IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS TUESDAY, THE 24TH DAY OF JUNE, 2021.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

PETITION NO: GWD/PET/12/2020

BETWEEN:

EXCELLENCE ANURIKA JOSHUA ……….….. PETITIONER

AND

DR KAYODE SUNDAY ADEKUNLE OBATADE ….. RESPONDENT

JUDGMENT

By Notice of Petition dated 19th August, 2020, the petitioner claims the following Reliefs against Respondent as follows:

1. **An Order of Dissolution of Marriage contracted with the Respondent on 21st February, 2015 on the ground Cruelty; the said Marriage has broken down irretrievably and that since the Marriage, the Respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with her.**

2. **An Order granting the Custody of the Child of the marriage: King Seanan Abimifoluwa Obatade, born on 13th April, 2016 to the Petitioner.**

3. **An Order mandating the Respondent to provide for the upkeep of the Child by depositing a reasonable amount in a domiciliary account to be**

opened in a reputable bank or make an annual deposit of a reasonable sum into the Registry of this Honourable Court for the educational and other needs of the Child of the marriage until the Child of the marriage: King Seanan Abimifoluwa Obatade, born on 13th April, 2016, attains the age of majority.

The petitioner then sought leave of court on 5th October, 2020 for leave to serve the Respondent by substituted service which was granted and the court ordered also that hearing notice be serve and the matter adjourned to 24th November, 2020.

When the matter came up on 24th November, 2020, the Record showed that the Respondent was served with the originating petition and hearing notice on 19th October, 2020 through the affidavit of service filed dated 24th November, 2020. The matter was then adjourned for hearing on 9th February, 2021 and the court ordered for hearing notice to be served on Respondent. Again from the Record, hearing notice was served on the Respondent on 21st February, 2021 vide certificate of service filed by the Bailiff of court dated 21st February, 2021.

The Respondent clearly chose not to defend the petition despite service of the originating court process and hearing notices. The matter accordingly proceeded to hearing. The petitioner testified in person as PW1 and the only witness. The substance and summary of her unchallenged evidence is that she got married to the Respondent at the Gwagwalada Marriage Registry on 21st February, 2015 in accordance with the Marriage Act and tendered a Certified True Copy of the marriage certificate which was admitted in evidence as **Exhibit P1**.

PW1 gave evidence to the effect they cohabited at different times in Ibadan and Lagos and that the marriage was essentially based on lies and deception, cruelty and absence of love.

That the attitude of Respondent changed towards her not long after the marriage as he started accusing her and her family members of witchcraft and stopped her from communicating with them and this disturbed her peace and well being. PW1 further testified that the Respondent constantly threatens and traumatizes her at home which caused her to have fear for her safety at home and that this frequent and incessant emotional trauma caused petitioner to nearly lose her mind and she fell into depression and ultimately diagnosed with “Meige Syndrome” at the

University College Hospital (UCH) Ibadan which was attributed to her problems at Home and she was advised to separate from her husband, the Respondent in 2017. PW1 stated that by then she had conceived and delivered a son but that the attitude of Respondent to her did not change.

PW1 stated that sometime in December 2017, she was asked to return to her matrimonial home but the behaviour of Respondent was still intolerable as he did not welcome her back but told her to leave. He continued with his threatening behaviour and did not show any iota of care or love to the petitioner.

She stated that one morning, when she could not take the stress anymore, she left the matrimonial home on 15th April, 2018 and moved to Abuja to be with her parents. That the Respondent never got in touch until three (3) months after she left and all he said was that she will return.

PW1 stated that sometimes in December 2018, the Respondent called her to apologise and she told him to come and see her parents but he refused to come till date. That all attempts at resolving the differences between them has failed and that the marriage has broken down irretrievably as parties have now lived apart for over two (2) years. PW1 stated that the only Child of the marriage: **King Seanan Abimifolu Obatade** was born on 13th April, 2016 and has been in her custody and that she wants custody of their son as she has been the sole provider for his clothing, accommodation, education and medical needs since she left the matrimonial home till date and will continue to do so. PW1 stated that the Respondent is a Medical Doctor and as such should be made to contribute to the welfare and well being of his child through an educational fund.

Learned counsel to the petitioner applied that the right of defendant to cross-examine petitioner and his right of defence should both be foreclosed since the Respondent did not appear in court or file a defence joining issues with petitioner. The court gave a considered Ruling and granted both Applications and the matter was then adjourned for address.

The final address of petitioner was filed on 18th February, 2021 and same was again served on Respondent together with hearing notice on 8th March, 2021 vide proof of service filed by the Bailiff of court dated 8th March, 2021 but the Respondent did not respond.

In the address, one sole issue was raised as arising for determination as follows:

"Whether the petitioner is entitled to the Reliefs sought based on the evidence before this Honourable court."

The issue above has clearly captured the essence of the issues to be resolved but which the court will however slightly alter or modify. The address forms part of the Record of court and I shall where necessary in the course of this judgment refer to it.

I only wish to briefly state here that the Respondent from the records has had more than ample time to defend this action if he wanted. He never availed himself of the opportunity. The principle appears settled that while the right to be heard is of wide application and great importance in any well conducted proceedings, it is however a right that must be confined within circumscribed limits and not allowed to run wild. See **LONDON BOROUGH OF HOUNSLOW v. TWICKENHAM GARDEN DEVELOPMENT LIMITED (1970) 3 All ER 326 at 347.** A party certainly does not have till eternity to prove or defend any action as the case may be.

Having carefully considered the petition, the unchallenged evidence led and the address of counsel, the narrow issue is whether the petitioner has on a preponderance of evidence established or satisfied the legal requirements for the grant of this petition. It is on the basis of this issue that I would now proceed to consider the evidence and submissions of counsel.

ISSUE 1

Whether the petitioner has on a preponderance of evidence established or satisfied the legal requirements for the grant of the petition.

I had at the beginning of this judgment stated the claims of the petitioner. Similarly I had also stated that the Respondent despite the service of the originating court processes and hearing notices did not file anything or adduce evidence in challenge of the evidence adduced by petitioner. In law, it is now an accepted principle of general application that in such circumstances, the Respondent is assumed to have accepted the evidence adduced by Petitioner and the trial court is entitled or is at liberty to act on the Petitioner's unchallenged evidence. See **Tanarewa (Nig.) Ltd.**

V. Arzai (2005) 5 NWLR (Pt 919) 593 at 636 C-F; Omoregbe v. Lawani (1980) 3-7 SC 108; Agagu v. Dawodu (1990) NWLR (Pt.160) 169 at 170.

Notwithstanding the above general principle**,** the court is however still under a duty to examine the established facts of the case and then see whether it entitles the claimant to the relief(s) he seeks. I find support for this in the case of **Nnamdi Azikiwe University v. Nwafor (1999) 1 NWLR (Pt.585) 116 at 140-141** where the Court of Appeal per Salami J.C.A. expounded the point thus:

"The plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence... the mere fact that a case is not defended does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant…"

A logical corollary that follows the above instructive dictum is the attitude of court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. **The Supreme Court in Duru v. Nwosu (1989) 4 NWLR (Pt.113) 24** stated thus:

"…a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory then he had not made out what is usually referred to as a prima-facie case, in which case the trial judge does not have to consider the case of the defendant at all."

From the above, the point appears sufficiently made that the burden of proof lies on the plaintiff or petitioner in this case to establish her case on a balance of probability by providing credible evidence to sustain her claim irrespective of the presence and/or absence of the defendant or respondent. See **Agu v. Nnadi (1999) 2 NWLR (Pt 589) 131 at 142.**

This burden or standard of proof required in matrimonial proceedings is also now no more than that required in civil proceedings. Indeed **Section 82 (1) and (2) of the Matrimonial Causes Act** (The Act) provide thus:

1) **For the purposes of this Act, a matter of fact shall be taken to be proved, if it is established to the reasonable satisfaction of the court.**

2) **Where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.**

Now in the extant case, the petitioner from her petition seeks for the dissolution of the marriage with respondent on the ground that the marriage has broken down irretrievably and essentially predicated the ground for the petition on 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.

It was also further averred as a ground that due to this state of affairs, the Respondent left the matrimonial home on 15th April, 2018 and that all efforts at reconciliation has failed and that Respondent has essentially since moved on with his life without Petitioner. It is doubtless therefore that the petition was brought within the purview of **Section 15 (1) (c), (e) and (f) of the Act.** It is correct that **Section 15(1) of the Act** provides for the irretrievable breakdown of a marriage as the only ground upon which a party may apply for a dissolution of a marriage. The facts that may however lead to this breakdown are clearly categorised under **Section 15(2) (a) to (h) of the Act.** In law any one of these facts if proved by credible evidence is sufficient to ground or found a petition for divorce.

Now from the uncontroverted evidence of petitioner before the court, I find the following essential facts as established, to wit:

1. That the parties got married on 21st February, 2015 vide Exhibit P1.

2. That the petitioner left the matrimonial home on 15th April, 2018.

3. That since 2018, a period now of nearly 3 years, parties have lived apart and cohabitation has effectively ceased between parties.

4. That even before petitioner left the matrimonial home, the marriage was completely lacking in care and love, which affected her mental wellbeing which led to depression and hospitalization and a diagnosis of “Meige Syndrome”.

5. That by his actions of constant threats and unfounded accusation of witchcraft, the Respondent has behaved in an intolerable manner that she cannot any longer live with him in peace and harmony.

6. That the marriage is blessed with a son and that she has been the sole provider for all his needs and will continue to do so.

7. That the Respondent, a medical doctor has since moved on with his life independent of the petitioner.

The above pieces of evidence and or facts have not been challenged or controverted in any manner by the Respondent who was given all the opportunity of doing so. The law has always been that where evidence given by a party to any proceedings is not challenged by the opposite party who has the opportunity to do so, it is always open to the court seize of the proceedings to act on the unchallenged evidence before it. See **Agagu v. Dawodu (supra) 169 at 170, Odunsi v. Bamgbala (1995) 1 NWLR (Pt.374) 641 at 664 D-E, Insurance Brokers of Nig. V. A.T.M Co. Ltd. (1996) 8 NWLR (Pt.466) 316 at 327 G-H.**

This is so because in civil cases, the only criterion to arrive at a final decision at all time is by determining on which side of the scale the weight of evidence tilts. Consequently where a defendant chooses not to adduce evidence, the suit will be determined on the minimal evidence produced by the plaintiff. See **A.G Oyo State v. Fair Lakes Hotels Ltd. (No 2) (1989)5 NWLR (Pt .121) 255, A.B.U. v Molokwu (2003)9 NWLR (Pt.825) 265.**

Indeed the failure of the Respondent to respond to this petition confirms in all material particulars the fact that the marriage has broken down irretrievably and that they have lived apart now for nearly three (3) years.

By a confluence of these facts, it is clear that this marriage exists only in name. As stated earlier, any of the facts under **Section 15 (2) a-h** (supra) if proved by credible evidence is sufficient to ground a petition for divorce. The established

fact of living apart for up to nearly 3 years show clearly that this marriage has broken down irretrievably and parties have no desire to continue with the relationship; this fact alone without more can ground a decree of dissolution of marriage. If parties to a consensual marriage relationship cannot live any longer in peace and harmony, then it is better they part in peace and with mutual respect for each other. The unchallenged petition on dissolution of the marriage in the circumstances has considerable merit.

Relief (2) seeks for the custody of the only child of the marriage to the petitioner.

Now in law particularly in proceedings relating to custody, guardianship, welfare etc of children of a marriage, the interest of the children is of paramount consideration to the court and whatever order a court makes is guided by these considerations and no more. See **Section 71 of the Matrimonial Causes Act** which provides guidelines the courts are expected to follow in proceedings in respect of custody of children of a marriage.

It is therefore incumbent on parties seeking custody to help the court in the discharge of this delicate and sensitive responsibility to clearly plead and lead credible evidence on what arrangements they have that will further the physical and mental well-being of the children.

In deciding matters of custody, the court does not proceed on the assumption that the claims of either party is superior or inferior, the welfare of the child or children is the first and foremost of all considerations. Therefore whatever superior benefit(s) or added advantage(s) to be derived from each of the alternative arrangements presented for the children by the competing parents, the court will now have to carefully consider these arrangements and make any order(s) as it thinks necessary in the overall interest of the children.

In this case, from the pleadings and evidence, it is clear that there is really nothing from the Respondent to situate what he has to offer with respect to the general welfare and needs of his son. What is before the court is only the unchallenged and uncontroverted evidence of the petitioner that she has been in custody of the son and the sole provider of all his needs from birth till date and will continue to do so. As this evidence is unchallenged and I don't find it improbable or incredible or indeed falling below accepted standards, it is the duty of court to accept and act on

it as it constitutes sufficient proof of the petitioners claim on the question of custody of the child of the marriage. See **Insurance Brokers of Nig. V ATMN (1996) 8 NWLR (pt.466) 316 at 327 G.**

Indeed the law is settled that where evidence given by a witness is not contradicted by any other admissible evidence, the trial judge is bound to accept and act on that evidence, even if it had been minimal evidence. See **Adeleke V Iyanda (2001) 13 NWLR (pt.729) 1 at 22 – 23 A-C**.

In circumstances of this case, where there is nothing from the Respondent to either challenge or impugn the evidence of the petitioner on custody or in the alternative offer what he considers are the best arrangement for the son; the interest of justice will appear to be better served to leave the son with his mother, the petitioner and under prevailing stable circumstances. It does not appear fair or right to make any alterations or cause any dislocations to his young life at this moment or stage. **Relief (2)** has merit and is availing.

The **final Relief (3)** is for an order mandating the Respondent to provide for the upkeep of the Child by depositing a reasonable amount in a domiciliary account to be opened in a reputable bank or make an annual deposit of a reasonable sum into the Registry of this Honourable Court for the educational and other needs of the Child of the marriage until the Child of the marriage: King Seanan Abimifoluwa Obatade, born on 13th April, 2016, attains the age of majority.

I have here carefully scrutinised the pleadings and evidence of the petitioner and it is really difficult to situate the basis of this Relief.

Let me start by stating that a party who seeks any order(s) under proceedings for a decree of a kind referred to in paragraph (a) of the definition of **matrimonial proceedings** must also comply with the applicable rules in filing his or her court process, by ensuring that facts relevant to the relief sought are properly pleaded and evidence subsequently led in proof.

Now for purposes of an award of maintenance under matrimonial proceedings, the provision of **Section 70(1) of the Matrimonial Causes Act** provides instructive guidelines to wit:

> ***"Subject to this section, the court may in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper having regards to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances."***

The above provision appears to me clear. The court in proceedings with respect to the maintenance of a spouse or children of a marriage has the discretionary powers to make such orders as it considers proper having regard to the means, earning capacity, conduct of parties to the marriage and all other relevant circumstances.

As a necessary corollary to the above, these factors or relevant circumstances which the court is bound to consider in making an award of maintenance must necessarily be predicated or premised on the pleadings and evidence of parties at the trial.

Now in the petition in this case, there was no proper pleading of the above relevant factors and the court was not provided either with the facts or premise on which the court is asked to make the order of maintenance sought by the petitioner for the young child.

All that paragraph 16 of the petition states is that the Respondent is expected to set up an educational fund for the child as his contribution to the welfare and wellbeing of the child. No more and then the petitioner made the claim under Relief (3).

Now in evidence, the petitioner stated as follows:

"I don't know what the Respondent does now but while we were together, I was the provider for the family. He is a medical Doctor by profession."

I also noted that in her evidence, she stated that the marriage was based on lies and deception in that when they got married, she said Respondent told her he has a house but when they got to Lagos, she found he was "squatting with a friend".

This pleading and evidence appears grossly insufficient and failing to provide a firm and clear template to make fair order(s) of maintenance in this case. There is nothing either in the pleadings or evidence of petitioners to show what for example is the means and earning capacities of parties or in particular the Respondent.

The "means" of parties on the authorities is not construed restrictively. It has been held to cover capital assets like buildings, equity and shares in a company together with contingent and prospective assets. It also includes pecuniary resources of the parties whether capital or income and whether actual or contingent. See the case of **ROGERS v. ROGERS (1962) 3 FLR 398** referred to by the learned author, **Professor E. I. NWOGUGU** in his book, **FAMILY LAW IN NIGERIA (Revised edition) at Page 242.**

Similarly earning capacity of a spouse refers not only to what he or she infact earns but the potential earning capacity if that spouse obtained suitable employment. All these relevant factors are missing in the extant petition. There is also nothing either in the pleadings or evidence on the background and standard of life which the husband previously maintained before he parted company with the petitioner etc. All these lapses are fundamental and would obviously affect whatever order of maintenance the court in the exercise of its discretion would ultimately make.

Now apart from the bare evidence that the Respondent is a Medical Doctor, no where was the necessary particulars to do with his means or his earning capacity pleaded or evidence led thereupon. These in the court's considered opinion are material facts which ought to have been properly pleaded in the petition and then established. On the authorities, a material fact is one which is essential to the case without which it cannot be supported. In other words that which tends to establish any of the issues raised. See **WEST AFRICAN PORTLAND CEMENT PLC v MAYINAT ADEYERI (2003) 12 NWLR (PT 835) 317 AT 533.**

It is important therefore to state that while any pleading is not expected to plead evidence, it is expected that all material facts that a party relies on for his claim must be pleaded because a party is only allowed to establish what he pleaded and to obtain only such relief that was prayed for on the basis of his pleadings and creditably established by evidence. See **AJIKANLE v. YUSUF (2000) 2 NWLR (Pt 1071) 301.**

It is really difficult in the prevailing circumstances to situate what is a reasonable amount to take care of the educational and other needs of the child. Furthermore, if the child attends school now for example, there ought to be pleading and then evidence of what kind of schools he attends and the fees paid. There ought also to be pleadings and evidence of the reasonable expenses incurred by petitioner with respect to other needs of the young son every month and generally the kind or standard of life under which he lives.

If theses have been done by petitioner, it would have provided some basis to make an award notwithstanding the obvious and daunting challenge that the earning capacity of Respondent has not been identified beyond the assertion that he is a Medical Doctor.

I appreciate the reality on the basis of the unchallenged pleadings and evidence that the Respondent is the father of his son with a responsibility and indeed duty to take care of his sons educational, clothing, feeding, housing and other needs. It is a responsibility, the court does not take lightly. Indeed judicial authorities wholeheartedly recognise the primary responsibility of a father to maintain his children. In **NANNA v. NANNA (2006) 3 NWLR (pt 966)1 AT 41 B-C** the Court of Appeal stated as follows:

> ***"A man has a common law duty to maintain his wife and his children and such a wife and child or children then have a right to be so maintained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and child and may by law be compelled to find them necessaries as meat, drink, clothes etc suitable to the husband's degree, estate or circumstance."***

The only challenge here is that the court cannot make an order for maintenance in a vacuum or in the absence of materials as sufficiently demonstrated above.

I must therefore underscore and indeed emphasise the point that for a court to properly and fairly exercise its discretion in making an order of maintenance, counsel owe the court a duty to ensure they properly plead these necessary facts on maintenance and lead credible evidence in support which will leave the court in no doubt on the necessity to make the maintenance order sought and on what terms.

At the risk of sounding prolix, I do not think that in law, the order for maintenance sought can be granted as a matter of course or in such unclear and uncertain circumstances. The order of maintenance is not a matter of shooting in the dark. It is also not a matter for sentiments, speculation or guess work. The court is bound to consider the totality of the circumstances and make an order that is fair and reasonable. The petitioner clearly has not pleaded and led any evidence on amount for maintenance and the earning capacity of the Respondent and the Relief accordingly stands compromised.

One more point. I note from the Record that in the application for substituted service of the originating court process on Respondent, the petitioner averred that **"the Respondent is no where to be found as his last known place of abode is under lock and key with no sign of recent habitation."** Now if the location of the Respondent is even unknown and by implication what he is even engaged in at the moment, this further goes to show the limitation in even making any award for maintenance in such fluid and unclear circumstances.

Relief (3) shall in the circumstances be struck out.

In the final analysis and in summation, having carefully evaluated the unchallenged petition and evidence, I accordingly make the following orders:

1. **An Order of Decree Nisi is granted dissolving the marriage celebrated between the petitioner and Respondent on 21st February, 2015.**

2. **The Petitioner is granted custody of the only child of the marriage, King Seanan Abimifoluwa Obatade born on 13th April, 2016.**

..

Hon. Justice. A.I. Kutigi

<u>Appearances</u>:

1. **Florence Aremu, Esq., for the Petitioner.**