

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
DELIVERED ON WEDNESDAY THE 20TH DAY OF MAY, 2020.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE .R.OSHO-ADEBIYI

SUIT NO. PET/192/2019

BWTWEEN:

PROSPER OKE EDEWOR -----PETITIONER

AND

REBEKA ONIAWU -----RESPONDENT

JUDGMENT

This is a Petition for dissolution of marriage dated and filed on 22/3/2019 by Prosper Oke Edewor (hereinafter called the Petitioner) seeking the reliefs set out in the Petition as follows;

- (a) A Decree of dissolution of the marriage between the Petitioner and Respondent, conducted at the Marriage Registry, Oredo Local Government Area of Edo State on the 19th day of September, 2009.
- (b) An Order, awarding custody of the only surviving child of the marriage Vida Edewor, female born September 9, 2010 to the Petitioner.

This Petition was filed on 22/3/2019 and served on the Respondent via Order of Court made 22/5/2019, to wit, serve the Petition and accompanying originating processes on the Respondent at No. 12, Obanosa Street off 2nd East Circular Road, near Ekiosa Market, Benin City, Edo State and subsequent Processes were served on the Respondent by pasting same on the general notice board of the Principal Court House, High Court of the FCT, Maitama by order of court. The Respondent on the other hand did not file an Answer to the Petition and was not represented by Counsel

of her choice. The Respondent was absent throughout the trial despite repeated service of Hearing Notices on her. The Petition thus proceeded upon Petitioner's counsel application on 16/5/2016 as Undefended.

The following is a recap of Petitioner's case: Petitioner as PW1, testified that he was lawfully married to the Respondent at the Marriage Registry, Oredo Local Government Area of Edo State on the 19th day of September, 2009 and tendered a Certified True Copy of the Marriage Certificate as Exhibit A. That both parties cohabited at Block 4, Flat 5, Street 16 Federal Housing, Aduwawa, Benin City Edo State Nigeria until Respondent left the matrimonial home on 18/9/2017.

PW1 further informed the Court that the marriage produced 2 (two) Children namely Vida Edewor female born on 9/9/2010, who presently lives with him and Vasyl Edewor male (deceased) born on 20/4/2015. That sometime in July, 2017 he had travelled to Togo, West Africa with the knowledge and approval of the Respondent on a business trip which lasted for two (2) weeks and upon return on the 5th of August, 2017 the Respondent had changed Church and was no longer cooperative. When confronted by the Petitioner, she (the Respondent) said she was no longer interested in the marriage but wants to be left alone. That on or about the 18th day of September, 2017 the Respondent left the matrimonial home abandoning the two children of the marriage, the youngest then being 2 years eventually died on 28th November, 2017. That to this day, Respondent had not enquired after her children. That he cannot be made to continue to suffer on account of the Respondent who has no intention of continuing with the marriage.

At the close of Petitioner's evidence the case was adjourned for the Respondent to cross-examine PW1 - the Petitioner. Respondent failed

attend Court despite service of Hearing Notice, neither was she represented by Counsel. Consequently, upon the Petitioner's Counsel application, the Court ordered the foreclosure of the right of the Respondent to Cross-examine the Petitioner (PW1) and to defend the Petition and called on the Petitioner, through his Counsel to file their Final Written Address. On 26/2/2020 O. C. Uju-Azorji Esq. adopted the Final Written Address filed on 20/2/2020, as argument and submitted two (2) issues for determination that is:

1. Whether the marriage between the Petitioner and the Respondent has broken down irretrievably, and ought to be dissolved with regards to the entire circumstances of this petition.
2. Whether it is in the best interest of the only surviving child of the marriage (Vida Edewor) to be granted custody of her to the Petitioner, in the entire circumstances of the petition.

Learned counsel submitted that on the strength of the evidence of desertion alone, this court can hold that the marriage between the Petitioner and the Respondent has broken down irretrievably on ground that the Respondent has deserted the matrimonial home for a continuous period of at least one year immediately preceding the presentation of the Petitioner's Petition. Counsel submitted that in issues concerning the custody of children the primary consideration is the welfare and interest of the child and not the rights of the parents. Counsel also submitted that in determining the proper order to make with respect to the custody of the child, the relevant considerations to be had by the court is the evidence before the Court as well as relevant statutory and judicial authorities. Submitted that the evidence before this court is that the Respondent deserted her matrimonial home abandoning the children of the marriage. Counsel finally submitted that it is in the best interest of the only surviving child of the marriage, Vida Edewor to be granted custody of her to the Petitioner. Counsel urged

the court to grant the reliefs contained in the Petitioner's Petition. Counsel relied on the following judicial authorities;

- i. **Section 15 (2) (d) of the Matrimonial Causes Act.**
- ii. **Bibilari v. Bibilari (2011) 13 NWLR (1264) 207 At Pg. 224 para E-G**
- iii. **Section 1 of the Child's Right Act CAP C50 LFN 2010**
- iv. **Section 71 of the Matrimonial Causes Act CAP M7 LFN 2010**
- v. **Ojeniran Ojeniran (2018) LPELR-45697 (CA).**

Having carefully considered the evidence of the Petitioner and the Submissions of Counsel as well as the Judicial Authorities cited, I find that only one issue calls for determination that is;

“Whether the Petitioner has made out grounds so as to be entitled to the reliefs sought”.

First, it is in the record of Court that the Respondent was served the Petition and all other processes of court, but failed to file an Answer to the Petition and was not represented by Counsel but chose to be absent throughout Hearing of the Petition. The Court held that where evidence is neither challenged nor controverted, Court should deem that evidence as admitted, correct and act on it. **See CBN Vs Igwilo (2007) 14 NWLR (PT 1054) 393 @ 406 and Iyere Vs Bendel Feed and Flour Mill Ltd (2009) All FWLR (PT 453) 1217 @ 122.** In the case of **Afribank Ltd Vs Moslad Enterprise Ltd (2008) All FWLR (PT 421) 879 @ 894 Paras E - F. Akaahs JCA** (as he then was) had this to say:

“Where a Defendant does not produce evidence or testify or call witness in support of defence, slight or minimum evidence which can discharge the onus of proof would be required to ground the Plaintiff's Claim”.

Hence, the burden of proof imposed on the Petitioner by **Section 131 - 134 of the Evidence Act and Section 15 (1) and 15 (2) a - h of the Matrimonial Causes Act** must be discharged for the Petition to succeed.

In the determination of a petition for dissolution of marriage under the Matrimonial Causes Act, it is competent for a marriage to be dissolved once a Court is satisfied that the marriage has broken down irretrievably. And to come to that conclusion, the Petitioner must satisfy the Court of any of the facts laid down in Section 15 (2) of the Matrimonial Causes Act categorized under sub sections a - h. In the instant case, the Petitioner in seeking the Court to dissolve the marriage, placed reliance on the facts contained in Section 15 (2) (d) of the Matrimonial Causes Act. Section 15 (2) (d) reads;

"That the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the Petition".

The court here interpreted desertion in **Nanna Vs Nanna (2006) 3 NWLR (PT 966) 1 @ 6** that

"It is not enough to show that the parties have lived apart for a continuous period of two years immediately preceding the presentation of the Petition, but that the desertion within Section 15 (2) (d) (e) and (f) must be one where any of the parties have been abandoned and forsaken without the Justification, thereby renouncing his or her responsibilities and evading its duties".

The evidence of the Petitioner in proof of those facts are that on or about the 18th day of September, 2017 the Respondent left the matrimonial home abandoning the two children of the marriage, the youngest then being 2 years eventually died on 28th November, 2017. That Respondent abandoned their matrimonial home and their children. That he cannot be made to

continue to suffer on account of the Respondent who has no intention of continuing with the marriage. I find these unchallenged and uncontroverted evidence of Petitioner satisfactory and are in conformity with the Section 15 (d) of Matrimonial Causes Act in establishing desertion by the Respondent.

On the issue of custody of the only surviving child of the marriage (Vida Edewor), the grant or otherwise of custody of children in a matrimonial proceeding is at the discretion of court. See **Section 71 of the Matrimonial Causes Act**. In the exercise of that discretion, the court must do so judicially and judiciously placing reliance on cogent facts and not according to its whims. On what Court may consider, in the determination of the issue of custody of Children in matrimonial proceeding, the Court in the case of **Damulak V Damulak (2004) 8 NWLR (PT 817) 151 at 156** stated that:

"In all matters relating to custody and welfare of the children of the marriage the dominant issue that calls for careful examination and consideration is the absolute interest of that child or children"

In the instant case, the Petitioner stated that the Respondent left the matrimonial home abandoning the two children of the marriage with him till date and eventually, the youngest died. That evidence of the Petitioner was not challenged by the Respondent and are deemed admitted. In the light of the unchallenged and uncontroverted evidence of the Petitioner in support of the prayer for custody of the only surviving child of the marriage, this Court is of the firm view that the interest of the child will be best served if left in the custody of the Petitioner.

From all of these and having proven to the reasonable satisfaction of this Court of the facts relied upon for the dissolution of marriage, this Petition

succeeds and Judgment is accordingly entered in favour of the Petitioner.

IT IS HEREBY ORDERED AS FOLLOWS:-

1. That the Marriage celebrated at the Marriage Registry, Oredo Local Government Area of Edo State on the 19th day of September, 2009 under the Marriage Act between **PROSPER OKE EDEWOR** - the Petitioner and **REBEKA ONIAWU** - the Respondent has broken down irretrievably and I hereby pronounce a Decree Nisi dissolving the Marriage between the parties.
2. That the said Order shall become absolute after three (3) months from the date of this Judgment, unless sufficient cause is shown to the Court why the decree nisi should not be made absolute.
3. That Custody of Vida Edewor the only surviving child of the marriage is hereby granted to the Petitioner. However, supervised access to the Child at reasonable time is granted to the Respondent.

Parties: Absent

Appearances: O. C. Uju Azorji, Esq., for the Petitioner. Respondent not represented.

HON. JUSTICE MODUPE .R. OSHO-ADEBIYI
JUDGE
20TH MAY 2020