

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT GUDU - ABUJA
ON WEDNESDAY THE 5TH DAY OF APRIL, 2023.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO -ADEBIYI

SUIT NO. PET/270/2020

BETWEEN

EZUGO NTOMCHUKWU OGBUEBIE-----PETITIONER

AND

CHIDIOGO IFEYINWA OGUEBIE ----- RESPONDENT

RULING

The Respondent on the 9th day of November, 2022 filed this motion on notice praying the Court for the following reliefs: -

1. An order of the court transferring this Petition to the Honourable Chief Judge of High Court of FCT for re-assignment to another Judge having acted a conciliator under Section 12 Of Matrimonial Causes Act.
2. Any other order(s) the honourable court may deem to make in the circumstance of the case.

The grounds upon which the Respondent brought this application are;

- a. Section 12 of Matrimonial Causes Act provides as follows That:
"Where a judge has acted as a conciliator under the section 11(1)(b) of this act but the attempt to effect a reconciliation has failed, the judge shall not expect at the request of the parties to the proceedings, continue the proceedings, or determine the proceedings; and in the absence of such a request the proceedings shall be dealt with by another judge".
- b. In October, 2020, this Honourable Court acted as a conciliator between the Petitioner and the Respondent in the chambers.
- c. The reconciliation failed.
- d. There is no request from the Respondent for this court to continue the proceeding.
- e. That the Respondent accordingly withdraws her consent for continuation of proceedings in this petition by this honourable court.

Attached to the application is a 9 paragraph affidavit deposed to by Mrs Chidiogo Ifeyinwa Oguebie the Respondent and a written address. The deponent averred that sometime in October 2020, this honourable court acted as a conciliator between the Petitioner and the Respondent in chamber. That the reconciliation failed. That by the provision of **Section 12 of the Matrimonial Causes Act** when a judge acts as a conciliator in matrimonial causes he shall excuse himself unless on consent of the parties. That accordingly the Respondent withdraws her consent for this honourable court to continue proceedings in this petition. That the petitioner will not be prejudice by this application. That it is in the interest of Justice for this Honourable court to grant this Application.

In the written address in support, learned counsel for the Respondent raised a sole issue for determination, namely;

“Whether in the circumstances of this case the Court ought to grant the Respondent/Applicant prayers”.

Summarily, learned counsel submitted that the Applicant's affidavit in support of the Application discloses a substantial ground for the grant of the Application. That the attitude of the Court in an Application of this nature is to withdraw from the hearing of the petition in the interest of justice and transfer the case file to the Honourable chief judge of FCT for reassignment to another judge and urged this Honourable Court to grant the Applicant's Application. Counsel relied on **Section 12 of Matrimonial Causes Act**.

The Petitioner filed a 13 paragraph affidavit in opposition deposed to by Ezugo Ntomchukwu Ogbuebie, the Petitioner. The deponent in summary averred that no reconciliation between him and the Respondent ever took place in the month of October 2020. That he filed this petition on the 21st day of May 2020 and issues have indeed been joined since 3rd July 2020. That the Petitioner closed his case against the Respondent on the 28th day of April 2022, after having taken three (3) witnesses who were all cross examined by counsel to the Respondent. That on the 27th of January 2021, this Honourable Court in line with the provisions of the Matrimonial Causes Rules invited him and the petitioner and their respective counsel in chambers where resolutions on the child school fees, welfare, upkeep of the child and payment of rent was reached. That from the close of the Petitioner's case till date parties have appeared before this Honourable Court three (3) times without the Respondent opening her defence to the petition or tendering evidence in proof of her cross petition. That by the law the Respondent has Fourteen (14) days within which to have indicated her objection to the proceedings after the Honourable Court's directions in

chambers. That the Respondent and her counsel have taken copious step in the proceedings after the Honourable Court's directions in chambers. That on the legal principle of estoppel by conduct and laches, the Respondent is estopped from renegeing to continue with the proceedings after having taken full financial benefit from him by the Honourable Court's directions in chambers. That there has been no formal conciliation between the parties by the Honourable Court save to ensure that the welfare and interest of the only child of the marriage is not compromised by him and the Respondent while the proceedings is pending. That it would be in the best interest of justice to refuse the Respondent's application and proceed to the conclusion of the trial in the interest of justice and fair play. That his interest would be very greatly jeopardized should the Respondent's application be granted.

Attached to the affidavit is a written address where Learned counsel also raised a sole issue for determination:

“WHETHER ON THE STATE OF THE FACTS AND THE LAW, THE RESPONDENT/APPLICANT HAS MADE OUT A CASE TO WARRANT THE GRANT OF THIS APPLICATION BY THE HONOURABLE COURT?”.

Summarily, learned counsel submitted that the Respondent's application is lacking in facts to support the application and should not be considered nor granted. That the Respondent simply referred to **Section 12 of the Matrimonial Causes Act** without adducing factual situations to support the said provision and it is trite law that law does not act in vacuum, it must be related to facts, provable facts that will ground or warrant a relief in law. Also, that **Section 12 of the Matrimonial Causes Act** cannot be read without reference to Section 11 of the said Act as Section 12 itself refers to Section 11. That mere isolated reference to **Section 12(1)(b) of the Matrimonial Causes Act** without reading the provision in sub (2) of Section 11 will not bring out the true meaning of the said section. Counsel further submitted that the Respondent cannot approbate and re-probate as what the Respondent has sought to do by her instant application, especially against the fact that when a person abstains from doing something to enforce his legal rights when he ought to have done so having become so aware but allowed the other party to proceed, he cannot now be heard to complain. Citing **OSOKOYA vs. ONIGEMO (2018) ALL FWLR pt. 942 pg 424@ 465 - 466 para G -A** and **KACHALLA vs. BANKI (2001) FWLR pt 73 pg 1 @ 14**. Counsel submitted that the Respondent has appeared consistently before this Honourable Court for well over ten (10) times since this matter was instituted in 2020 till date without objection to the proceedings. That having cross examined all the witnesses for the petitioner and the matter is now set for her defence and proof of cross petition, she is estopped by her conduct from trying to renege on the

proceedings that have taken place, with her active participation and consent. Furthermore, counsel submitted that assuming without conceding that she has a right to raise an objection in law to the instant proceedings, that it is too late for her in the day to do so based on the Latin maxim *vigilantibus non dormiantibus juro subveniunt* which means the law will not permit an indolent party to benefit from his indolence. Relying on **CHIEKWEILO & ANOR AND NWALI & ANOR (1998) 8 NWLR pt. 560 144 @ 153 para G-H**. Counsel also submitted that it is the law that where both counsel and his party are guilty of non-compliance to any step they may have taken before now to raise objections if any, to the proceedings or to have ensured that any necessary step which may be to their advantage is taken but it was not taken timeously, neither counsel or his client can be heard to complain about any such infraction that may arise subsequently. Citing **BRAWAL SHIPPING (NIG) LTD AND OMETRACO INT. LTD (2012) ALL FWLR pt. 628 pg 932 @ 947 para-B**. That by the provisions of **ORDER XXI RULE 4 of the Matrimonial Causes Rules CAP M7 LFN 2004** this Honourable Court cannot in the circumstances entertain the Respondent's application on the grounds that the Respondent's application has not been made within a reasonable time. That the Respondent has taken "SEVERAL STEPS" in the proceeding without objections to the continuation of trial by the Honourable Court even after the meetings held in chambers to which she and the only child of the marriage are currently benefiting as to her maintenance and welfare of the only child of the marriage even before the final determination of the petition. Counsel urged the Honourable Court therefore, to dismiss the Respondent's application with substantial cost, against the Respondent/Applicant having regard to the fact that the Petitioner incurred cost to bring his two witnesses both within and outside Nigeria to court to testify on his behalf and for causing unnecessary delay in the trial of this petition.

Having carefully considered the affidavit evidence and the submissions of Counsel and the judicial authorities cited, the court finds that there is only one (1) issue that calls for determination, which is;

"Whether the Applicant is entitled to the reliefs sought"

The Respondent/Applicant placed reliance in **Section 12 of Matrimonial Causes Act** in bringing this application. The said **Section 12 of Matrimonial Causes Act** provides thus;

"Where a judge has acted as conciliator under Section 11(1) (b) of this Act but the attempt to effect a reconciliation has failed, the judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings; and, in the absence of such a request, the proceedings shall be dealt with by another judge".

Now putting the record straight, on the 29th of June, 2022 Petitioner counsel in the open court intimated the court that the interim visitation right to the Petitioner is been restricted and that the Respondent insists that it must be in her presence. On this basis the court ordered the Respondent to produce the child in chambers on the 5th or 6th of July, 2022 by 8am and asked that the Petitioner be present also so as to hear both parties. Parties met in chambers strictly on the custody and maintenance of the child of the marriage. Agreement on the custody and maintenance were reached. Thereafter on the 18th of October in the open court the Respondent submitted and I quote; “My Lord the agreement as to custody and maintenance in chambers, I do not want it again. I have changed my mind”. Based on this submission the court held that the Respondent is no longer bound by the agreement between parties in chambers. The judge was never appointed a conciliator. At no time did the judge attempt to reconcile both parties as the issue of divorce was up for consideration by both parties.

Having stated the above facts, it is evident that the court has not acted as a conciliator in any reconciliation between parties in this suit. Therefore, the provision of **Section 12 of Matrimonial Causes Act** relied upon by the Respondent/Applicant does not apply here. **Section 12 of Matrimonial Causes Act** envisages a situation where the judge attempts to reconcile both parties with a view to ensure both parties do not go ahead with divorce but uphold their marriage vows. On the contrary the issue of reconciliation of parties never came up and both the Respondent counsel and Petitioner’s counsel would attest to this. The issue that came up in chambers was the welfare and custody of the child of the marriage which is governed by the Childs Right Act and not Matrimonial Causes Act. **Section 1 of the Childs Right Act** enjoins the judge to make the interest of the child paramount in all proceedings. The interest of the child of the marriage was the issue that came up when parties in chamber agreed to the modus of welfare and maintenance of the child. In my view **Section 12 of Matrimonial Causes Act** has not been breached. Hence Application of the Respondent counsel is hereby struck out.

However, if Respondent has other grounds, another application can be made to this court anytime before judgment or letter can be written to the Hon. Chief Judge of FCT seeking for transfer of this matter.

Parties: Petitioner is present. Respondent is absent.

Appearances: Helen M. Gbor appearing for the Petitioner. E. E. Ngenegbo appearing for the Respondent.

JUDGE

HON. JUSTICE MODUPER. OSHO-ADEBIYI

5TH APRIL, 2023