

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT MAITAMA – ABUJA**

BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE

COURT CLERKS:	JAMILA OMEKE & ORS
COURT NUMBER:	HIGH COURT NO. 32
CASE NUMBER:	SUIT NO. FCT/HC/PET/328/20
DATE:	16TH JUNE 2021

BETWEEN:

TEMITOPE SABINA AKINYEMI.....PETITIONER

AND

OLARENWAJU AKINYEMI.....RESPONDENT

APPEARANCES:

Opempi Olorunfemi Esq for the Respondent.

Respondent in Court.

JUDGMENT

The Petitioner Temitope Sabina Akinyemi has filed a petition for dissolution of her marriage to the Respondent, her husband Olarenwaju AKinyemi. It is dated 31st day of July 2020 and filed same date.

The petition which was settled by Gerald O. Ivhador of Redridge Solicitors, Legal Practitioner to the Petitioner, is accompanied by a Verifying Affidavit of 8 paragraphs deposed to by the Petitioner herself, the Petitioner’s Witness Statement on Oath and an annexure, which is a photocopy of a marriage certificate.

The facts relied upon by the Petitioner as constituting the grounds specified in the petition are as follows:

- (a). The Petitioner became pregnant for the Respondent while still a student in her third year in Babcock University. As a result of family and religious pressure as well as other circumstances surrounding the pregnancy, the Petitioner was constrained to temporarily drop out of school and marry the Respondent.
- (b). In October, 2014 shortly after the marriage took place, the Respondent who at the material time had resided and worked in Lagos, was transferred to Abuja by his former employers. However, the Respondent, being comfortable with squatting at the homes of his friends, was uninterested in securing an accommodation for himself and the Petitioner to reside in upon the marriage.
- (c). The Petitioner's mother being concerned about the situation, offered the parties an apartment in one of her properties situate at Lugbe, Abuja (the address of which is stated in paragraph 5(i) above to reside in after the marriage.
- (d). The Petitioner and the Respondent moved into the said apartment much to the displeasure of the Respondent sometime in December, 2014. Two days after moving into the apartment, the petitioner gave birth to the only child of the marriage.
- (e). Sometime in May 2015, the Petitioner returned to school to conclude her education and left her child in the care of her mother, where she remained until the Petitioner concluded her degree programme at Babcock University.
- (f). In October 2015, the Petitioner after concluding her degree programme in the University, returned to the matrimonial home. However, the Respondent who at this time had lost his job blamed the Petitioner for his inability to secure another job since he had received many job offers in Lagos State but could not take them because of the Petitioner's absence and the impropriety of leaving his daughter behind.
- (g). The Petitioner became pregnant for the Respondent shortly after returning from school. However, the Respondent insisted that the pregnancy be aborted on the grounds that he did not have a job and could not afford another child. The Petitioner insisted on keeping the pregnancy and vowed to take care of the baby but the

Respondent replied that the Petitioner could barely take care of herself talk less of another baby.

- (h). Feeling helpless and much to the chagrin of the Petitioner and against her desire, the Respondent took the Petitioner to an abortion clinic to get rid of the baby when the pregnancy was three months old without the knowledge of the Petitioner's mother or any of her relatives.
- (i). Sometime in March 2016, the Respondent secured another job and relocated to Lagos State leaving the Petitioner and the child of the marriage behind in Abuja. The Respondent has since then further relocated to Ibadan, Oyo State and has remained there till date without any plans for the Petitioner and the child to join him.
- (j). The Petitioner has made several efforts to join the Respondent in Ibadan and has made a number of visits to him. But each visitation has been met with stiff resistance and complaints. The Respondent becomes hostile to the Petitioner until she leaves out of frustration.
- (k). During such visits, the Respondent always comes up with various excuses not to fulfil his conjugal duties with the Petitioner which caused the Petitioner not only to develop numerous insecurities about her physical appearance, but also caused her emotional and mental distress. The Respondent's lack of affection and emotional abuse towards the Petitioner has also caused the Petitioner to become depressed.
- (i). The Respondent, on numerous occasions, has made clear his refusal and intention not to cohabit with the Petitioner despite all efforts by the Petitioner to ensure cohabitation.
- (m). The Petitioner and the Respondent have lived apart for a period of over three (3) years since March 2016 when the Respondent left the matrimonial home and relocated to Lagos leaving the Petitioner and the child of the marriage in Abuja.
- (n). That the Respondent visits the child of the marriage once every year and at the instance of the Petitioner, every December in order to celebrate the child's birthday with her. Since the birth of the child, the child has never left Abuja; not even to visit the Respondent. And the Respondent has never requested that the

child be brought to spend some time with him. At all material times, the Petitioner has been solely responsible for the care of the child of the marriage and the Petitioner has been ably assisted by the Petitioner's mother.

- (o). The Petitioner and her mother have been fully responsible for the Petitioner's upkeep and maintenance since the marriage and the Respondent has done little or nothing to cater for the emotional or financial welfare of the child of the marriage.

The Orders sought by the Petitioner are as follows: -

- "a. **A DECREE** of dissolution of the marriage between the Petitioner and the Respondent herein on the grounds that the parties have lived apart for a continuous period at least three years immediately preceding this petition.
- b. **A DECREE** of dissolution of the marriage between the Petitioner and the Respondent herein on the ground that since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
- c. **AN ORDER** of this Honourable Court granting the Petitioner the sole custody of the child of the marriage (i.e. Rebecca Iyanuoluwa Akinyemi).
- d. **AN ORDER** of this Honourable Court mandating the Respondent to pay a monthly sum of N50, 000.00 only for the upkeep of the child of the marriage.
- e. **AN ORDER** of this Honourable Court mandating the Respondent to pay the terminal school fees of the child of the marriage up to the sum of N100, 000 until the child's graduation from elementary school."

Upon being served with the Notice of Petition, the Respondent filed his Answer and Cross Petition dated 7th day of September 2020.

While in response, the Petitioner filed a reply to the Respondent's Answer/Cross Petition and a Statement on Oath in support dated 7th September 2020.

Final Written Addresses were filed, exchanged and adopted by both parties in the petition.

At trial, the Petitioner gave evidence on 16th October 2020 and adopted her two Witness Statements on Oath. Likewise, several Exhibits were tendered through the Petitioner, admitted in evidence and marked as follows:-

- (1). Original marriage certificate – Exhibit A.
- (2). A medical report dated 24th February 2016 – Exhibit B.
- (3). GTB transaction receipt dated 29th November 2019 – Exhibit C.
- (4). Evidence of transfer to Petitioner – Exhibit D1.
- (5). Statement details issued by financial master card dated 15th January, 2020 marked Exhibit D2.
- (6). Statement details issued by financial master card dated 18th February 2020 – marked Exhibit D3.
- (7). A Gmail printout titled RE: IELTS test dated mon, February 3rd, 2020 – Exhibit D4.
- (8). A Certificate of Compliance pursuant to Section 84 of the Evidence Act, 2011 – Exhibit D5.
- (9). Copies of six photographs – Exhibits E1 – E6 respectively.

The Petitioner then asked the Court to dissolve the marriage between her and the Respondent.

She was duly cross-examined by the learned Respondent's Counsel.

On his part, the Respondent in his Answer/Cross Petition, seeks the following reliefs:

- (a). An Order dismissing the Petition.
- (b). A decree of dissolution of the marriage between the Respondent/Cross Petitioner and the Petitioner on the grounds

that the marriage has broken down irretrievably and, the Petitioner has behaved in such a way that the Respondent cannot reasonably be expected to live with the Petitioner.

- (c). An Order that the Respondent/Cross Petitioner be granted full custody of the child of the marriage to wit: unfettered access of the Petitioner to the child on all school vacations whenever she is on school breaks.

IN THE ALTERNATIVE

- (d). AN Order for joint custody, with supervised access to the child whenever agreed by the parties: -
 - i. That any travel outside Nigeria should be with the consent of the parties.
 - ii. That International Passports, any other travel documents and other documentation with respect to the child be in possession of the Respondent/Cross Petitioner.
 - iii. That the child of the family be raised in the Christian faith.
 - iv. In the event, the Petitioner remarries within the time the child is still a minor, full custody of the child will be granted to the Respondent/Cross Petitioner.
- c. A Perpetual Injunction restraining the Petitioner, her agents, servants and or privies howsoever called from harassing, assaulting, intimidating, threatening and/or making phone calls or sending text messages to molest, disturb and/or disrupt the Respondent/Cross Petitioner's quiet and peaceful enjoyment of his life.

Meanwhile, in his Answer and Cross-Petition, the Respondent denied all the Petitioner's allegations. This is also clearly captured in his Evidence on Oath before the Court.

Firstly, the Respondent states amongst other things that he's currently a Telecom Engineer for Airtel and MTN and he moves around constantly due to his work as he has no particular base. He testified that he sits in the office as a supporting engineer and a field engineer as well.

He testified as to the circumstances/facts leading up to his marriage with the Petitioner in 2014. Before then, the Petitioner testified that during their courtship the Petitioner became pregnant, he said he was very happy but at the same time concerned because she was still in school. He stated he took her to his Mom who was happy she was going to have a grandchild. But, that he thought the Petitioner's mother was not happy about it as she was still in school.

He admitted that when he moved to Abuja on transfer, it was the mother of the Petitioner who provided an apartment for them because initially he used to stay with a friend.

According to the Respondent, when the offer was made he initially resisted but agreed under pressure but on the condition that he will furnish the apartment.

Then, Respondent stated that he lost his job in 2015. He testified that before he lost his job with Ericson, he was getting income from three sources and that helped him all through before he got a job. According to the Respondent, in the period of one year and four months that he was out of a job, that he never failed in his responsibilities as a husband and a father. He said he picked his daughter from school, paid her school fees and bought her diapers. He stated that he has never failed in that regard all to the glory of God. He testified that he has continued to pay for his daughter's school fees, and the Respondent testified further that he was not aware of online classes in his daughter's school until the school authority contacted him about it and it led to a fight between him and the Respondent. He said that their daughter even said Mommy why are you always fighting? That he also tried to reach out to his mother-in-law on the issue but the Petitioner wouldn't allow him to talk to her.

According to the Respondent subsequently before the online classes, he used to send money in chunks to the Petitioner.

But that upon inquiry as to how much she had saved, the Petitioner told him she hadn't saved anything.

He informed the Court that although the Petitioner secured a job as a sales Representative for Swatch at Jabi Mall, she left the job saying it was tedious.

That yet again, she got another job from her ex-boyfriend but that based on her mother's advice, she resigned.

He testified that in 2019, the Petitioner called to tell him that she had secured a job in Ibadan and that she was moving there. Dw1 stated that the Petitioner's job was a call agent at the National Emergency call centre, Monotam, Ibadan which she was required to work three days and the get three days off. That after the Petitioner got the first payment, in the 3rd week of the 2nd month she told the Respondent that she will resign because the calls were affecting her eardrums. That this was in 2019.

According to the Respondent, the Petitioner later travelled to Canada and he never set eyes on her till that very day in Court.

He testified that they nurtured the idea of relocating to Canada. Initially they tried American visa but were denied.

He stated that they later both agreed to try again for Canadian visa. Student visa/spouse visa that his mother-in-law paid the tuition fee while he paid the agent's fee, the charges and biometrics for his wife in 2018; but that she was denied the visa.

He said they tried again in 2019, he paid the agent, but still they were yet again denied.

However, according to the Respondent on the first Sunday of 2019 the Petitioner received a call about her brother who was said to be in a ghastly accident in Canada. That he was in the same school the Respondent was trying to get into at the time.

That, he made efforts to search online because they were unable to establish contact with the school, so he got in touch with the Police, the Doctor taking care of Petitioner's brother and his girlfriend.

According to the Respondent he was informed that his brother-in-law might not make it so he advised his wife not to tell her mother, because of her health condition, but to tell only her uncles. He said that was how the Petitioner got her visa to Canada for her brother's funeral.

He stated that as their daughter's birthday was coming up and she was looking forward to the celebration, he stated that he had to stay behind

even though he got the visa as well so as to offer moral support to his wife.

The Respondent further testified that he has always been a pillar of support for his wife and family including during that tragic time.

He testified that the last time he saw his wife was in December 2019 when he took her to the airport when she was travelling.

He stated that initially the Petitioner didn't even want him to take her to the airport. She called him selfish and said all he wanted was to have sex.

Respondent, however, informed the Court that he is still wearing his wedding ring and in the eye of the law and of God, he is still legally married. He testified that he has never been unfaithful to his wife during the marriage. Lastly, the Respondent prayed the Court to grant all the reliefs sought in his Cross Petition.

Respondent was duly cross-examined by Petitioner's Counsel.

However, the Petitioner in the averments of her reply to the Answer/Cross- Petition, has challenged Respondent's averments.

Meanwhile, in the Respondent/Cross- Petitioner's final Written Address, three issues for determination were formulated by Opemipo Olarunfemi Esq, learned Respondent's Counsel to wit:-

- “(1). Whether the parties are entitled to the relief of dissolution of marriage sought for.***
- (2). Whether the Petitioner having regards to the evidence is entitled to the sole custody of child of the marriage.***
- (3). Whether the Petitioner is entitled to the relief of maintenance sought.”***

In his submissions on issue one, learned counsel submitted that from the statement of parties and evidence , parties have only lived apart since 2nd December 2019, therefore from the provisions of Section 15(1) and (2) of the Act, the Petitioner's ground of parties living apart for three years and her relief for dissolution of the marriage cannot be granted.

But, urged the Court to grant the Respondent's reliefs sought in his Cross- Petition, and prayed the Court to so hold.

On issue two, which is whether the Petitioner having regards to the evidence is entitled to the sole custody of the child, learned Counsel submitted that the term "custody" has been defined to mean care, control and maintenance of a child awarded by the court to a responsible adult. Counsel relied on the cases of ***OTTI V OTTI (1992) 7 NWLR (Pt. 252) 2 NWLR 187, ODOGWU V ODOGWU (1992) 2 NWLR (Pt. 225) 539 at 559 – 560; ALABI V ALABI (2007) 9 NWLR (Pt. 1039) 397; NANNA V NANNA (2006) 3 NWLR (Pt. 966) 1; ODUSOTE V ODUSOTE (2012) 3 NWLR (Pt. 1288) 478 @ 504; OLOWU FOYEKUN V OLOWO FOYEKUN (2011) 1 NWLR (Pt. 1227) 177; WILLIAMS V WILLIAMS (1987) 2 NWLR (Pt. 54) 66***; as well as Section 71(1) of the Matrimonial Causes Act on the issue of custody in matrimonial proceedings.

He submitted that in the instant case, it is on record that the Petitioner is travelling to faraway Canada for her master's degree. As such it is submitted that the Respondent ought to be granted full custody of the child since he has shown that he's quite capable of taking care of the child and her basic needs. The Court is urged to grant Respondent's reliefs or the alternative prayers sought in the cross- Petition.

That in the absence of any reason shown by the Petitioner, the Respondent should be granted custody of the child.

On issue three which is whether the Petitioner is entitled to the relief of maintenance sought, the learned Counsel submitted that this prayer being an ancillary relief under Order XIV of the Matrimonial Causes Rules, the Petitioner has to plead certain facts or lead evidence on those facts. That in this case, non-compliance with the Rules goes to the root of maintenance. Therefore the Court will not be in a position to make any justifiable Order of maintenance.

Counsel also cited the case of ***TABANSI V TABANSI (2018) 18 NWLR (Pt. 1651) 279 (SC) 299, para G*** in support of his arguments on the issue and urged the Court to abide by the concessions of the Respondent/Cross- Petitioner on the issue of monthly upkeep payable.

The Court is also urged to consider the position of the Respondent that any payment of school fees as should be as agreed by both parties, since the Respondent has so far not failed in fulfilling his role as a father,

by paying his daughter's school fees. That the Petitioner has failed to show that the Respondent can afford such exorbitant fees sought by the Petitioner.

The Court is on the whole, urged to dismiss the Petition and grant the reliefs sought in the Cross- Petition.

Meanwhile, in the Petitioner's final Written Address, two issues for determination were formulated by Gerald O. Ivhador Esq, learned Petitioner's Counsel to wit:

- “(i). Whether the Petitioner is entitled to a decree of dissolution of marriage.***
- “(ii). Whether the Petitioner is entitled to the sole custody of the child of the marriage and the relief of maintenance sought on her behalf.”***

In arguing issue one, learned Counsel submitted that it is on the authority of Section 15(1)(2)(f) of the Matrimonial Causes Act, that the Petitioner herein brought this petition i.e. that the marriage has broken down irretrievably as the parties have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. It is submitted in that regard that the parties herein have lived apart since March 2016, a period of over four years immediately preceding the presentation of this Petition when the Respondent relocated to Ibadan upon securing a job and leaving the Petitioner and the child in Abuja without any plan for them to join him. In this premise, learned Counsel referred the Court to the case of ***HARRIMAN V HARRIMAN (1989) 5 NWLR (Pt. 119) at Pg. 15.***

That contrary to the arguments in the Respondent's address in paras 4.2 and 4.3 the Petitioner gave satisfactory evidence that the parties have lived apart for a continuous period of three years immediately preceding the Petition.

The Court is referred to the provisions of the Matrimonial Causes Act on period of separation. That no account is taken of any or more periods not exceeding six months during which parties have resumed living with each other. That the Respondent is gravely misconceived to think that the parties have only lived apart since 2nd December 2019, being the last time Respondent saw the Petitioner.

Learned Counsel placed reliance on Section 17(2) of the Matrimonial Causes Act. It is submitted that the evidence adduced during trial did not show the Petitioner ever stayed with the Respondent for a period of up to six months during her visits to the Respondent. Counsel also referred the Court to evidence of the Respondent during examination in-chief on the same issue.

It is submitted further, that there was a clear intention by the Respondent to live apart from the Petitioner and not return to the marriage despite all the efforts made by the latter in line with the Respondent. That in his evidence, the Respondent failed to show the Court, contrary to averments in his cross-petition, what efforts he made to ensure that the Petitioner and the child of the marriage live with him. That the contention of the Respondent that Petitioner refused to move with him is of no moment.

Reference was made again to Respondent's evidence in-chief on his permanent and current address as well as Exhibits E1 – E6, to argue that the Respondent did not intend for the Petitioner and the child of the marriage to live with him.

Moreso, the learned Counsel argued that a cursory look at the Respondent's Cross-Petition clearly reveals that the Respondent failed to give particulars for the irretrievable breakdown of the marriage as required by law. Counsel cited ***IBRAHIM V IBRAHIM (2007) 1 NWLR (Pt. 1015) 383***, the Court is urged to hold that Respondent has failed woefully to meet his requirement in his Cross-Petition on this issue in line with Section 15(2) of the Matrimonial Causes Act. The Court is therefore urged to discountenance the Cross-Petition of the Respondent and Order of dissolution of marriage on the grounds stated in the main Petition.

On issue two which is whether the Petitioner is entitled to the sole custody of the child of the marriage and the relief of maintenance sought on her behalf, learned Counsel cited Section 71(1) of the Matrimonial Causes Act Cap M7, LFN, 2004 and the cases of ***DAMULAK V DAMULAK (2004) 8 NWLR (Pt. 874) 151; ODUSOTE V ODUSOTE (2012) 3 NWLR (Pt. 1288) 478 and BUNWANHOT V BUNWANHOT (2009) 16 NWLR (Pt. 1166) 22.***

On the exercise of Court's discretion, Counsel cited ***AHMAD V S.S. H.A (2002) 15 NWLR (Pt. 791) 539.***

The Court is urged to consider that the child of the marriage has always been in custody of the Petitioner and the child's grandmother who have been responsible for the child's physical, educational, mental and moral upbringing from the time of her birth.

That under cross-examination, the Respondent confirmed that even though he was in Abuja as at the material time, the child of the marriage was in the care of the Petitioner's mother when the Petitioner went back to school to conclude her studies, when the child was just six years old.

That there's no evidence to show that the child lacked care and support moral or otherwise from the Petitioner, that the Respondent has not presented evidence to show that he has been responsible for the payment of the child's fees.

That the Respondent has admitted that the child of the marriage has never spent any holiday either with him or any member of his family since her birth. That he also admitted, that he has never requested that the child be brought to visit him whether in Lagos or Ibadan. That the Respondent in a feeble attempt to justify this seeming indifference and disconnection with his daughter stated during trial that even if he had asked, the Petitioner would not have allowed it.

That the Respondent was presented with many opportunities to spend reasonable time with the child of the marriage but was treated with gross indifference.

That although he stayed behind with their daughter when Petitioner travelled to Canada for her brother's funeral, that by his own admission, Respondent stated that even though the child's birthday was in December 2019, he only spent one week with her in January 2020. In spite of the fact that the Petitioner spent about four months in Canada.

Learned Counsel urged the Court to consider Exhibits E1 – E6, which were not objected to nor contradicted. On this premise, learned Counsel relied on ***GEGE V NANDE (2006) 10 NWLR (Pt. 988) 256; KANO TEXT PLC V GH NIG LTD (2002) 2 NWLR (Pt. 751) 420.***

It is also argued for the Petitioner that the Respondent has not presented this Court with any credible evidence to show that he is capable and in a position to provide the moral spiritual, mental and physical care of the child of the marriage which she has enjoyed with the Petitioner and her grandmother since birth.

That in the instant case, the facts show that the child is certainly not familiar with the Respondent's family. Reliance was placed on the case of **AKINBUWA V AKINBUWA (1998) 7 NWL (Pt. 559) 661; ODOWU V ODOGWU (1992) 2 NWLR (Pt. 225) 539; ODUSOTE V ODUSOTE (supra)**.

On the issue of termination of the married couple's pregnancy, learned Counsel contended that contrary to Respondent's Cross- Petition, the Petitioner never consented to it, and that by his action, it is crystal clear that the Respondent never intended to build a family with the Petitioner and also lacks capacity to take proper care of the child of the marriage.

That Exhibit C shows to the contrary, that it is the Respondent that has continued to benefit financially and otherwise from the Petitioner and her family.

It is submitted that even where the Court awards custody of the child to the Petitioner and she goes back to school leaving the child in the care of her mother, she would not have violated any order of Court. Reliance was placed on the case of **OKOB V OJODI (2020) 1 NWLR (Pt. 1705) 301** the Court is urged to grant sole custody of the child of the marriage Rebecca Iyanuoluwa Akinyemi, to the Petitioner.

On Order XIV Rule 4 of the Matrimonial Causes Rules, it is submitted that Respondent is misguided on the issue. That the relevant section is Section 70(1) and that the Petitioner has duly complied with para 13(d)(e) of the Petition, since Petitioner is seeking reliefs of maintenance not for herself but for the child of the marriage.

Also, Counsel cited **NANNA V NANNA (2006) 3 NWLR (Pt. 966) 1** in support of his arguments on the issue.

That by the Respondent's own evidence as to his earnings, he is eminently capable of affording the sum the Petitioner is asking for maintenance. The Court is urged to hold in the Petitioner's favour.

In conclusion, learned Counsel urged the Court to grant all the reliefs sought in the Petition.

Now, under and by virtue of Section 15(1) of the Matrimonial Causes Act, Cap M7 LFN, 2004, the Court hearing a Petition for dissolution of a marriage shall hold the marriage to have broken down irretrievably if and

only if the Petitioner satisfies the Court on any of the grounds enumerated under Section 15(2)(a) – (h) thereof. On this premise, I also refer to the case of **AKINBUWA V AKINBUWA (1998) 7 NWLR (PT. 559) 661. IKE V IKE & ANOR (2018) LPELR-44782 (CA) per EKPE, J. C. A** at pages 10-16, paragraphs C-A, where the Court held as follows:-

“For a Petition for the Dissolution of marriage to succeed, the Petitioner has to prove at least one of the ingredients contained in Section 15 (2) of the Matrimonial Causes Act, even if the divorce is desired by both parties”.

The main ground of the Petitioner seeking the decree for dissolution of the marriage as distilled from the Notice of Petition, is that the parties have lived apart for a continuous period of at least three years immediately preceding this Petition.

The Petitioner states in paragraph 15 of her Witness Statement on Oath as follows: -

“The Respondent and I have lived apart for a period of over three (3) years since March 2016 when the Respondent left the matrimonial home and relocated to Lagos leaving me and the child of the marriage in Abuja.”

Meanwhile, in paragraph 1p of his Answer/Cross Petition, the Respondent/Cross- Petitioner denied the above assertion and maintained in both his evidence-in-chief and under cross-examination that he secured a job in 2016 and relocated to Lagos and later Ibadan. The Respondent has also confirmed in his evidence before the Court that he currently lives in Ibadan. During cross-examination, he admitted that he has been shuttling between Lagos and Ibadan since 2016 because of his work. Although, he did say that he had made efforts to move his family to Ibadan but that the Petitioner said she didn't want to leave her mother.

However, it is the case of the Petitioner as distilled from her Witness Statement on Oath that she was the one making effort to visit the Respondent in Ibadan, and stated even during cross-examination that she went to visit him four times in Ibadan. In addition, she asserts that the Respondent only visits the child of the marriage once every year and at her instance, every December in order to celebrate the child's birthday with her.

That since the birth of the child, the child has never left Abuja, not even to visit the Respondent, and that the Respondent never requested for the visit.

This is clearly denied by the Respondent. Although, I have observed that the Respondent has not denied that the parties have lived apart since he relocated to Lagos then Ibadan in 2016.

However, it is the contention of the learned Respondent's Counsel in paragraphs 4:2 and 4:3 of the Address, among others that the Petitioner and Respondent have only lived apart since 2nd December, 2019 and that the Petitioner has not brought forth evidence showing that she has lived apart from the Respondent for three years, therefore her relief for dissolution on the grounds of living apart for three years cannot be granted. The Court is urged to on the contrary grant the reliefs sought by the Respondent in his Cross- Petition.

Interestingly, the Respondent/Cross- Petitioner has also prayed the Court to dissolve his marriage to the Petitioner on the ground that the marriage has broken down irretrievably on the intolerable behaviour of the Respondent.

Now, on the grounds that parties have lived apart for a continuous period of three years immediately preceding presentation of this Petition. In response to Respondent's Counsel's argument on the issue, learned Petitioner's Counsel submitted particularly in paragraph 5:7 – 5:8, of the address, that in determining whether the period of separation is continuous, no account is taken of any or more periods not exceeding six months during which the parties may have resumed living with each other. That the Respondent is gravely misconceived to think that the parties have only lived apart since 2nd December 2019, being the last time Respondent said he said the Petitioner.

In support of his argument on the issue, learned Counsel cited Section 17(2) of the Matrimonial Causes Act which explaining what it means for parties to have lived apart. I shall reproduce it for ease of reference. The Section provides thus: -

“In considering for the purposes of Section 15(2) of this Act whether the periods for which the Respondent has deserted the Petitioner or the period for which the parties to a marriage have lived apart has been continuous, no account shall be

taken of any one period (exceeding six months) or of any two or more period (not exceeding six months in all) during which the parties resumed living with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be.”

Likewise, Section 17(3) of the Act provides thus: -

“References in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.”

Therefore, in the instant case, going by the evidence led by the Petitioner and even the Respondent, I have observed that the Petitioner has visited the Respondent in Ibadan including the 2nd of December the last time the Respondent said he saw her, and clearly visits can be distinguished from cohabitation. Section 17(3) of the Act states “...Living together in the same household”

The parties in this Petition have clearly not lived in the same household as husband and wife since March 2016. But for the occasional visits made to the Respondent by the Petitioner, the Petitioner resides in Abuja while the Respondent has admitted that he shuttles between Lagos and Ibadan. Respondent gave his address as House No. 5 Oluokekere, Ikolaba Estate Ibadan.

On this premise, let me refer to Section 15(3) of the Matrimonial Causes Act which provides thus: -

“For the purpose of subsection (2)(e) and (f) of this Section, the parties to the marriage shall be treated as living apart unless they are living with each other in the same household.”

See also the case of ***EZIAKU V EZIAKU (2018) LPELR 46373 (CA)***.

Therefore, having considered all the above facts as well as statutory provisions reproduced earlier vis-a-vis the date this Petition was filed, it is my humble opinion that the Petitioner has satisfied the Court that the marriage in this case has broken down irretrievably pursuant to Section 15(1)(2)(f) of the Matrimonial Causes Act, that the parties herein have lived apart for a continuous period of at least three years i.e from (March

2016) immediately preceding the presentation of this Petition filed on 31st of July 2020). I so hold.

This now brings me to the issue of custody of the only child of the marriage Rebecca Iyanuoluwa Akinyemi. The Petitioner and the Respondent/Cross- Petitioner are both seeking sole custody of the only child of the marriage.

On what the Court will consider when awarding custody in matrimonial proceedings, the Court held in the case of **MRS. LYDIA OJUOLA OLOWUN FOYEKU V MR. JAMES OLUSOJI OLOWUN FOYEKU (2011) 10 NWLR (PT. 1227) Page 177** at 203, paragraphs E-F as follows:

“In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, Court of Law, or administrative or legislative authority, the best interest of the child of the marriage shall be the primary considerationcustody is never awarded for good conduct, nor is it ever denied as punishment for the guilty party in Matrimonial offences. The welfare of the child of the marriage that has broken down irretrievably is not only paramount consideration but a condition precedent for the award of custody.”

Indeed, the Supreme Court has held in the case of **WILLIAMS V WILLIAMS (supra)** (cited by the learned Respondent’s Counsel in the Written Address) at page 66 thus:-

“In regard to custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable by either without the other.”

See also the case of **ODUSOTE V ODUSOTE (2013) 3 NWLR (Pt. 1288) 478.**

It is submitted for the Respondent/Cross- Petitioner that he has shown the readiness to cater for the child as well as the wherewithal to do so; and the Court is urged to consider that he has been sending thirty five thousand Naira monthly for his daughter’s upkeep and that the Petitioner

has not held any employment or has any identifiable source of income. The Court is urged to grant him full custody of his child.

Meanwhile, it was submitted for the Petitioner that the child in this case has always been in custody of the Petitioner and her mother who have been responsible for the child's physical, educational, mental and moral upbringing from the time of her birth till date. That even when the Petitioner went back to school to conclude her studies, it was Petitioner's mother that took care of her. The Court is also urged to look at Exhibits E1 –E6 and the fact that due to the nature of his job, the Respondent spends most of his time in his workplace, going by his own testimony.

Indeed, I've taken a look at the photographs tendered by the Petitioner i.e Exhibits E1 – E6, showing the place of residence of the Respondent. And in my humble view considering the earnings of the Respondent as stated in his testimony before the Court, I would have to agree with the submission made for the Petitioner that the abode in question leaves much to be desired, and it is clearly not to be considered as a family home nor a place fit enough to keep a child of tender age.

It must be borne in mind that whatever the decision this Court makes, must be in the best interest of the child of the marriage.

The Respondent has not countered nor challenged this piece of evidence in any manner. Therefore, the Court has no option but to deem it as the truth and accept same.

I must say that regrettably, although the Respondent is seeking for sole custody or even joint custody in the alternative, he has not made any decent arrangements to have his only daughter to live with him in a clean, healthy, safe and secure environment.

The child who is now about seven years old needs to be properly taken care of.

Having said that, this fact will not in any way remove the parental rights of the Respondent being the biological father of the child of the marriage and one of the child's primary custodians. On this premise, I refer to the case of **MRS. LYDIA OJUOLA OLOWUN FOYEKU V MR. JAMES OLUSOJI OLOWUN FOYEKU (supra) at P. 177 at 203, Paras A- E (supra).**

See also the case of **ODUSOTE VS ODUSOTE (2012) 3 NWLR (PT. 1288) 478; WILLIAMS V WILLIAMS SC 197/1985.**

In **ALABI V ALABI (2007) LPELR- 8230 (CA), per Agube J.C. A at pp 47-49 paras E-D**, the Court held as follows:-

“Award of custody of children of a marriage that has broken down irretrievably as in this case is governed by Section 71 (1) of the Matrimonial Causes Act 1990, which enjoins the Court in proceedings relating to custody, guardianship, welfare, advancement or education of children of the marriage , to take the interest of the children as paramount consideration and the Courts in this regard are given wide discretionary powers which they can exercise according to the peculiar circumstances of each case.....”

Likewise on the Criteria laid down to be considered by the Court with regard to the welfare and interest of the child of the marriage, the Court set out such criteria the case of ALABI & ALABI (supra) as follows:-

- 1) *The degree of familiarity of the child with each of the parents (parties).***
- 2) *The amount of affection by the child for each of the parents and vice-versa.***
- 3) *The Respective incomes of the parties.***
- 4) *The Education of the child.***
- 5) *The fact that one of the parties now lives with a third party as either man or woman, and.***
- 6) *The fact that in the case of children of tender ages, custody should normally be awarded to the mother unless other considerations makes it undesirable etc.”***

In the instant case, I've considered that the child of the marriage is still of tender age, she has for the better part of her life lived with her mother and the Petitioner and was cared for by Petitioner's mother (her grandmother) even during her absence, and the fact that the Respondent has not made adequate arrangements at the moment to accommodate his child's needs. The child will require the basic necessities of life, not only financial which I have no doubt is within the capability of the Respondent, but quality time with her father, not only visits during her birthdays. Every child deserves that including Rebecca Iyanuoluwa Akinyemi.

Moreso, another factor to be considered is that according to the Respondent by the nature of his work, he shuttle between Lagos and Ibadan and is frequently on onsite and offsite supervisions.

Therefore, if he were to be granted sole or joint custody who will take care of the child in his absence? All these are very important factors to be considered which the Respondent has not satisfied the Court as to the arrangements made if any in that regard.

On the issue of maintenance of the child of the marriage, the Court shall be guided by the provision of Section 73 of the Matrimonial Causes Act.

On the whole, having carefully considered all the evidence adduced on both sides and putting the best interest of the child of the marriage as its prime consideration, this Court hereby orders as follows: -

- (1). I hereby make an Order Nisi dissolving the marriage between the Petitioner Temitope Sabina Akinyemi and the Respondent Olarenwaju Akinyemi celebrated at the Federal Marriage Registry Abuja on the 1st day of November 2014, on the grounds that the marriage has broken down irretrievably. The decree shall become absolute if nothing intervenes within three months from this date.
- (2). The Petitioner shall have sole custody of the child of the marriage until she is 15 years old; when both parents will have joint custody of the child. In the period of absence of the Petitioner, the Petitioner's mother i.e. grandmother of the child is to have temporary custody till Petitioner returns from her studies abroad.
3. At all times, the Respondent shall have unfettered access to the child of the marriage subject to convenience of the parties at the time of request.

4. When the child of the marriage is 13 years old, Respondent shall have the child of the marriage spend part of her school holidays with him, if proper, secure and healthy accommodation is secured by the Respondent to cater for the needs of his daughter. In addition, there should be a relative there to take care of the child in the Respondent's absence due to the nature of his work.
5. Any travel with the child of the marriage outside Nigeria, shall be with the consent of both parties.
6. The Respondent shall pay the sum of N40, 000 Naira monthly for the upkeep of his daughter, excluding medical bills.
7. The Respondent shall pay the school fees of the child of the marriage which is N100, 000.00 for each term until she graduates from elementary school. Any subsequent school arrangements shall be on fees agreed upon by both parties.
8. The Respondent shall provide health care for his daughter in a competent hospital agreed upon by the parties.
9. The Petitioner shall have custody of the International Passport of the child of the marriage.
10. The Respondent/Cross- Petitioner has not lead any evidence to support relief no. V sought in the alternative prayer and it is accordingly dismissed.

Signed:

Hon. Justice Samirah Umar Bature
15/4/2021