

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE .H. MU’AZU
SUIT NO.PET/070/2021
MOTION NO. M/3770/2021 &
M/4279/2021
ON THE 9TH NOVEMBER, 2021

BETWEEN:

OLATOKUNBO FATOGBE - PETITIONER/RESPONDENT

AND

OLUWAKEMI ODEGBAMI FATOGBE - RESPONDENT/APPLICANT

Appearance:

C.C. Igata Esq for the Petitioner /Applicant.

Chinenye .I. Ogu Esq for the Respondent/Applicant.

CONSOLIDATED RULING

This Petitioner and the Respondent in this matter both filed application for grant of custody to the Children of the marriage the Petitioner seeks to dissolve in this petition. This Court directed that two Applications be consolidated and heard as one, as only one Ruling is required on the matter.

For clarity, the Petitioner in his Application with Motion No. M/3770/2021 dated 1st of April, 2021, seeks for the following reliefs:

1. An Order of this Honourable Court granting the Petitioner custody of the Children (Fatogbe Malcolm Oluwabankole Oladipo and Fatogbe Oluwatomiwa George) pending the determination of the petition on the ground that as at the date of the petition, the Respondent has confessed that she is of unsound mind and the further fact that Respondent has low insane of living to take care of the Children.
2. And for such further orders or order as the Honourable Court may deem fit to grant in the circumstance.

On the other hand the Respondent, in her application, is praying this Court for the following reliefs:

1. An Order granting custody of the two Children of the marriage between the parties, namely: (a) Malcolm Oluwabankole Fatogbe born on 6th June, 2013 and (b) Oluwatomiwa George Fatogbe born on 15th January, 2015 to the Respondent/Applicant pending the hearing and determination of this petition.
2. An Order for the Petitioner to pay the sum of N200, 000. 00 per month as maintenance for the Respondent and two Children of the marriage commencing from 18th May 2018 when the Respondent was forced to move out of the matrimonial home, pending the hearing and determination of this petition.

3. Such further Order(s) as the Honourable Court may deem fit to make in the circumstances.

The Respondents' application is predicated on the following grounds:

- a. The Children of the marriage are minors and need to be under the care and guidance of their mother (Respondent/Applicant).
- b. The Respondent/Applicant is equal to the task of taking good care of the Children. She has been doing that for more than 3 years now and the Children are doing very well and lack nothing.
- c. The Petitioner/Respondent is a drug addict and emotionally, mentally and financially unstable and incapable of taking care of the Children of the marriage.
- d. Since the parties separation in 2018, the Petitioner/Respondent has not cared about the welfare of the Children, he has not cared to see them and has never called or sent any short message services (sms) enquiring about their welfare.
- e. The Respondent/Applicant and the Children need financial support of the Petitioner/Respondent for their maintenance, shelter and general wellbeing.
- f. The Petitioner/Respondent has a duty to be financially responsible for the education of the Children and general welfare

of the Respondent/Applicant and the Children suitable to his economic and social standing as a banker.

- g. The Petitioner/Respondent is a banker with good monthly income and he is taking care of only himself.

Before the Court are the affidavit in support of the Petitioner's application and further and better affidavit in respect of his application and a Counter affidavit in respect of the Respondent's application. All the processes were supported by written address wherein the learned Petitioner's Counsel formulated the following issue for determination of the Court, to wit:

1. Whether in the circumstances and facts of this case, the Court has power to grant this application.

Whether upon a due consideration of the extent provisions of the matrimonial causes, case law and the circumstance of this case, the Petitioner is not entitled to the reliefs sought in this application on the 17th of September, 2021 when the matter came up for hearing, learned Petitioner's Counsel relied on all the averments in the 3 affidavits and all the annexures for the affidavits. Counsel also adopted their address as their arguments in the matter.

The Respondent also filed affidavit in support of her application and a further affidavit and a Counter affidavit to the Petitioner application. Respondent also filed addresses in support of the affidavits wherein learned Counsel for the Respondent formulated the following issue for the determination of the Court, to wit:

- 1. Whether considering the circumstance of this case, the Respondent/Applicant is not entitled to the custody of the Children of the marriage pending the hearing and determination of this petition.***
- 2. Whether the Respondent/Applicant is not entitled to an order for the maintenance of herself and the Children by the Petitioner/Respondent pending the hearing and determination of this petition.***
- 3. Whether considering the circumstance of this the Petitioner is entitled to be granted custody of the Children of the marriage and not the Respondent pending the hearing and determination of this Petitioner.***

At the hearing of the matter the Respondent's Counsel relied on all the averments in the 3 affidavits of the Respondent and adopted the

addresses as their arguments in this matter and urged the Court to resolve the issue in favour of the Respondent.

I have read and carefully considered the applications of both parties, the affidavit evidence and exhibits attached; I have also considered argument canvassed by Counsel on both sides. I shall reproduce and or refer to the arguments in the course of this only when it is necessary to do so.

It is my view that after due consideration of the two applications the two issues that are fundamental to the determination of this consolidated matters is as follows.

1. ***Whether considering the circumstance of this matter the Children should be taken from the custody of the Respondent and granted to the Petitioner/Applicant.***
2. ***Whether, if the custody is granted to the Respondent, the Respondent and the Children be entitle to maintenance by the Petitioner.***

To address this issue, it is important that the Court take bearing from the averments on the affidavits before the Court and apply same to the extents issue to rule on this matter.

In the case for the Petitioner on the custody of the Children I find the following facts to be relevant.

In the affidavit in support of the Petitioner's application, the Petitioner averred that, The Respondent has absconded with his Children since 2018 till date without notifying him. The Respondent has made herself unreachable and all attempts to reach her prove abortive.

Further, that the Respondent has pursued him by her nagging, blackmailing, abuse, name calling and violent disposition beyond his capacity. Consequently, there was no peace in the matrimonial home. The Respondent using the police arrested the Petitioner and was charge to Court for assault sometimes in 2018. However the Suit was dismissed for lack of merit. The FIR dismissed order was attached and marked Exhibits E & F.

That the Respondent tried to make him lose his job. See Exhibit G. And that the Respondent has confessed to being mentally ill.

Finally the Petitioner avers that he is mentally, emotionally and financially stable to take care of the Children urging the Court to grant the application.

In the further affidavit it was averred that the Petitioner is not a drug addict and has never been addicted to any form of illicit or illegal drugs.

In the Counter affidavit to the affidavit in support of Respondent's application, the Petitioner avers that he did not at any point violently attack the Respondent but that it was the Respondent that tried to

strangulate him. That the monthly spouse allowance that went to Respondent was with his permission owing to his good heart and the love of his Children.

On the part of the Respondent, the following facts are relevant in my view.

In the affidavit in support of the Respondent's application it was averred that the two Children in question are minors and used to be under the care and guidance of their mother (the Respondent) she is wealthy, a professional, a practicing legal practitioner, highly educated, decent, hardworking and caring a decent income.

That while with the Petitioner she suffered attacks/anxiety as a consequence of the traumatic experience carried by the Petitioner/Respondent violent attack against her in July, 2017. That before the incident, she had no history of illness.

That she has fully recovered from the panic attacks and trauma and has been living her normal active life. She drives herself and the Children and takes care of her domestic and official responsibilities. That she has taken proper care of the Children since 2018 and the Children are doing well and lacking nothing.

That the Petitioner is emotionally, mentally and traumatically unstable and incapable of taking care of the Children.

That the Petitioner knew where she resides with the Children and made no effort to see them. That she and the Children need the financial support of the Petitioner for their maintenance, shelter and general wellbeing.

That the Petitioner worked with Keystone Bank since 2013 and his income has risen to almost N500, 000. 00 per month.

On the 1st issue which bothers on the custody of the Children pending hearing and determination of the Suit, the Court must be guided by the provision of the Extent law, in this case the Matrimonial Causes Act, Matrimonial Causes Rules and the Child Rights Act at all already cited by the parties.

Order XIV Rule 22(1) of the Matrimonial Causes Rules empowers this Court to hear this matter as an Interlocutory application.

Section 71(1) of the Matrimonial Causes Act which is very similar to Section 69 of the Child Rights Act provides thus:

“In proceeding with respect to the custody, guardianship, wellbeing, advancement or education of Children of a marriage, the Court shall regard the interest of these Children as the paramount consideration; and subject thereto, the Court may rules such order in respect of those matters as it thinks proper”.

It should be noted at this point that both Learned Counsel for the parties are right when they stated, in their respective addresses, that in custody proceedings the interest of the Children in question is the paramount consideration in the determination of who among the parents should be granted custody.

What then is the best interest of the Children as provided under section 71(1) Matrimonial Cause Act?

In ODUSUTE V. ODUSOTE (2011) LPELR – 9056 (CA) in giving meaning to provision of section 71(1) of the Matrimonial Cause Act hold that

“These provisions plainly had stated that the Court in determining the issue of custody should regard the interest of the Children as a paramount consideration. Interest of the Children would include their welfare, Education, security and overall wellbeing and development. Therefore the welfare of the Children is the prime consideration in the determination of who should be granted custody”.

Having been so guided, I shall consider the evidence before the Court to determine custody with the interest of the Children as the paramount consideration.

It is in evidence, and beyond disputes that master Malcolm Oluwabankole Fatogbe is 8 years old and Master Oluwatomiwa George Fatogbe 6 years old.

It is also a fact beyond disputes that both have been under the custody of and living with the mother/Respondent since 2018 when the marriage broke down.

There is nothing in the affidavit of the Petitioner establishing that the Children are not properly taken care of, or are abused or are in any danger either from the Respondent or a third party. Although the parties, as is common have tended to paint each other in bad light, custody of Children is not granted as a reward for good behavior of a party or as a punitive measure for the bad behavior of the other party, the consideration is for the Children to be where they will be best cared for. See *OLWOOFUYEKU V. OLWOOFUYEKU (2010) LPELR – 11865 (CA)*.

In any event, if I were to believe what has been alledged, portage none of the parents will be worthy of having custody and care of the Children.

The two Children are with the Respondent and have been with her for 3 years with little or no contact with the Petitioner, which may not necessarily be his fault, but, never the less. I do not see how granting

custody to the Petitioner will serve the best interest of the Children at this moment.

The Supreme Court held in ODOGWU V. ODOGWU (1992) LPELR – 2229 (SC) THAT:

“If the parents are separated and the child is of tender age, it is provided that the child will be happier with the mother and no order will be made against the presumption, it is abundantly clear that the contrary is the situation e.g. immorality of the mother, infectious disease on the mother and cruelty to the child”

In this case, there is no evidence of infectious disease or cruelty to the child attributed to the Respondent. And even though, the Petitioner has alleged improper conduct of the Respondent, it has to my mind, not become abundantly clear as same has been controverted.

In all I find that the interest of the Children is best served if they are left in the custody of the Respondent (mother) pending determination of the Petitioner, I so hold.

On the 2nd issue, to wit:

“Whether, if the custody is granted to the Respondent, the Respondent and the Children will be entitled to maintenances by the Petitioner.

Having resolved the 1st issue in favour of Respondent by granting custody of the Children to her, it is now pertinent to consider if they will be entitled to maintenance by the Petitioner.

On this issue it is the contention of the Petitioner/Respondent that the Respondent/Applicant must be confined as, in paragraph 9 of the affidavit in support of her application, averred that she was equal to the task of taking good care of the Children and then contradicted herself in paragraph 19 where she said she and the Children need the financial support of the Petitioner/Respondent for their maintenance. The Petitioner refers the Court to the authority in ENWEZOR V. ENWEZOR & ANOR (2012) LPELR – 8544 (CA) and MUELLER V. MUELLER (2005) LPELR – 12687 (CA).

I cannot also ignore the fact that the Respondent/Applicant had not demanded for maintenances from the Petitioner since their separation and seemed happy with the situation as long as he stayed away.

I prefer to believe paragraph 9 of the Respondent/Applicant affidavit where she said:

“That I am equal to the task of taking good care of the Children. I have been doing so for more than 3 years now. The Children are doing very well and lack nothing. Copies of some of the School results of the Children are hereby attached as Exhibit B” .

I hold that the Respondent is a person of means.

Does that mean that the Petitioner is not obliged to finance the care of his Children? The answer must be in the negative

I have put the income of the parties into consideration in determine that both should be responsible for the maintenance of the Children. In that regard, I find that the maintenance of the Children will be borne by both parties.

In line with my finding earlier on the 1st issue, the issue of custody is resolved in favour of the Respondent/Applicant. Accordingly, custody is granted to the Respondent pending the determination of the Petitioner.

Meanwhile in line with provision of section 69(1) of Child’s Right Act (CRA) the Petitioner shall have access to the Children for minimum of 10 hours every week to be agreed by parties or by the Registry of the Court with the assistance of social welfare office.

On the 2nd issue, the Respondent application partly succeed. The maintenance of the Children shall be borne by both parties. In line with section 14(2) of CRA the Petitioner shall pay the sum of N100, 000. 00 every month (through the Registry of the Court) for the upkeep of the Children pending the determination of the Petitioner. The Respondent shall bear the balance of N100, 000. 00 as accessed by her in her Application.

This is the ruling of the Court.

Signed
Hon. Judge.
9/11/2021.