

**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/239/16

BETWEEN:

MRS LINDA ENEMUO.....PETITIONER

VS

MR CYRIL ENEMUO.....RESPONDENT

JUDGMENT

By a Notice of Petition dated 20/9/2016 and filed on 20/9/2016, the Petitioner –Mrs Linda Enemuo filed a Petition for dissolution of marriage against the Respondent – Mr Cyril Enemuo, seeking for the following reliefs, in the face of the Petition as follows:-

- (1) A Decree of Dissolution of Marriage between the Petitioner and the Respondent on the grounds that the marriage has broken down irretrievably in that since the marriage the Respondent has behaved in such a way that the Petitioner cannot be expected to live with him.
- (2) An Order of custody of the child of the marriage (Chiamanda Cyril Enemuo) to the Petitioner.

- (3) An Order granting the Respondent monthly access to the child of the marriage in the day time only and the company of a Police Officer of the Rank of Inspector and above.
- (4) An Order directing the Respondent to make adequate Provision for the education of the child of the marriage and to pay the Petitioner a monthly maintenance of One Hundred Thousand Naira (N100,000.00) only until the child of the marriage attains the age of 18 years.
- (5) Any other order the court thinks fit to make in the circumstances.

The Petition was served on the Respondent and on receipt of the process, the Respondent caused an Answer/Cross-Petition was filed and served on the Petitioner/Cross-Respondent.

In the said Cross-Petition, the Respondent/Cross-Petitioner prays for the following reliefs;

- (a) An Order dismissing the Petition.
- (b) A Decree of Dissolution of the marriage on the grounds that the Petitioner has deserted the Respondent for a continuous period of one year immediately preceding the presentation of this Petition.
- (c) An Order granting custody of the child of the marriage (Chiamanada Cyril Enemu) to the Respondent.

- (d) An Order granting the Petitioner Access to the child on weekends and during holidays; the child can also spend part of her holiday with the Petitioner.
- (e) An Order directing the Petitioner to refund a total sum of Eight Million and Eight Hundred Thousand Naira (~~N~~8,800,000.00), 10,000 Euros and 1500 Pounds received from the Respondent between January – May, 2015.
- (f) An Order directing the Petitioner to pay the Respondent a sum of Ten Million Naira/10,000,000.00) as general damages.
- (g) Any other order or orders as the court may deem fit to make in the circumstance.

There was no Reply to the Answer-Cross-Petition by the Petitioner/Respondent.

The pleadings having been filed and exchanged, and all Preliminary application taking and concluded by the court, the case proceeded to full blown trial on 14/1/2019.

The testimony of the Petitioner as PW1 in brief, is that the parties got married on 2nd day of January, 2015, at the St Mary Catholic, Church, Egbegwu, Nimo, Anambra State. They both resides at Plot 72 Unity Estate, Independent Layout, Enugu, Enugu Estate and Bennis Hotel, Festac, Lagos from 2/1/2015 to 29th April 2015. The PW1 listed catalogue of issues resulting to the breakdown of the marriage, such as excessive cruel,

aggressive, harsh and unfriendly attitude of the Respondent, lack of trust against the Petitioner and her family.

That all this lead to breakdown in good communication between the parties. Further that this disagreement and dispute lead to constant threat to life by the Respondent over monies the Respondent gave to the Petitioner. That despite efforts of the family to resolve the issue through family meetings on 17/4/2016 all efforts proved abortive. PW1 stated that the marriage was blessed with a child, Chiamanda Cyril Enemuoh born on 31/8/2015.

PW1 stated that this marriage to Respondent has brought her nothing but pains and shame causing her to lose her self-esteem and confidence, hence prays this court to grant the prayers sought in the Petition.

PW1; tendered the following document in evidence;

- (a) A Marriage Certificate evidencing the marriage celebrated at St Mary's Catholic Church, Egbegwu, Nimo, Anambra State, under the marriage Act on 2/1/2015 admitted as Exhibits "A".
- (b) Birth Certificate in respect of Cyril Calliope Chiamanda born on 31/8/2015 and issued by National Population Commission (NPC) is Exhibit "B".

Cross-examined – PW1 admitted contracting the marriage based on her conviction, even though advised by her parents. She maintained her family name till this Petition. She admitted not able to travel to U.K. but not aware of any funds made to her father for the purpose. She admitted that

she called the Respondent after her delivery and refused to give her address to the Respondent. She stated that she made verbal report of threat to Police, but cannot remember the Police Station. She confirmed that the Respondent have not seen the child of the marriage, since birth. There was no re-examination.

At the end of the testimony of PW1, the Petitioner close her case.

The Respondent –Cyril Enemu, testified as DW1 and adopted his Witness Statement on Oath sworn to on 22/1/2019 and in brief, stated and confirmed marriage to the Petitioner, and that he was responsible for payment of resit exams for the Respondent at the Nigerian Law School and upkeep, also paid for accommodation and travel expenses to U.K., including Visa Compliments through the Petitioner’s father, and sums of money for her travel to U.K. for a fashion course. That in all total sum expended on the Petitioner, is about ₦10,000,000 (Ten Million Naira), which sum the Petitioner has refused to refund. He stated that despite his efforts on his return to the country, severally to see his child, the Petitioner refused and failed to allow him have access to the child and apartment he provided money for the Petitioner to rent. He stated that on his second trip to Nigeria on 17th March 2016 in efforts to resolve the issues, at the family meeting convened, the meeting came to a deadlock and also was not given the opportunity to see the child. He stated that he is yet to get access to the child of the marriage despite all efforts. He stated as a result he caused his lawyers to write letters to Police, and other relevant authorities of formal complaint. Further that all other efforts through their Parish Priest to intervene has proved abortive. He maintains that he has a

flourishing business in Nigeria and Europe and comfortable residence to accommodate the child of the marriage with facilities to raise her in accord with their Igbo culture. Hence prays for the reliefs set out in his Cross-Petition.

The DW1 in course of his evidence tendered the following documents in evidence.

- (1) A letter dated 3/5/2016 to the I.G.P. Nigeria Police Force, Gender Unit as Exhibit "C".
- (2) A letter dated 21/6/2016 to Chairperson International Federation of Woman Lawyers (FIDA) as Exhibit "D"
- (3) A letter dated 3/5/2016 to Executive Secretary, National Human Right Commission as Exhibit "E".

Cross-Examined, stated that he does not reside in Nigeria, but in Switzerland and have residence in both places. He confirmed that he does not have proof of payment stated in my evidence to the Petition, but Euro payments were made direct, whilst other were reflected in account of the Petitioner and payment of ₦2 Million into the account of the Petitioner's father from his First Bank. He denied causing trouble at the family meeting. He denied contracting any other marriage, whilst this suit is subsisting. He confirmed that he does not have any proof of earning before this court and maintained that he has fixed address in Nigeria and Switzerland.

There was no re-examination.

At the close of the case of the Respondent/Cross-Respondent, the parties filed and exchanged their Final Written addresses.

In the Respondent Final Address filed o 20/2/2020, and settled by D.T. Nwachukwu Esq, three (3) issues were formulated for determination namely;

- (1) Whether the Petitioner's case is competent for non-compliance with the condition precedent under Section 30 (1) of the Matrimonial Causes Act, Cap M17 LFN, 2004.
- (2) Whether the Petitioner has proved her case to entitle her to the reliefs sought by this Petitioner.
- (3) Whether the Cross-Petitioner has proved the Cross-Petition to entitle him to the relief sought.

In the Petitioner's Final Written Address filed on 18/9/2020 and settled by Peter Eriwode Esq, three (3) issues were formulated for determination;

- (1) Whether the Petitioner's Petition is incompetent?
- (2) Whether from the facts and evidence before the court, the Petitioner is entitled to Judgment.
- (3) Whether the Cross-Petitioner has proved his Cross-Petition as to be entitled to Judgment as per his reliefs claimed?

I have given an insightful consideration to the pleadings as well as the testimonial and documentary evidence and the written submission of

Learned Counsel for the parties and find that only three (3) issues calls for determination namely:-

- (1) Whether the Petitioner's case is incompetent.
- (2) Whether the Petitioner has proved the ground alleged in seeking the decree of dissolution of marriage and therefore entitled to the reliefs sought, if not;
- (3) Whether the Respondent/Cross-Petitioner has proved his case to warrant the grant of the relief sought in his Cross-Petition.

On issue 1, both counsel contend the competence and incompetence of this Petition. While, the Cross-Petitioner contends that it is incompetent for non-compliance of Section 30 (1) of the Matrimonial Causes Act, 2004. The Petitioner on the other hand contends that it is not incompetent, relying on Section 30 (2) of the Matrimonial Causes Act which grant waiver of the Provisions of sub-Section 1 of 30 (1) of Matrimonial Causes Act.

The said Section 30 (1) of Matrimonial Causes Act, 2004, reads;

"Subject to this Section, proceedings for a decree of dissolution of marriage shall not be instituted within two (2) years after the date of the marriage except by leave of the court".

Sub-Section (2) relied on by the Petitioner reads;

"Nothing in this Section shall apply to the institution of proceedings based on any of the matters specified in Section 15 (2) (a) or (b) or 16 (1) (a) of this Act, or to the institution of proceedings for a decree of dissolution of marriage by way of Cross-Proceedings"

On careful perusal of the extant law, which is tantamount to condition precedent and the relevant cases cited, it is clear that where conditions precedent are set out, there must be full compliance. In this case, that non-compliance would have the effect vitiating the said proceeding.

However, in this instance granted that ordinarily the non-compliance of the relevant Provision of the law is capable of vitiating the entire proceedings of the Petitioner, it must be noted that the Cross-Petitioner/Respondent, have in this proceedings taken steps in the matter, which in my firm view amount to a waiver of right to complain at this stage, having filed processes and reacted thereto, is an act of acquiescence and amounting to a waiver. What amount to a waiver was stated in the case of A.I.E Vs Adebayo (2005) 19 NWLR (PT.959) Pg 44 @ 122, where Ogbuagu (JSC)'

"To amount to a waiver, express or implied two elements is settled must co-exist;

- (i) The party against whom the doctrine is raised, must have knowledge or be aware of the act or commission which constitute the waiver
and
- (ii) He must do some unequivocal act adopting or recognizing the act or omission".

In this instance, the Cross-Petitioner by his action of filing an Answer and Cross-Petition, without first amounts in my firm view amounts to a waiver

of some sort that will preclude the Cross-Petition from contesting this issue at this stage.

From, all of these, I find that though the extant law is clear and unambiguous, the act of the Cross-Petitioner is sufficient to hold that he has waived his right. Consequently, I resolve this issue in favour of the Petitioner/Respondent.

On issue 2 and 3, I shall take them together as it bothers on proof of otherwise of their respective reliefs.

Both the Petitioner and Cross-Petitioner are praying firstly for dissolution of the marriage, on different facts relied on.

The Petitioner is praying for dissolution on the facts that the marriage has broken down irretrievably In that since the marriage, Respondent has behaved in such a way that the Petitioner cannot be expected to live with him. That is Section 15 (2) (2) (C) of the Matrimonial Causes Act, 2004.

On the other hand, the Cross-Petitioner is praying for dissolution of the marriage on grounds that the Petitioner has deserted the Respondent for a continuous period of one year immediately preceding the presentation of this Petition. That is Section 15 (2) (d) of Matrimonial Causes Act.

In the determination of the Petition for dissolution of marriage under Section 15 (1) of Matrimonial Causes Act, 2004, 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 prove to the reasonable satisfaction of the court any of the facts as

prescribed by Section 15 (2) of the Matrimonial Causes Act, 2004 categorized under sub-section A – H.

In proof of her case, the Petitioner referred to catalogue of facts as stated in paragraphs 10 (1) & (V) of the Notice of Petition and paragraph 40 of her Witness Statement on Oath as the grounds upon which the relief is hinged on.

To succeed, the Petitioner must lead evidence to the reasonable satisfaction of the court of such particular acts or conducts of the Respondent which would warrant the grant of the relief sought and such acts must be weighty and grave in nature to make further co-habitation virtually impossible. See Case of Ibrahim Vs Ibrahim (2007) ALL FWLR (PT.340) 474 @ 489 Para H – B.

Having carefully considered the evidence of PW1 as disclosed in support of the facts stated in Paras 10 (1) & (V) of the Notice of Petition and Para 40 of the Oath, this court finds that the evidence is not weighty enough for this court to hold that the Petitioner has sufficiently prove the facts of Section 15 (2) (c) of the Matrimonial Causes Act. Accordingly, this ground does not avail the Petitioner.

For the Cross-Petitioner, relies on Section 15 (2) (d) of the Matrimonial Causes Act, which reads;

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

In this instance, the Cross-Petitioner must prove his Cross-Petition independently of the main claim just as in a counter-claim to succeed.

The principle factors which a party seeking dissolution of marriage under this ground must show are;

- (1) Physical Separation
- (2) Lack of just cause for their withdrawal of co-habitation
- (3) Intention to remain permanently separated.
- (4) Absence of consent.

All of these must be present for the court to hold that a marriage has broken down.

In proof the Cross-Petitioner by his evidence on Oath and pleadings in the Answer/Cross-Petition gave catalogue of events showing facts to support his grounds relied on. A careful perusal of the evidence against the facts the Cross-Petitioner must show are in tandem with those facts stated. The Petitioner/Respondent did admit this facts of desertion in Para 37 of her Oath.

From the totality of the evidence of the Cross-Petitioner, I find that all the four elements of desertion stated above in the conduct of the Petitioner/Respondent, the court can infer from it that the marriage has indeed broken down irretrievably. This ground relied on for the dissolution of the marriage therefore avails the Cross-Petitioner.

Now to the other reliefs sought.

On the issue of custody of the child of the marriage, the court has held that in the grant or otherwise of the relief, the paramount consideration is the welfare of the children. See case of Damulak Vs Damulak (2004) 8 NWLR (PT.874) 157 @ 156. Also Section 71 (1) of Matrimonial Causes Act, 2004, which reads;

“In the proceedings with respect to the custody, guardianship, welfare, advancement or education of marriage, the court shall regard 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 things proper”.

Also, in the case of Alabi Vs Alabi (2008 ALL FWLR (PT.418) 245 @ 257 – 258 P.292 Para C – E (CA), the Court per Augbe J.C.A. set out relevant criteria for consideration.

In this instance, there is evidence that the child is presently in the custody of the Petitioner. A careful perusal of the evidence and pleadings of both the Petitioner/Cross-Respondent and Cross-Petitioner/Respondent before the court, they have not clearly shown how they entered to take care of the child of the marriage. It is in view of this that the court shall call in and the Provision of the extant law and case laid in exercising its discretion in the matter moreso that the child in issue about a one (1) year now In the absence of any contrary adverse evidence against the Petitioner’s conduct as proper person to have custody by the Respondent the court holds that the welfare of the child will be better served if left in the custody

of the Petitioner/Cross-Respondent. I so hold and in line with the case of Alabi Vs Alabi (Supra).

On the issue of access, having granted custody, to the Petitioner/Respondent, it would be most appropriate to grant access to the Respondent/Cross-Petitioner. The Petitioner/Cross-Respondent having by her evidence conceded to access but with conditions. It is for the court to determine access and not for a party to give conditions before court can exercise that discretion. The child of the marriage is a product of both parents the facts that the both parents have chosen this part, should not leave the child of the marriage to suffer neglect of one parent by depriving that party from access. In the circumstance therefore, this court shall grant access to the child to the Cross-Petitioner on a monthly basis at a time agreed to by both parties and in the company of a Social Welfare Worker within the State the Petitioner resides with the child.

On the issue of maintenance and education of the child. By Para 9 (1) of the Notice of Petition and Paragraph 26 of the Statement on Oath, the Petitioner stated that she has been responsible for the maintenance, upkeep and welfare and medical of the child of the marriage, these facts were never challenged by the Cross-Petitioner. It is trite that such unchallenged fact be taken as true and correct. See CBN Vs Igwilo (2007) NWLR PT 1054 393 at 406.

It is trite law that the court has powers to make order of maintenance of a party and child of the marriage, but that exercise of that power is subject to the factors stated in the case of Adejumo Vs Adejumo (2010) LPELR –

35602 and the Provision of Section 70 (1) of the Matrimonial Causes Act, 2004. In this instant there is no evidence of the earning capacity of the Cross-Petitioner. It is trite that at Common Law, a father has a duty to maintain the child of the marriage. It is in this light, that I shall make an order as to maintenance of the child of the marriage.

On the Cross-Petitioner, Relief (iii), An Order directing the Petitioner to refund a total sum of ₦8,800,000 (Eight Million and Eight Hundred Thousand Naira, 10,000 Euros and £1500 Pounds received from the Respondent between January – May 2015. Granted that the Cross-Petitioner did plead these facts in the Cross-Petition in Paragraphs 10 -18 and Paragraphs 11 – 19 of the Statement on Oath, the Cross-Petitioner did not substantiate these claims with any material facts in support and the court is of the firm view that these assertions without more is not sufficient to grant those claims.

On the Relief (f), An Order directing the Petitioner to pay the Respondent a sum of ten Million (₦10,000,000) as general damages, Damages are awarded at the discretion of the court, which must be exercised judicially and judiciously. To succeed in a claim for damages, a Claimant must lead credible evidence. The evidence relied on in support of this claim is akin to the evidence led in support of Relief (e), wherein this court found that it lacks any supporting material facts to support the claim. It is the view of this court that the Cross-Petitioner. Relief (f) is the same as Relief (e) which this court has refused. In the circumstance, this Relief (f) fails.

From all of these, the Reliefs of the Petitioner/Cross-Respondent and the Cross-Petitioner/Respondent succeeds in parts. Accordingly, Judgment is hereby entered as follows:-

- (1) The Marriage contracted at St Mary's Catholic Church, Egbegwu, Nimo, Anambra State, under the marriage Act on the 2nd day of January, 2015 between the Petitioner – Mrs Linda Ememuo and the Respondent – Mr Cyril Enemuo has broken down irretrievably and I hereby pronounce a Decree Nisi dissolving the marriage between the parties. This said Order shall become absolute after three (3) months from today.
- (2) Custody of the child of the marriage Chimamanda Cyril Enemuo is hereby granted to the Petitioner. However, access is granted to the Respondent to visit the child of the marriage on monthly basis and at a time agreed by the parties and in the company of a Social Welfare Worker with the State the Petitioner resides.
- (3) The Respondent is hereby ordered to make the sum of ₦60,000.00 (Sixty Thousand Naira monthly for the maintenance of the child of the marriage.

This is the Judgment of the court.

HON. JUSTICE O.C. AGBAZA
Judge
28/1/2021

Appearance:

PETER ERIVWODE ESQ – FOR THE PETITIONER.

D.T. NWACHUKWU ESQ FOR THE RESPONDENT.

