IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

THIS THURSDAY 2ND NOVEMBER,2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFA

SUIT NO: FCT/HC/PET/511/2022

BETWEEN:

SULE AYINLA ………………………………………PETITIONER

AND

DORA EWA GIMALSKA………………………………. RESPONDENT

JUDGMENT

The petitioner by a notice of petition dated 21st day of September, 2022 filed dated the same date, seeking for the following orders;

A decree of dissolution of the marriage between the petitioner and the Respondent contracted on the 25th day of July, 2009 on the ground that the marriage has broken down irretrievably on account of the fact that parties have lived apart for over three (3) years since the filling of this petition.

Attached to the notice of petition is a verifying affidavit of Sule Ayinla of No 4, ii Samy Adams Crescent, Lightgold estate, phase 4, Airport Road Abuja, the petitioners witness statement on Oath deposed to by Sule Ayinla of 18 paragraphs (XVIII), Certificate relating to reconciliation dated the 16th day of September, 2022 and the certificate of marriage.

On the 5th-12-2022 the petitioner filed a motion exparte with motion Number M/531/2022 for an order of this honorable court for leave to issue and serve the notice of petition and all other accompanying processes in the suit on the

respondent by pasting same on the Notice board of the court within the Judicial Division of this proceeding and an order of substituted service of the notice of the petition and all the processes filed in this suit on the respondent by pasting the said notice of petition and all other accompanying processes in the suit on the notice board of the court within the Judicial division of this proceeding.

The motion was moved dated the 6-01-2023 and the order sought therein was granted and the matter adjourned to the 16th day of February, 2023 for mention.

On the 16-02-2023 the petitioner filed a motion on notice with motion no FCT/HC/GWD/m/114/2023 dated the 11th day of January, 2023 seeking for an order granting leave to the petitioner/Applicant to conduct the hearing of this case virtually, via the zoom online platform in accordance to section 6(6)(a) of the 1999 CFN as (amended). The motion was moved on the 28/3/2023 and the order sought therein was granted, when it became practicable that the respondent cannot be served.

On the 10th day of May, 2023 the petitioner opens his case and testified as PW1. In his testimony he stated that he is currently living at polland and worked with a furniture company as a quality manager, knows the respondent who is his wife as they are married but now living apart since 2012.

On the 22/08/2022, he deposed to the witness statement on oath before the notary public in Poland, this which he recognized it through his signature, the stamp of the Notary public and his passport photograph. He went further to state that he wants this court to accept the said witness statement on oath as his evidence before this court.

That in paragraph 1 of the witness statement on oath he made reference to a marriage certificate which contains his name and the name of the respondent. The marriage certificate was admitted in evidence as exhibit A (between Sule Ayinla and Dora Ewa Gimaska dated the 25-7-2009. He then prays the court to grant his prayers and dissolve the marriage and that he is not contesting the custody of the only marriage and the matter was adjourned to 20-06-2023 for cross-examination with an order of this court to serve hearing notice on the Respondent.

On the 20th June, 2023, the petitioner was present in court through virtual hearing and his counsel one E.U Ogah. The petitioner counsel then prays the court to

foreclose the Respondent as the order of this court has been compiled with and still the respondent is not present in court.

The order for the foreclosure of the right of the Respondent to cross-examining the petitioner was granted and PW1 was discharged. The learned counsel to the petitioner then close the petitioner case and the matter was adjourned to 12-07-2023 for defence.

On the 12-07-2023, same appearance counsel to the petitioner informed the court that the respondent has been served and not present in court. In the circumstance applied that the defendant be forclosed from entering his defense. The order sought was granted and a date fixed for the petitioner to file in his final written address for adoption.

The petitioner filed in its final written address and same was adopted, whereof the petitioner in its final written address formulated a sole issue for determination to wit:

> **"Whether the petitioner has proved his case to be entitled to the reliefs sought"**

On this he submits that the petitioner has proved his case to be entitled to the reliefs sought in this matter based on the testimony of the petitioner and exhibit/documents tendered during trial. That the petitioner has been able to satisfy the court and has discharged his legal duty carefully placed on him under section 15 (2c, d, e and f) of the matrimonial causes Act, and section 133 of the Evidence Act 2011 as (amended) and the case of Ogwuche V B.S.C.S.C (2014)7 NWLR PT 1406) 374 at 392-393 paras A-C where it was held thus:

> **"He that asserts must prove, see section 135-137 of Evidence Act. The general principle is that he who asserts or alleges must prove. This burden of proof in civil cases which is not static but shifts from side to side like a pendulum no doubt was first cast on the Appellant to first prove…"**

Further submit that for the petition to succeed in having the reliefs sought, the petitioner must proof any of the grounds provided under section 15(20 of the Matrimonial Causes Act and referred the court to the case of Damulak V Damulak (2004) 8 NWLR (PT 874) 151. the act provides 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 finds it intolerable to live with the respondent.

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.

d. The respondent has deserted the petitioner for a continuous period of atleast one year immediately preceding the presentation of the petition.

e. That the parties to the marriage have lived apart for a continuous period of atleast 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 two years immediately preceding the presentation of the petition

g. That the other party to the marriage has, for a period not less than one year failed to comply with a decree or restitution of conjugal rights made 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 it is the submission of the learned counsel to the petitioner that the petitioner has proved his case via his pleading and oral testimony in line with section 15(2c, d, e and f) of the MCA. Further stated that these facts in evidence were proved by the petitioner in line with the paragraph of his witness statement on oath and the notice of petition which is consistent with the evidence of the petitioner in line with section 15c, d, e and f of the MCA.

On the strength behavior of the respondent which he described as cruelty, and cruelty in matrimonial proceedings is regarded as a conduct which is grave and weighty as to make cohabitation practically impossible. Referred the court to the case of Bassey V Bassey (1973) 10-12 CHCJ242 where the court held that , cruelty, bad behavior of a party to the marriage is a ground for dissolution of marriage, and the case of Nanna V Nanna (2006) 3 NWLR (PT. 966)1. Where the court pronounced on intolerable behavior worthy of separation of marriage. The

test of same intolerable behavior is objective and must be such that a reasonable person cannot endure it.

The learned counsel further submits that both parties have agreed to part their separate ways. There are no joint properties and the child is in the custody of the respondent and the petitioner isn't dragging the custody of the child with her. That the parties have been living apart for over Ten (10)years before the filling of this petition.

Finally, the learned counsel to the petitioner referred this court to the case of Ezeaku V Ezeakwu (2012) 4 NWLR (PT 1291) 555 Paras D-F which is to the effect that;

> **"The matrimonial Causes Act does not make provision for automatic or implied dissolution of marriage where the parties have lived apart for atleast three years preceeding the presentation of the petition. Section 15 of the Act only made provision for ground upon which a party seeking dissolution of marriage can approach the court, it does not allow for implied or assumed dissolution. A petitioner must therefore fulfill all the requirements of law relating to divorce proceedings and get a pronouncement from the court before such marriage can be said to have been dissolved"**

Page. 556 para D-E of the above cited case also went further to state as follows;

> **"There is a standard process for the dissolution of marriage whether statutory or customary and concrete evidence that the necessary requirements were satisfied must be adduced before a court can hold that there has been a divorce and the validly contracted marriage between a couple had formally and legally come to an end".**

In conclusion he stated that, the petitioner has been able to fulfill and satisfy all the requirement of law relating to divorce proceedings as contained under section 15 of the MCA. In the Circumstance urge the court to grant the reliefs as contained on the Notice of petition.

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

I had at the beginning of this judgment stated the claims of the petitioner. I have also stated in this judgment that the respondent despite the service of the originating court process, and hearing notices did not file anything or adduce evidence to challenge the evidence adduced by the petitioner. In law, it is now an accepted principle off general application that in such circumstance, the defendant/herein (the respondent) is assumed to have accepted the evidence adduced by the petitioner/plaintiff) and the trial court is entitled or is at liberty to act on the petitioners unchallenged evidence. See Agugu V Dawodu (1990) NWLR (PT 160) 169 at 170.

Notwithstanding the above general principle, the court is however still under a duty to examine the established facts of the case and then see whether it entitles the (claimant) petitioner to the reliefs he seeks. I find support for this in the case of Nnamdi Azikiwe 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 sustain it irrespective of the posture of the defendant.”

In all civil cases, the plaintiff should rely on the strength of his case rather than on the weakness of the defendants case. All the law requires from him is to discharge the burden placed on him by the law. The rule changes if the plaintiff finds in the evidence of the defence facts which strengthen his own case. See Ayorinde V Sogunro 2012) 11 NWLR (PT 1312) p.460 (SC).

The party who is claiming a relief from a court generally has the burden of proving the existence of facts upon which he is basing the grant of his claim. The legal burden of proof is that which the law places upon a person who would have judgment delivered against him, if no evidence was led in the pleadings before the court. The person is usually the plaintiff/claimant/petitioner as the case may be, but might by the defendant in certain circumstances such as where a presumption of the law operates in favour of the law operates in favor of the plaintiffs' claims. He is expected to adduce cogent and convincing evidence to proof his case. See presentation national High School V Ogbebor (2018) LPELR 44784.

A logical corollary that follows the above instructive diction 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 (PT113) 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 so patently unsatisfactorily 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"**

From the above, the point appears sufficiently made that the burden of proof has 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 Nnnadi (1999) 2 NWLR (PT 589) 131 at 142.

This burden or standard of proof required in matrimonial proceedings is also now no more than that required in civil proceedings. Indeed section 82(1) and (2) of the MCA 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 reasonably 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 facts, or as to that other matter"

Now in the extent case, the petitioner from his petition seeks for the dissolution of the marriage with the respondent that the marriage has broken down irretrievably and essentially predicated that ground for the petition on that 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 also further averred as a ground that due to this state of affairs the parties have stayed apart for over 12years and all the averments as stated on the grounds for the petition as stated in this judgment. It is___ therefore that the petition was brought within the purview of sections 15(1) (c), E and (f) of the Act. It is correct that section 15(1) of the Act, provisions for the irretrievably breakdown of marriage as the only ground upon which a party may apply for a dissolution of marriage. The fact that may however lead to this breakdown are clearly categorized under section 15(2) (a)- (h) of the Act. In law anyone of these facts if proved by credible evidence, is sufficient to ground or found a petition for divorce.

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

1. **That parties got married on the 25th day of July, 2002 at the Abuja municipal Area council FCT, Abuja.**
2. **That the respondent has deserted the petitioner and cut all ties with the petitioner since 2004.**
3. **That the petitioner and respondent have lived apart for a period of three years**
4. **That even before the respondent left the matrimonial home, she has behaved in an intolerable because of the wayward lifestyle of the respondent.**
5. **The respondent has since moved on with her life completely independent of the petitioner.**
6. **That the respondent has even gone ahead to file a case for the dissolution of the marriage in the court.**

The above piece 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. The law has always been that where evidence given by a party to any proceedings is not challenged by the opposite party who has the opportunity to do so, it is

always open to the court to seize of the proceedings to act on the unchallenged evidence before it.

See insurance Brokers of Nigeria V A.T.M Co. LTD (1996)8 NWLR (PT466) 316 at 327 G-H

This matter was conducted through virtual hearing, virtual hearing is a court hearing conducted by audio-visual means where cases are conducted without the need of participants to attend the court in person. The hearing is conducted through the format of a virtual conference. This is a digital procedure which enables remote participants to access live online meetings and events from their computers across the globe.

The basic requirement for a virtual hearing are as follows;

a. **A device you can access internet connection,**
b. **The device must have a video conferencing software already installed.**
c. **A fast and stable internent connection.**
d. **A web cam or a built in camera on your device that will allow the judge to see you during the virtual hearing and a microphone to enable audio communication with the other parties.**
e. **You must also have a valid email address,to send and receive invitation links, meeting ID, password and other relevant details.**

In this case the type of virtual hearing is video conference which allows participant to hear and see each other during a meeting with a computer video camera and microphone or the built in camera of a mobile device.

In view of the above, the petitioner has complied with the provision as stated above. This is so because in civil cases, the only criterial to arrive at a final decision at all time is by determining on which side of scale, the weight of evidence falls. Consequently, where a respondent chooses not to adduce evidence, the suit will be determined on the minimal evidence produced by the plaintiff or petitioner. See A.B.U V Molokwu (2003) 9 NWLR (PT 825) 265.

Indeed, the failure of the Respondent to respond to this petition confirms in all material particulars the fact that the marriage has broken down irretrievable and that they have lived apart for nearly 12years.

From the above facts as disclosed in this judgment, it is clear that this marriage exists only in name. as stated earlier, any of the facts under section 15(2) a-h if proved by credible is sufficient to ground a petition for divorce. The established fact of living apart for upto 12years show 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 peace and with mutual respect for each other. The unchallenged petition In the circumstance has considerable merit.

In the final analysis and summation, having carefully evaluated 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 25th day of July, 2009 at AMAC Registry FCT, Abuja.**

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Hon. Justice A. Y. Shafa

Appearance:

1. E. U. Ogah Esq for the petitioner.
2. Respondent Absent.