

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY,
IN THE ABUJA JUDICIAL DIVISION,
HOLDEN AT COURT NO. 11 BWARI, ABUJA.
BEFORE HIS LORDSHIP: HON. JUSTICE O. A. MUSA.**

SUIT NO: FCT/HC/BW/PET/11/2019

BETWEEN:

ENGR. DR. (MRS.) BECKY DAMILOLA-OKE --- PETITIONER

AND

MR. DAMILOLA ISSAC OKE --- RESPONDENT

JUDGMENT

DELIVERED ON THE 5TH FEBRUARY, 2021

The Petitioner beseeched this Court by way of a Petition seeking a decree of dissolution of the marriage contracted between the Petitioner and the Respondent on 11th February, 2013.

The reliefs as set out in the Notice of Petition dated and filed on 17th December 2019 are as follows:

1. A DECREE OF DISSOLUTION OF MARRIAGE on the ground that the marriage has broken down irretrievably by reason of the fact that since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
2. A DECREE OF CUSTODY OF THE CHILDREN OF THE MARRIAGE to wit; Master Charis Damilola Oke, Miss Princess Soteria Damilola Oke and Miss Queen Natasha Damilola-Oke.

Also accompanying the Petition is a 4 paragraph verifying affidavit deposed to by the Petitioner, a Certificate relating to reconciliation and a witness statement on oath of the Petitioner described as

"Sworn deposition of Engr. Dr. (Mrs) Becky Dumilola-Oke" deposed to on 17/12/2019.

On 22nd January 2020 this Court made an Order permitting the service of the Petition and all further processes therein on the Respondent by substituted means, to wit; by pasting or affixing same at the entrance gate of the Respondent's last known address at 12, Kunyun close, off Lugard Street, Asokoro, Abuja. A certificate of service issued by the bailiff of this Court on 26th February, 2020 affirms that the Notice of Petition and other processes were served on the Respondent on the said 26/02/2020 in accordance with the order of this Court earlier made.

I am also satisfied from the examination of the Court's file that hearing notices were repeatedly issued and served on the Respondent at various times, to wit; on 17/06/2020, 04/07/2020, 12/10/2020 and 04/11/2020, to afford the Respondent with the opportunity to respond to the Petition. Notwithstanding the service of the originating process and various hearing notices on the Respondent the Respondent neither filed any Answer to the Petition nor did he deem it fit to make an appearance before this Court to defend himself on the contents of the Petition.

This Court subsequently granted leave to the Petitioner to lead evidence on the Petition and on 29/06/2020 the Petitioner (as PW1) was called to testify, following which she identified and adopted the witness statement on oath filed on 17/12/2019 as her testimony in support of the Petition. Exhibit PT I which is the marriage certificate issued in favour of the Petitioner and the Respondent was also tendered through PW1. The proceedings were then adjourned to 14/07/2020 for cross-examination of PW1.

Again, despite being served with the hearing notice for the next adjourned date, the Respondent did not appear to cross-examine PW1. On 15/10/2020, this Court foreclosed the Respondent upon the application of Petitioner's counsel and directed the Petitioner to file her final address and serve same on the Respondent. I am satisfied from the records before me that the Petitioner's final address was indeed served on the Respondent on the 04/11/2020. The Respondent however chose to ignore the said final address.

I must pause at this point to consider the effect of the Respondent's failure to file any process in this Petition or to attend Court throughout the course of hearing. Ordinarily, the fact that the Petition was undefended by the Respondent, despite the service of all the processes on him should entitle the Petitioner to judgment in the terms of the reliefs sought in the Petition without any further judicial rigour.

This in line with the general principle that where a defendant to an action fails to deliver his defence, such a defendant must be adjudged to have conceded to the case of the Plaintiff. Indeed, it is not the duty of a Court to assist a party who fails to file a defence in a matter to marshal a defence. See the case of F.U.T MINNA & ORS V. OLUTAYO (2017) LPELR-43827(SC).

However, I am not also unmindful of the fact that divorce proceedings are sui generis- see BAKARE V. BAKARE (2016) LPELR-41344(CA). For this reason, it is my view that the Court must be careful to consider the merits of a Petition before making a pronouncement on an issue as radical as dissolution of marriage, whether the adverse party has filed a defence or not. That, to my mind, is the prudent thing to do. Thus, I am

of the view that the mere fact that the Petitioner's processes are uncontroverted by the Respondent herein does not relieve the Petitioner who seeks the positive orders of this Court of the obligation to prove her case in accordance with the standard of proof required by law.

Consequently, I hold that this Court remains under a duty to carefully and painstakingly examine the case put forward by the Petitioner and the evidence adduced in its support with a view to determining the merits or otherwise of the Petition.

I shall now proceed to consider the case of the Petitioner. The sole ground of the Petition is set out in the body of the Petition as follows:

"The marriage of the parties has broken down irretrievably by reason of the fact that since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent."

At the end of trial, the Petitioner submitted a final address dated 22/10/2020 but filed on 23/10/2020. This address was adopted on 10/11/2020. In the said address the Petitioner has nominated a sole issue for determination, thus: "Whether in the light of the evidence before this Honourable Court, the Petitioner has proved her Petition to entitle her to a grant of a decree of the dissolution of her marriage with the Respondent" In arguing the final address, the Petitioner has contended amongst other things that the discovery that the Respondent had teenage children and is a chronic philanderer are grounds for the dissolution of the marriage. It is also argued that the Respondent ran away from the matrimonial home and disappeared in February 2019 and that parties have been living apart since then, Petitioner concludes by arguing that the evidence led in the course of trial is sufficient to entitle

the Petitioner to the grant of the reliefs sought. Petitioner then urged the Court to accept the uncontroverted evidence led by her and to grant all the reliefs sought in the Petition.

DETERMINATION OF THE PETITION

The sole ground of the Petition is predicated on the provisions of S. 15(2)(c) of the Matrimonial Causes Act which provides thus:

**"S 15(2) "The Court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if,
(c) That since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;"**

The question of whether a petitioner cannot reasonably be expected to live with the Respondent within the contemplation of Section 15(2)(c) of the MCA is not one to be answered subjectively by the Court, rather, it is to be considered in strict accordance with the relevant provisions of the Act. In the case of a Petition founded on Section 15(2)(c) of the MCA, the applicable provisions are those contained in Section 16(1) (a-g) of the Act. This Court must therefore be guided by the extant provisions of Section 16(1) (a-g) of the MCA in the determination of this Petition. The said Section 16(1) (a-g) of the MCA provides:

S. 16(1): "Without prejudice to the generality of section 15(2)(c) of this Act, the court hearing a petition for a decree of dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in the said section (15)(2)(c) of this Act if the petitioner satisfies the court that:

- (a) Since the marriage, the respondent has committed rape, sodomy, or bestiality or
- (b) Since the marriage, the respondent has for a period of not less than two years;
 - (i) been a habitual drunkard; or
 - (ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation, or has for a part of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or
- (c) Since the marriage, the respondent has within a period not exceeding five years:
 - (i) Suffered frequent convictions for crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less than three years; and
 - (ii) Habitually left the petitioner without reasonable means of support; or
- (d) since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition; or
- (e) Since the marriage and within a period of one year immediately preceding the date of the petition, the respondent has been convicted of:
 - (i) Having attempted to murder or unlawfully kill the petitioner; or

- (ii) Having committed an offence involving the intentional infliction of grievous harm or hurt on the petitioner or the intent to inflict grievous harm or grievous hurt on the petitioner; or
- (f) The respondent has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner:
 - (i) Ordered to be paid under an order of, or an order registered in, a court in the Federation; or
 - (ii) Agreed to be paid under an agreement between the parties to the marriage providing for their separation; or
- (g) The respondent:
 - (i) Is, at the date of the petition, of unsound mind and unlikely to recover; and
 - (ii) Since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution."

Without any doubt, for the instant Petition to succeed, the Petitioner must be shown to have satisfied this Court of the existence of at least one of the conditions set out in S. 16(l)(a)-(g), otherwise it must fail. See the decision of the Court of Appeal in the case of EMMANUEL v. FUNKE (2017) LPELR- 43251(CA) where Abdullahi JCA held thus:

"Given the wordings of this Section 15 (2) (C), it is clear that the Petitioner who relies on this ground must establish by cogent

evidence that it would be unreasonable to require him to live with the Respondent.

In that wise, the test of whether those behaviours are intolerable to expect the Petitioner to continue to live with the Respondent is objective and not wholly subjective. Therefore, there is every possibility that what the Petitioner terms "intolerable" may not pass this objective test. However, Section 16 (1) (a)-(g) exhaustively listed the various behaviours that qualifies as intolerable behaviour that will be unreasonable to require the Petitioner to continue to cohabit with the Respondent under Section 15 (2) (C) M.C.A. Indeed, the operative word in Section 16(1) MCA is "shall" and shall implies compulsion and divestment of discretion on the part of the Court. In other words unless and until any of the conditions listed in Section 16 (1) (a)-(g) exist with credible evidence; the Court shall refuse to make an order of dissolution of marriage."

The sum total of the foregoing is that the Petitioner was under a burden to demonstrate by cogent and compelling evidence that at least one of the conditions listed in S. 16(1) (a-g) of the Act has been met in the instant Petition. In the light of this, the determination of this Petition turns on the question of whether the Petitioner has satisfactorily discharged this burden as imposed by law. To answer this query, the Court must first have recourse to the Petitioner s pleadings Paragraphs 10.1-10.8 of the facts of the Petition state as follows:

1. The parties got married under the Act at the Marriage Registry of the Abuja Municipal Area Council, FC1 ON 11/02/2013. The marriage Certificate with Certificate no: 224 evidencing the statutory marriage is hen by pleaded.

2. Prior to the marriage, the Petitioner as a spinster, has always prayed for, and desired an honest and God-fearing bachelor for a husband.
3. The respondent dishonestly failed to disclose to the Petitioner his status as a father to two children from another woman and misled the petitioner into entering a marriage with him deceitfully.
4. Throughout the subsistence of the marriage between the parties, the Respondent continued to undisclosed his status as a father to two girls who are now teenagers; and the petitioner first stumbled on the knowledge of the girls, the Respondent lied that they are his nieces- precisely, daughter of his late sister which later turned out to be false.
5. The petitioner only got to know very recently that these girls were indeed daughters of the Respondent for over 5 years of their marriage.
6. The respondent, whilst being married to the Petitioner, also indulged in luring some female staff of the Petitioners Company with money and sleeping with them to the oblivion of the petitioner.
7. The petitioner only became aware of the Respondent's dishonesty and infidelity early in 2019 and is gravely dismayed and felt betrayed.
8. Upon realising that the Petitioner has discovered his misconducts, the Respondent disappeared from the house since late February 2019 and has not been seen by the petitioner ever since. The Petitioner sadly considers the Respondents' behaviour reprehensible and finds it intolerable to live with him and has since

the discovery in late February 2019, been living apart from the Respondent till the date of the Presentation of this Petition."

Now, what was the quality of the evidence put by the Petitioner before the Court? In her testimony, the Petitioner as PW1 adopted the sworn deposition made on 17/12/2019 and tendered the marriage certificate (Exhibit PTI). The testimony of the Petitioner merely affirms the truth of all the averments contained in the said sworn deposition. As I have already observed previously in this Judgment, the Respondent never appeared to cross-examine the PW1 despite the service of hearing notices on him. The legal implication of the Respondent's failure to cross-examine the PW1 is well-established in law. The law is clear that where evidence is given in a trial and the adverse party fails to cross-examine the witness for the purpose of impeaching the veracity or credibility of such testimony, the Court will take the uncontroverted testimony as admitted and reliable, unless there is any reason why it should not do so- See the decisions of the Supreme Court in OMOREGBE V LAWANI (1980) - LPELR 2655 (SC) and LANRE v. STATE (2018) LPELR-45156(SC).

I therefore hold that it the evidence of PW1 is reliable for the purpose of proving the facts sought to be established by her testimony. This Court shall rely on the unchallenged evidence of PW1 in making this judgment. Whether that evidence is sufficient to discharge the evidential burden imposed by law is another matter altogether.

The relevant depositions in PW1's sworn testimony are as contained in paragraphs 5, 6, 7, 8, 9 and 10 thereof. The summary of the evidence of PW1 is that the Respondent failed to disclose his status as a father to

two children from another woman; that the Respondent deceitfully led the Petitioner into the marriage and thereafter continued to deceive her that the said children were his nieces; that the Respondent lured some female staff of her company and had adulterous relations with them; that she became aware of the Respondent's infidelity in late February 2019 whereupon she felt saddened and betrayed; and that upon becoming aware that she had discovered his misdeeds, the Respondent left the matrimonial home and has not returned since then; and that the parties have lived apart from each other till the date of the deposition.

From the above unchallenged evidence, the Court is of the view that the main evidential planks upon which the Petition rests are as follows: (a) that the Respondent has committed adultery (b) that the Respondent has dealt with the Petitioner dishonestly in the course of the marriage and; (c) that the Respondent has abandoned the Petitioner since February 2019.

In the first place, the Court is inclined to observe that whereas the Petitioner has levelled allegations of adultery against the Respondent, the Petition is not founded on the ground of adultery as provided for in Section 15(2)(b) of the MCA. Indeed, as observed elsewhere in this judgment, the sole ground of this Petition is derived from S. 15(2)(c) of the MCA. This Court is of the view that adultery, as despicable as it may be, is not one of the factors relevant for the determination of a Petition brought pursuant to S. 15(2)(c) of the MCA and can only avail a Petitioner who relies on it as a ground of the Petition. I therefore hold that the ground of this Petition is incompatible with the allegations of adultery contained therein and that for this reason, the Petitioner is not entitled to the grant of the reliefs sought it on that basis. In any event,

the MCA is clear on the fact that a petitioner seeking a dissolution of marriage on grounds of adultery must join the specified persons alleged to have engaged in adultery with the Respondent to the Petition (See Section 32(1) of the Act). Having not complied with this mandatory} condition, the Petition cannot succeed on this point and I so hold.

The next issue to consider is whether the dishonesty of the Respondent is sufficient ground for the dissolution of the marriage of the parties. The evidence of the Petitioner is that the Respondent concealed the fact that he had other children from her before the marriage and continued to do so during the marriage. Admittedly, the action of the Respondent is morally reprehensible and unacceptable. The twin foundational pillars of a marriage ought to be trust and fidelity. However, does the fact that the Respondent has been dishonest, deceitful or coy as to the fact that he had children prior to his marriage to the Petitioner ordinarily entitle the Petitioner to a declaration that the marriage has broken down irretrievably? Put simply, does the dishonesty of the Respondent on that fact entitle the Petitioner to the issuance of a decree of dissolution of marriage under S 15(2)(c) of the Act? I think not. Dishonesty is not one of the conditions exhaustively laid down in S. 16(1) (a-g) of the MCA upon which this Court can grant a dissolution of marriage pursuant to S. 15(2)(c) of the MCA. Notwithstanding he morally reprobate nature of the Respondent's actions, this Court is bound by the law and cannot make an order in excess of the jurisdiction conferred by the enabling statute. I therefore hold that the Petition fails on this point.

The final point for consideration is the evidence of the Petitioner that the parties have lived apart since February 2019 when she discovered his various misdeeds until the filing of this Petition on 17/12/2019- a period

of at least v months. It is the case of the Petitioner that the Respondent left the house and has not come back since then. To my mind, the case made out by the Petitioner on this point is one of desertion by the Respondent. Certainly, one of the grounds recognized by law for the dissolution of a marriage is where parties have lived apart for specified periods of time in any of the circumstances stipulated in S. 15(2)(d), (e) & (f) of the MCA which provide thus:

d. That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

e. That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to the decree being granted;

f. That the parties to the marriage have lived apart for a continuous period of a least three years immediately preceding the presentation of the petition.

See the case of EZIAKU v. EZ [AKU (2018) LPELR-46373(CA)].

It is pertinent to observe here that the Petitioner has not sought the dissolution of the marriage or any of the grounds set out in S. 15(2)(d), (e) & (f) of the MCA. Accordingly, the evidence that the parties have lived apart since February 2019 is irrelevant to the determinate on of this Petition. Now, even assuming it were so relevant, can this Court make an order of dissolution of the parties' marriage on account of the act that the) have lived apart for a mere 8 months? Certainly not. I do not see a ny reason to find that the marriage of the parties has broken down irretrievably merely on account of the fact that said parties have lived

apart for a period of 8 months only. Nothing in the law allows me to do so. In any case where desertion by the Respondent is a ground of the Petition, the minimum period to be reckoned with is two years. Accordingly, I hold that this Petition must necessarily fail on this point and so fails. It is for this and the other reasons given above that this Court finds itself constrained to arrive at the conclusion that the Petitioner has failed woefully to prove her entitlement to the grant of the reliefs sought in this Petition.

I must add here that an Order of dissolution of marriage is not granted as of right or as a matter of course, even where both parties desire such an outcome. To terminate a marriage freely contracted by parties is a very serious matter which this Court has a duty to carry out in unbending obedience to the law. The Court of Appeal emphasized this point in the case of OGUNTOYINBO v. OGUNTOYINBO (2017) LPEI R-42174(CA) where Tsammani J.C.A. held thus:

"I only wish to observe that the marriage institution is the bedrock upon which any orderly and civilized society is built its collapse will inevitably have a negative effect on not only the children and the couple involved, but ultimately the society at large. To that end, it will be in the interest of society, that divorce is not granted unless the Court is fully satisfied upon unassailable facts that its grant is the only remedy to the marriage. In other words, the jurisdiction of the Court to dissolve a marriage is one which should not be readily applied, because such jurisdiction involves the status of the parties. Accordingly, public interest demands that the marriage bond should not be set aside without strict proof of the grounds alleged or without painstaking and strict judicial enquiry."

I therefore hold on the totality of the pleadings and the evidence placed before me that the Petitioner has failed to discharge the evidentiary burden of proof required by the law for the dissolution of a marriage under Section 15(2)(c) of the Matrimonial Causes Act.

The Petition is unmeritorious and is accordingly dismissed. That is the Judgment of this Court.

APPEARANCES:

C.C. Njoku Esq. for the petitioner.

The Respondent not in court.

Sign

Hon. Judge

05/02/2021