenance of the two children.**
- 4. Full custody of the two children is granted to the petitioner.**
- 5. The petitioner allows the Respondent to have access to the two children when on holidays with the knowledge and approval of social welfare department of Gwagwalada Area Council.**

This is my Judgment.

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Hon. Justice A. Y. Shafa

Appearance:

1. EzeEnaEmeka holding the brief of OwobohGodday for the Petitioner who is in court.
2. Defendant absent