

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPower EBAHOR

COURT NO: 10

SUIT NO: FCT/HC/PET/76/2012

BETWEEN:

IKECHUKWU BERNARD OSUJI.....PETITIONER

VS

IHUOMA JULIET OSUJI.....RESPONDENT

JUDGMENT

By a Notice of Petition dated 27/1/2012 and filed same day by Mr. Ikechukwu Barnard Osuji (hereinafter called the Petitioner) seeking the reliefs contained in Paragraph 18 of the Petition as follows:-

- (1) A Decree of Dissolution of Marriage between the Petitioner and Respondent contracted on the 16th day of April 2010.
- (2) Custody of the two children Basil and Berwin born on 4th day of April, 2011.
- (3) An Order for the maintenance, welfare, advance and education of the children of the marriage.

The facts relied on by the Petitioner for the court to dissolve the marriage are as stated in Paragraph 11 of the Petition as listed below;

- (a) The Respondent has terminal disease prior to the marriage (HIV Positive) and fails to disclose same to the Petitioner.
- (b) That since the marriage, the Respondent has been persistently violent, abusive and disrespectful to the Petitioner and his family.
- (c) The marriage is predicated on fraud, forgery and deceit.
- (d) The Respondent family has consistently interfered in the marital issues as major family decisions are obtained from the Respondent family.

The Notice of Petition along with other court processes were served on the Respondent and with Leave of Court, Respondent filed her Answer to the Petition out of time, urging the court to dismiss the Petition for being frivolous, groundless, vexatious and totally baseless.

The Petitioner filed and served on the Respondent his Reply to the Respondent's Answer to the Petition and upon receipt of the process, Respondent through her counsel filed a Rejoinder to the Petitioner's Reply on 2/6/2014. With pleadings having been filed and exchanged the Petition went into trial.

Petitioner opened his case on 4/6/2014 and testified as PW1, he told the court that the parties were married in Catholic Church on 29/5/2010 and lived together for 2 years and 7 months after which they have lived apart. The marriage produced two male children, KamisyoChukwu Berwin Osuji and Kosisiochukwu Basil Osuji. He stated that he came to court to dissolve

the marriage because Respondent is very violent woman, at the slightest argument she destroys things in the house, just to get over her anger PW1 said;

“Whenever I have argument with her, before you know, she gives me a slap and I called the attention of her parents, especially her mother who swept my challenges under the carpet. In a particular instance she told me that it is love that is why she is doing and she would talk to her. The Respondent is very disrespectful and above all, one day I found that the Respondent was taking a retroviral drug.

PW1 narrated that before they got married they carried out HIV Test at Our Lady of Fatima (St Vincent) Kubwa – A Catholic Hospital, his result was negative while that of the Respondent came out positive. He was shocked and asked for explanation, but Respondent could not give a concrete explanation. Both parties then agreed to conduct another and identified a particular laboratory for the second test, but while he was away for an official assignment, Respondent brought a test result from her mother’s work place which pronounced her negative to HIV. Respondent and her mother made him believe that the initial test result was wrong. When Petitioner later found the retroviral drugs with the Respondent and upon enquiry Respondent informed the Petitioner via WhatsApp Sms messages that the drugs were given to her as a result of a rape incident which occurred while she was in school and it was meant to prevent any viral disease that may occur and this was after the marriage with the Respondent.

PW1 finally told the court that he has been taking care of the children of the marriage and have paid school fees for them via Exhibit "D^{1 - 10}" and have also made cash transfer to the Respondent for their upkeep.

During Cross-examination by Respondent's counsel PW1 informed the court that the parties courted for four years and during that time both parties had sexual contact. But did not know of the HIV status of the Respondent. The HIV confirmation test was to be carried out at Eco Scan as agreed but Respondent went behind him to get one at NIBRD, where Respondent's mother worked as a Deputy Director, while Petitioner was away. Petitioner is HIV Negative as well as the children of the marriage who were conceived through the natural sexual process. Petitioner works as public servant and return home from work at 5pm.

There was no re-examination of PW1.

In the course of the evidence of PW1, the following documents were tendered and admitted as Exhibits;

- (1) A copy of Marriage Certificate issued by the Holy Trinity Catholic Church Maitama, Abuja in respect of marriage between the Bernard Ikechukwu Osuji and Mrs Juliet Ihuoma Osuji admitted as Exhibit "A".
- (2) The copy of marriage certificate issued by Abuja Municipal Area Council Registry dated 16/4/10 in respect of marriage between Ikechukwu Bernard Osuji and Ihuoma Juliet Osuji admitted as Exhibit "B".

- (3) A computer print-out and picture are admitted as Exhibit "C¹⁻⁸" the picture C2.
- (4) Deposit Teller of GTB Plc dated 14/2/2014, 29/4/2014, 24/2/2009, 22/4/2009, 1/3/2010, 23/8/2010, 13/12/2011, 22/12/2011, 11/4/2014 and 7/3/2004 all in favour of Osuji Ihuoma Juliet of various sums are admitted as Exhibit "D¹⁻¹⁰".
- (5) The Statement of Account No. 0022957921 from GTB Plc along with an affidavit of verification admitted as Exhibit "E¹⁻²".
- (6) Receipt dated 8/4/2012, 6/5/2013, 17/1/2014, 9/4/2013, 21/2/2014, 24/5/2014, 24/5/2013, 5/4/2014, 21/4/2014, 11/11/2013, 13/7/2013, 24/5/2013, 17/1/2014, 5/12/2013, 29/6/2013, 24/8/2013, 9/4/2013, 17/4/2013, 3/5/2013, 12/3/2013, 27/11/2012, 02/11/2012, 3/10/2012, 7/12/2012, 18/2/2013, 5/7/2013, 27/11/2012. 02/11/2012, 31/10/2012, 7/12/2012, 18/2/2013, 5/7/2013, 30/1/2013, 11/12/2012, 24/11/2012, 28/12/2012, 27/7/2013, 19/10/2012, 6/9/2013, 24/8/2013, 5/12/2013, 17/1/2014, 5/4/2014, 4/5/2014 and 1/6/2013 collectively admitted as Exhibit "F¹⁻³⁹".
- (7) HIV Counseling/Testing Client form in respect of Ikechukwu Osuji dated 13/1/2010 tendered by the Subpoenaed witness admitted as Exhibit "G".

- (8) HIV Counseling/Testing Client form in respect of Ihuoma Osuji dated 13/1/2010 from Daughters of Charity Health Services tendered by the subpoenaed witness admitted as Exhibit "H".

At the close of the evidence of the Petitioner, Respondent opened her case Respondent did not attend court to testify but called two witnesses to defence of the Petition.

Chief (Mrs) Adeline Ngozi Osuji Respondent's mother testified as DW1, she stated that when the parties got married, there was a lot of misunderstanding, beating, arguments and complains from time to time. And narrated observing injuries on the body of the Respondent as well as acts of violence perpetrated by the Petitioner on the person of the Respondent. DW1 recounted a particular instance when she stated;

"When we got there Petitioner/Respondent came out and offered me drinks that the reason for the visit is to assist in resolving the constant quarrels for 10 months, he did not say anything, then the Respondent offered to talk, another argument came up and the Petitioner started beating Respondent when I attempted to stop him he pushed me down and continue beating the Respondent, the sister was there but did nothing. During the period the Petitioner went on, unlocked the door and went out it was then I stood up and came out and the sister came out, but the Respondent came from the house crying, when the Petitioner went out I heard him calling the father that the marriage was over".

All of these acts of violence led the Respondent's father to ask DW1 to bring the Respondent back to their home. Respondent refused to go with DW1, but later left her matrimonial home because the Petitioner threatened to kill her asking her to leave before he return home. Respondent left accompanied by a woman soldier with a few belongings and with the two children of the marriage. After a period of two days, Respondent went back to her matrimonial home because she had earlier left with the keys of the house, but found that all the entrance keys had been changed by the Petitioner and since then Respondent and the two children could not have access to their home.

DW1 further told the court that the Petitioner's claim that the Respondent tested positive to HIV was not to her knowledge. That she took the Respondent to Eco Scan for HIV test, and the result was negative. DW1 stated further that she enrolled the two children of the marriage in school and paid for their 1st term school fees, while Petitioner paid for the second terms fees. Respondent and the children left for USA upon invitation of her sister. The children cannot be brought back to her as she is old and does not have the resources to cater for them.

DW1 Finally told the court that she wants the court to grant the reliefs of the Petitioner as confirmed to her by the Respondent. However want to court to grant custody of the two children of the marriage to the Respondent because the Petitioner chased the children out of his home.

During cross-examination by Petitioner's counsel, DW1 informed the court that she moved into live with the parties upon delivery of their twin

children and lived with them for three weeks. All that she had informed the court may not be what the Respondent told her, but at times received phone calls and hears cries of the Respondent when Petitioner beats her. Some of the facts came to her while some happened in her presence, not all of the events narrated occurred in her presence and is not aware of Exhibits "P", notification of absence from school.

DW1, further stated that the Respondent went to the USA with the children on invitation and they were to stay for one month, but are yet to return. DW1 is aware of the Order of Court for the children to be returned to Nigeria

There was no Re-examination of DW1.

In the course of the evidence of DW1 the following documents were tendered and received in evidence.

- (1) Copies of letters dated 11/6/2015 written to the Petitioner, Titled Refusal of the Respondent to send the children of the marriage to school admitted as Exhibit "I".
- (2) Copy of the letter dated 16/12/2014 addressed to the Petitioner Titled "Support for the education of our kids Osuji Basil Kosichukwu and Osuji Berwin Kamsayochukwu as Exhibit "J".
- (3) A bundle of Bank Teller of payment of fees with Nos. 2959190 – GTB, 0005193 – GTB, 0002604, Skye Bank 0005118 GTB, 0002604 – Skye Bank, 2959190 GTB, 0005193 – GTB, 005118

- GTB and school receipt from Christabel Private School Abuja No. 4752 and 4751 collectively admitted as Exhibit “K”.
- (4) A bundle of receipt No. 4751 and admission form for Osuji Basil, cash receipt No. 1027 school receipt No. 4751 and another school receipt No. 3768 collectively admitted as Exhibit “L”.
 - (5) A Bundle of school receipt from Christabel Private School Abuja No. 4752, Admission Form for Osuji Berwin, Bank Teller for payment of PTA Levy No. 0014609, Skye Bank deposit Teller No. 000518 – GTB, Bank payment voucher No. 0002604- Skye Bank; Deposit Slip No.2959190 – GTB, Deposit Slip No. 0005193 – GTB and School Receipt No. 4752 collectively admitted as Exhibit “M”.
 - (6) Test Result issued by Eco Scan in respect of Juliet Ihuoma Osuji admitted as Exhibit “N”.
 - (7) The admission form from Christabel Private School for registration of Osuji Berwin Kamsiyoschukwu and Osuji Basil Kosisochukwu collectively admitted as Exhibit “O¹⁻¹⁹”.
 - (8) The letter Titled “Notification of Absence from school dated 28/9/2016 addressed to Mr.Osuji B. Ikewchuwu from Christabel Private School Abuja admitted as Exhibit “P”.

In her testimony DW2 corroborated the evidence of DW1 and added that she sometime saw the Petitioner in club where he spends almost ₦100,000.00 on drinks and ladies and comes home drunk that the

Petitioner does not provide for the family. DW2 wants the court to grant custody of the two children to the Respondent and visitation access to the Petitioner as well as an order for the Petitioner to return the belonging of the Respondent.

Under cross-examination DW2 stated that the Respondent could not breastfeed the babies because she had malaria and the breast milk did not flow from her breast. She stated further that she wasn't staying with the parties, but was visiting. She did not see any test result prior to the marriage. DW2 is aware of the Order of Court directing Respondent to bring back the children to their family home and the Respondent has not complied to it. Also aware that the children were attending Christabel school, Wuye Abuja before they were taken out of the country, but unaware that the Petitioner paid their school fees.

At the close of the evidence of the Respondent the case went into Address.

Addressing the court on 7/12/2020 Lady Rose Mbaka Esq for the Respondent adopted the Final Written Address settled by Emmanuel Ugwuja Esq filed on 9/10/2020 as their Final Written Address, in the said Address, two main issues were formulated for determination that is;

- (a) Has the Petitioner proved his case as to be granted the prayers he asks of this court?
- (b) Subsumed under this broad issue are sub-issues namely;
 - (i) In view of the evidence before this court and law, is the Petitioner entitled to a decree of dissolution of marriage?

- (ii) Whether in the light of his evidence and the law the Petitioner is entitled to be granted the custody of the twin boys whom he chased out the matrimonial home at Seven (7) months old and who are now Eight (8) years old?

On issue one, submits that Petitioner's case is premised on the ground that the marriage is founded on fraud, forgery, deceit and that the Respondent has a terminal disease (HIV) prior to the marriage, which Respondent failed to disclose to him but the Petitioner failed to provide evidence to establish these grounds, therefore, urge court to hold that the Petitioner having not proven his case is not entitled to a decree of dissolution of marriage.

On the second issue, submit that the Respondent left their matrimonial home on 15/9/2012 after a fight and from the evidence in court, Petitioner never made attempt to bring the children who were just 7 months back home. The Petitioner never wanted them back hence he changed the keys to the house and went to the place of work of the Respondent to spread information that the Respondent was HIV positive, which made the Respondent to contemplate suicide. Submits that the Petitioner's prayer in his Motion M/348/16 that the children be brought back to Nigeria to DW1 and not to him indicates that he does not want them. And based on all of these, Petitioner cannot be granted custody of the children. Refer to Sections 72 and 73 Part VIII of the Child Right Act and Section 71 (1) (4) of the Matrimonial Causes Act.

Finally urge court to dismiss the Petition and grant custody of the two children to the Respondent, General damages to the Respondent against the Petitioner for spreading false information that Respondent was HIV positive, thereby leading her to abandon her jobs and to contemplate suicide. Also urge court to order the Petitioner to release the Respondent's personal effects as enumerated in Motion No. M/15/2016.

Addressing the court, I. R. Aleke Esq adopted the Written Address settled by Moses Awuru Esq filed on 14/7/2020 as their Final Written Address. In the said Address Petitioner's counsel formulated two issues for determination namely;

- (1) From the totality of evidence before this Honourable Court, whether the Petitioner is not entitled to the dissolution of his marriage with the Respondent.
- (2) As between the Petitioner and the Respondent who is entitled to custody of the two children of the marriage regard to the conduct of the Respondent and the state evidence before the court.

On issue one submits that from the incontrovertible led by the Petitioner has satisfied the requirement of the law and has proven the facts relied upon in support of the Petition. Refer to Section 15 (2) (1) of the Matrimonial Causes Act, the cases of Williams Vs Williams (1966) 1 ALL NLR 36 and Damulak Vs Damulak (2004) 8 NWELR (PT.874) 151 @ 166. Submits further that failure of the Respondent to cross-examine the witness on a document means admission to the content of the document,

therefore the purported test result from Eco Scan purporting to prove that the Respondent is HIV negative is of no moment. Refer to Gaji & Ors Vs Paye (2003) LPELR – 1300 (SC) and Emirate Airline Vs Makwunye (2014) LPELR – 22685 CA.

Submits that, since the Respondent failed to lead evidence in support of her Answer and purported cross-Petition, same is deemed abandoned and cannot be acted upon by this court. Refer to Okpoko Community Bank Ltd Vs Igwe (2013) 15 NWLR (PT. 1376) 167 @ 183 – 184, FCDA Vs Naibi (1990) 3 NWLR (PT. 138) 270, Umoh Vs Tita & Co (1999) 12 NWLR (PT.631) 427 @ 434, Agbodon Vs State (2000) 7 NWLR (PT.666) 687 @ 702 – 703 Paras H – A; Ijebu Ode Local Govt. Area Vs Adedeji (1991) LPELR SC 221189, Chief Sunday Ogunyade Vs Solomon Oluyemi Oshunkeye & Anor (2007) 7 SC (PT. 11) 60, Odulaja Vs Haddad (1973) 11 SC 357 and Nigeria Maritime Services Ltd Vs Afolabi (1978) 2 SC 29.

Relying on the cases of Bibilari Vs Bibilari (2011) LPELR 4443 CA, Ibrahim Vs Ibrahim (2007) 1 NWLR (PT. 1015) 383, Nnana Vs Nnana (2006) 3 NWLR (PT. 966) 1, Damulak Vs Damulak (Supra) and Williams Vs Williams (Supra). Submits that the Petitioner has satisfied the facts contained in Section 15 (2) (c) of the Matrimonial Causes Act and can no longer be reasonably expected to live together with the Respondent as husband and wife.

Submits further that the evidence led by the Respondent in disproving that she is HIV positive amounts to documentary hearsay, same having not been tendered by the maker refer to Lawrence Vs Olugbemi & Ors (2008) LPELR

45966. Also submits that the evidence of DW1 and DW2 are hearsay since proof of facts can only be by direct evidence of a person who can give direct evidence of the facts in issue. Refer to Section 37 of the Evidence Act and the case of Okolo Vs FRN (2018) LPELR 45431.

On issue two submits that the Respondent did not file a Cross-Petition, her prayers for custody rest on nothing, therefore same cannot stand. Refer to Mcfoy Vs UAC (1961) 3 WLR 1405 @ 1409 Nzelu Vs Nzelu (1997) 3 NWLR (PT. 494) @ 472. Submits that Respondent is in disobedience of the Order of Court given on 9/2/2017, hence Respondent is not deserving of any relief from the court. Refer to Shugaba Vs UBA Plc (1999) 11 NWLR (PT.627 459 and Hart Vs Hart (1990) SC 1.

Submits further that in deciding the question of custody, the paramount consideration is the welfare of the children. Refer to Section 71 (1) of the Matrimonial Causes Act and the case of Nnana Vs Nnana (Supra), the court should consider this relief solely on the basis of the evidence of the Petitioner and grant the Petitioner custody of the children of the marriage.

Submits finally that the Respondent's Motion M/5691/17 dated 20/4/2017 was dismissed, same reliefs cannot be granted since the court become functus officio on the reliefs claimed in that Motion, urge court to grant the reliefs of the Petitioner.

I have carefully considered the submissions of counsel, the judicial authorities cited, the pleadings as well as the evidence led by the parties and I find that there is only one issue for determination that is;

“Whether the Petitioner has successfully made out a ground for the grant of the relief sought”.

In the determination of a Petition for dissolution of marriage under the Marriage Act, it is competent for a marriage to be dissolved, once a court is satisfied that the marriage has broken down irretrievably and to arrive at that conclusion that a marriage has broken down irretrievably, the Petitioner must satisfy the court of any of the facts as prescribed by Section 15 (2) (a) – (h) of the Matrimonial Causes Act.

In this instant Petition, Petitioner relies on two main grounds for court to dissolve the marriage between the parties as gleaned from the pleadings and evidence adduced in court. However the facts of the Respondent of having a terminal disease prior to their marriage, fraud, forgery and deceit are facts which are not within the facts contemplated by Section 15 (2) (a) – (h) of the Matrimonial Causes Act upon which a court could hold that a marriage has broken down irretrievably, thus any evidence in proof of those facts goes to no issue and cannot ground this Petition for dissolution of marriage. Thus the only ground upon which this Petition may rest is on the facts contained in Section 15 (2) (c) of the Act, which reads;

“That since the marriage the Respondent has behaved in such a way that the Petitioner cannot be reasonably be expected to live with the Respondent”.

It is trite that the facts relied under this head; to succeed must be grave and weighty to make further co-habitation impossible. See Ibrahim Vs

Ibrahim (2007) 1 NWLR (PT.1015) 283 @ 386 See also the English Case of Katz Vs Katz (1972) ALL ER.

In proof of this ground, Petitioner led evidence on the conduct of the Respondent which includes being disrespectful, violent, destructive of things in fits of anger, physically assaulting the Petitioner. On the other hand the Respondent through DW1 and DW2 stated that it was the Petitioner who was violent, comes home late, after going to clubs with ladies whom he spends lavishly on and his failure to provide for the upkeep of the family. All of these pieces of evidence the Petitioner's counsel challenged as being hearsay contrary to Section 37 of the Evidence Act, which defines hearsay as "Statement, Oral or Written made otherwise than by a witness in a proceeding or (b) contained or recorded in a book, document or any record whatever, proof of which is not admissible under any Provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. I have taken a considered look at Provision of Evidence Act vis-a viz the pleadings and evidence of the Petitioner, I find that indeed the evidence led by DW1 and DW2 in support of the Respondent's Answer to the Petition are mere hearsay and therefore inadmissible thus leaves the evidence of the Petitioner as unchallenged and uncontroverted. And the court is duty bound to accept the Petitioner's evidence and act on it. See the case of CBN Vs Igwilo (2007) ALL FWLR (PT. 1954) 393 @ 406. And I find the said unchallenged and uncontroverted evidence of the Petition satisfactory and in conformity with the law and hold that the marriage between the parties has broken down irretrievably.

On the issue of custody of the children of the marriage, it is cardinal principle of law that the interest of the children should be of paramount consideration. Section 71 (1) of the Matrimonial Causes Act which guides the court on the issue of custody provides as follows;

“In proceedings with respect to the custody guardianship, welfare, advancement or education of children of marriage, the court shall have regard to the interest of those children as the paramount consideration and subject thereto, the court may make such order in respect of those matters as it thinks proper”.

See the case of Nnana Vs Nnana (2006) 3 NWLR (PT. 966) 1 @ 13. In this instance, the children are minor and there is evidence vide Exhibits “D¹⁻¹⁰”, “E¹⁻²”, “F¹⁻³⁹” and “P” that the Petitioner had been involved in the maintenance, upkeep, welfare and education of the children. There is also unchallenged evidence that he is gainfully employed. In Nnana Vs Nnana (Supra) 45 Paras A – B, the court stated Per Abba;

“Although there is no settled Rule that a child of tender age should remain in the custody of the mother, I take the view that custody of a child of the marriage came along with it, the all-important implications is of the preservation and care of the child’s person”

From all of these the court is of the firm view that the children although minors their interest will be better served if left in the custody of the Petitioner, this court therefore exercise its discretion in favour of the Petitioner, this more so as the Respondent did not file a Cross-Petition and did not challenge the evidence of the Petitioner, leaving the court to act

on the unchallenged evidence of the Petitioner in the consideration of the issue of custody.

The Petitioner having proven his case is entitled to the relief sought, accordingly Judgment is entered as follows;

- (1) The marriage contracted under the Marriage Act at Holy Trinity Catholic Church on 16/4/2010 between Mr. Ikechukwu Barnard Osuji – the Petitioner and Mrs. Ihuoma Juliet Osuji – the Respondent has broken down irretrievably and I hereby pronounce a Decree dissolving the marriage between the parties. The said Order shall become absolute after three months from the date of this Judgment.
- (2) Custody of the two (2) children of the marriage, Osuji Basil Kosisiochukwu and Osuji Berwin Kamsiyochukwu, born on 4th day of April 2011 is hereby granted to the Petitioner, there shall be reasonable access to the Respondent.
- (3) Relief 3 fails as it is the duty of the father of a child to provide for the maintenance, welfare. Advance, and education of children of a marriage.

HON. JUSTICE O.C. AGBAZA

Judge

4/3/2021

I.R. ALEKE ESQ FOR THE PETITIONER

LADY ROSE MBATA FOR THE RESPONDENT

