

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 8TH DAY OF JULY, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 6
SUIT NO: PET/219/17

BETWEEN

ABIMBOLA CHARLES OLAJUYIN ----- PETITIONER

AND

1. IME ABIMBOLA OLAJUYIN ----- 1ST RESPONDENT
2. LANRE BENJAMIN AKINRIMISI ----- 2ND RESPONDENT

JUDGMENT

The Petitioner is a legal practitioner residing at Yayale Ahmed Estate Apo, Abuja and petitions this Court for dissolution of his marriage to the 1st Respondent on the ground that the marriage has broken down irretrievably. The Petitioner further prayed the Court for custody of the two children of the marriage Onaopemipo Jasmine Abimbola Olajuyin (f) born 3/11/2005 and Oluwasinaayo Tehila Abimbola Olajuyin (M) born 22/6/2007 and for the 1st Respondent to revert to her maiden name Etim Essien.

The Petitioner testified on the 9/12/2019 as PW1 and said that he got married to the 1st Respondent on the 27/11/2004 at St. Andrews Cathedral, Owo, Owo Local Government Area of Ondo State which is a licensed place of worship. He said after the marriage, the 1st Respondent started moving with some women of easy virtue. He objected to her movement with them and told her to desist from associating with the women but she refused. He further stated that the 1st Respondent started having an affair with the 2nd Respondent in 2014 just after she had secured a job with Chrisland Schools Ltd Abuja. He narrated an occasion when the 1st Respondent lied to him that she had been given fee slot to attend a conference in the USA sponsored by her employers only to go and spend 10 days with the 2nd Respondent in a Hotel in the USA. Upon her return, he requested for the conference papers but she told him that she had given them to her friend.

Thereafter, the Petitioner said he noticed that the 1st Respondent started spending lots of time on the phone and he saw lots of sex text messages and received calls on her phone from the 2nd Respondent. He confronted the 2nd Respondent but he denied ever knowing the 1st Respondent. Again the witness said in August, 2015 when he sent the 1st Respondent and the children on vacation to the USA to stay with his sister, his sister later called him that the 1st Respondent had abandoned the children and went to Maryland to spend time with the 2nd Respondent. That on the 23/10/2015 the 1st Respondent left the house with the children without informing him and dropped the children off at her sister's house, parked her car there and disappeared without a trace. She resurfaced on the 25/10/2015 and when he enquired as to where she had been for 3 days, she could not give any reasonable answer.

In December, 2015, the 1st Respondent left Abuja with the children to Uyo, in Akwa Ibom State stating that

she was attending her mother's 70th birthday. She returned on the 27/12/2015, dropped the children with him and travelled to Abeokuta on the 28/12/2015 without prior notice. The 1st Respondent returned from Abeokuta on the 10/1/2016, picked up the children and went back to Abeokuta same day not caring that the children had resumed for the new year at their school; Chrisland School Abuja.

On the 19/1/2016, the witness said he got a call from a man claiming to be the driver that takes the children to school in Abeokuta. He asked the Petitioner to come and pick his children because the 1st Respondent had travelled to the USA without the knowledge of the children. On the 3/2/2016 the Petitioner went to Abeokuta to lodge a formal report of child abandonment at the Ministry of Women and Children Development, Abeokuta and the children department immediately set up a team to recover the children from the house where the 1st Respondent resided. The men of the Police Force

forced their way into the premises after a stiff challenge by one Bayo who claimed to be her neighbour. The children were eventually rescued but in a pathetic condition. The witness said the 1st Respondent upon her return called the Petitioner on the 9/2/2016 and confessed to the several adulterous act.

PW1 concluded by stating that he has been responsible for the upkeep of the children since they were born.

The following documents were tendered through the witness and marked as Exhibits A, A1 – A5. They are:

- Certificate of marriage marked as Exhibit A
- Hotel Receipt, Airline Tickets local and international together with certificate of compliance collectively marked as Exhibit A1.
- Letter dated 7/6/18 marked as Exhibit A2.
- CTC of letter for release of children dated 4/2/16 marked as Exhibit A3.

- Application for release dated 5/2/16 marked as Exhibit A4.
- 19 receipts collectively marked as Exhibit A5.

The 1st and 2nd Respondents were served with the Notice of Petition together with numerous hearing notices for each day the case came up, but they elected not to file any process in defence of this suit or cause an appearance to be entered on their behalf. PW1 was thus not cross examined. After several adjournments for defence, the Respondents were foreclosed from defence.

Benjamin Sundu Barau Esq filed the Petitioner's written address dated 3/2/2021 and duly adopted same before the Court. He raised three issues for determination therein as follows:

- “1. Whether the marriage between the Petitioner and the 1st Respondent has broken down irretrievably.*
- 2. Whether the Petitioner can be granted full custody of the children of the marriage.*

3. Whether the Petitioner has discharged his burden of proof to entitle him to the reliefs sought.”

Learned counsel submitted extensively on the above issues, and cited several authorities to buttress this point. He urged Court not to bind the Petitioner to a marriage that is not working, as cohabitation has ceased permanently. He further urged the Court to dissolve the marriage. on the unchallenged evidence of the Petitioner.

Section 15 of the Matrimonial Causes Act sets out in detail the grounds for dissolution of a marriage. It provides thus:

“15(1). A petition under this Act by a party to a marriage may be presented to the Court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

Section 15(2)(a – h) breaks down the details of what is required to be proved by the Petitioner in convincing the Court of his/her entitlement to decree of dissolution of marriage. The grounds of this Petition are

unreasonable behaviour, adultery, living apart for 2 years immediately preceding the presentation of this petition and desertion for one year.

Starting with unreasonable behaviour pursuant to Section 15(2)(c) of the Matrimonial Causes Act, the Act provides:–

“The Court hearing a petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the Court of one or more of the following facts –

(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;

Now to constitute ‘the Court hearing a petition etc.’ the Court has to be satisfied during the hearing. By Section 82(1) of the Matrimonial Causes Act, *“a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court”*. See **Bakare vs.**

Bakare (2016) LPELR – 4034 CA. It is my view that the proof required by Section 82(1) is proof orally by witnesses at the trial in open Court.

When evaluating unreasonable behaviour a court considers three main aspects:

- The spouse's conduct,
- Its effect on the other party,
- The history of the marriage.

It is necessary for the Petitioner to show that the Respondent's behaviour has been of a particular type and that because of that behaviour it would be unreasonable to expect the Petitioner to live with the Respondent. The Respondent's conduct must be considered by the Court within the context of all the circumstances. The behaviour here is something more than a state of affairs or a state of mind. Behaviour in this context is action or conduct by one which affects the other. Such conduct may either take the form of acts or omission or may be a

course of conduct, and, in my view, it must have reference to the marriage. See Katz vs. Katz (1972) 1 WLR 9655, Bannister vs. Bannister (1980) 10 Fm Law 240.

In other words, the court considers whether the effect of the spouse's conduct was such that, based on the parties' history and personalities, the Petitioner should not reasonably be expected to live together with the Respondent. It is important to point out that the court does not apply an objective standard of what the reasonable person would be expected to do, but what would be reasonable for the two parties based on all the circumstances.

In this instance the Petitioner narrated series of events that transpired during the course of the marriage. The Respondent leaves the matrimonial home at will, travel without his consent, abandoning her children and lying to him at several times. He accused her of infidelity and narrated how at several times she has travelled to the USA to meet the 2nd Respondent. He has also stated that

the 1st Respondent is a woman of easy virtue and moves around with friends of easy virtue. Several attempts to talk the 1st Respondent out of moving with these friends were met with stiff refusal by the 1st Respondent. The Petitioner finds these conducts of the 1st Respondent intolerable and therefore has prayed this Court to dissolve the marriage. The Respondent did not file any defence or put up any appearance.

It should be noted that there are two limbs to the Provision of Section 15(2)(c) of the Matrimonial Causes Act. The Petitioner must firstly prove that the Respondent has behaved in a particular manner. Secondly, the Court has to consider whether, in the light of the Respondent's conduct, it will be reasonable to expect the Petitioner to continue to live with the Respondent.

The duty on the court is to consider whether the alleged behaviour is one in which a right thinking person would come to the conclusion that the Respondent has behaved in such way that the Petitioner could not

reasonably be expected to live with him taking into account the whole of the circumstances, and the matrimonial history of the parties. See Ibrahim vs. Ibrahim (supra), Nanna vs. Nanna (2006) 3 NWLR (part 966) page 1, Katz vs. Katz (1972) 3 All ER page 219.

Considering the matrimonial history of the parties regarding the conduct of the 1st Respondent it is my view that no reasonable person can be expected to continue to put up with that behaviour. The Petitioner herein is certainly not an exception. I find the Respondent's conduct grave and weighty enough to ground a dissolution of the marriage. I hold that this Petition succeeds on the ground of unreasonable behaviour.

The Petitioner has also relied on Adultery and has prayed this Court for the sum of N10,000,000.00 (Ten Million Naira) as damages against the 2nd Respondent. Adultery is a matrimonial wrong which must be specifically pleaded and clearly proved. See Obajimi vs. Obajimi (2011) LPELR - 4665, Uzochukwu vs. Uzochukwu

(2014) LPELR – 24139. It is axiomatic that adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstances. The law has thus set down certain conditions from which adultery can be inferred and these are:

1. Evidence of disposition and opportunity for sexual intercourse with a person other than the spouse.
2. General cohabitation – where it is established that there is a state of general cohabitation between a man and a woman, adultery is presumed between them;
3. Confession and admission of adultery;
4. Entry in register of birth;
5. Frequent visits to hotels.

See Ibeabuchi vs. Ibeabuchi (2016) LPELR – 41268 (CA).

In this instance, the Petitioner narrated how the 1st Respondent has visited the USA under pretence of work to be with the 2nd Respondent. He even said when he sponsored the 1st Respondent and the children to go on

vacation to his sisters place in the USA, his sister called to tell him that the 1st Respondent abandoned the children and left for Maryland to be with the 2nd Respondent.

In this instance, the Petitioner did not give evidence establishing he cross checked and found out that the 1st Respondent travelled to Maryland and met with the 2nd Respondent. The Petitioner has also not presented evidence to prove that the 1st Respondent was caught by him or any other witness in compromising circumstances with the 2nd Respondent pointing to adulterous exploits. The Petitioner himself said when he confronted the 2nd Respondent, he denied ever knowing the 1st Respondent. Even the flight tickets and hotel documents tendered did not in anyway point to the 2nd Respondent being with the 1st Respondent in all her trips or in the hotel she lodged.

The law is that mere proof of familiarity is not sufficient to establish adultery. See Okwueze & anor vs. Okwueze (2019) LPELR - 48403 (CA). Infact, none of those who allegedly gave the Petitioner reports about the

movements of the 1st Respondent was called as a witness to testify. A high standard of proof is expected of the allegation of adultery to warrant the Court to give judgment on that ground. I am therefore unable to find in favour of the Petitioner on ground of adultery. Thus the claim for damages also fails.

As for living apart for two years (Section 15(2)(e)) and desertion (Section 15(2)(d)) the evidence before the Court is that the parties have been living apart since December 2015 when cohabitation ceased and the Petition was filed on the 11/5/2017. This is clearly less than two years preceding the presentation of the Petition as provided for under Section 15(2)(e) of the Matrimonial Causes Act. The Petition therefore fails under this ground.

For desertion, this ground is stipulated under Section 15(2)(d) of the Matrimonial Causes Act which provides:

“The Court hearing a petition for a decree of dissolution of marriage shall hold the marriage to

have broken down irretrievably if, but only if, the petitioner satisfies the Court of one or more of the following facts -

(d) that the Respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.”

In law, there are two types of desertion to wit: simple desertion and constructive desertion. Simple desertion occurs where the deserting party abandons the matrimonial home. While in constructive desertion the spouse remains in the home but has abdicated all matrimonial responsibility and has thus by his conduct expelled the other spouse. See Nwosu vs. Nwosu (2011) LPELR - 465 (CA). In this case, the type of desertion complained of is a simple desertion.

The Petitioner testified that the 1st Respondent left the matrimonial home in December, 2015. She left the matrimonial home without any reason and parties had

lived apart since then. To establish the allegation of desertion, the Petitioner must establish:

- a) Physical separation,
- b) Avowed or manifest intention to remain separated on a permanent basis,
- c) Absence of consent from the other spouse,
- d) Absence of any good, just cause or justification.

See Anioke vs. Anioke (2011) LPELR – 3774 (CA).

In Monica Ego Odili vs. Thomas Odili (1966 – 1979) Vol. 5 (Oputa LR) Oputa, J (as he then was) stated thus:

“The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict enquiry or without proper proof of the grounds alleged”

As already observed in this judgment, the 1st Respondent was duly served with all processes but she chose not to file any response. Under and by virtue of

Section 15(2) of the Matrimonial Causes Act, the Court is empowered to grant an order of dissolution of any marriage where it is satisfied that the marriage has broken down irretrievably. There is evidence that the 1st Respondent left the matrimonial home in December, 2015 and has since not returned. The cessation of cohabitation had been for a continuous period of more than one year immediately preceding the presentation of the petition. The Respondent had no justification to leave the matrimonial home and without the consent of her husband, the Petitioner.

I have reviewed the evidence led on this issue and found same to be credible, and that being the case I am bound to act on it since it is unchallenged and uncontroverted. I hold that the Petitioner has established the fact of desertion against the 1st Respondent under Section 15(2)(d) of the Matrimonial Causes Act and that the marriage has broken down irretrievably.

The Petitioner has prayed for custody of the children of the marriage. By and large, the award of custody of a broken marriage is based on considerations other than the guilt, blameworthiness or innocence of the parties concerned. Custody is never awarded as a reward for good conduct, nor is it ever denied as a punishment for the guilty party's matrimonial offences. See Allen vs. Allen (1948) 2 All ER page 413 at 415.

This Court has had recourse to the records of the Court and the motion No. M/9888/17 filed as way back as 4/10/2017, and the subsequent ruling of the Court on the 12/12/2017 directing the 1st Respondent to release the 2nd child of the marriage to the Petitioner. Therein, it was observed that the children have been in custody of the Petitioner prior to the filing of the motion. The children are still in custody of the Petitioner. I have no evidence of any change in the situation and there is no contest regarding their continued stay with the Petitioner.

When it comes to custody, the law behind issues of custody is the best interest of the child being the paramount consideration, and it is only subject to that any order of custody need to be made by the Court. See Alabi vs. Alabi (2007) 9 NWLR (part 1039) page 305, Odogwu vs. Odogwu (2006) 5 NWLR (part 972), Buwanhot vs. Buwanhot (2009)16 NWLR (Part 1). Having been living with the Petitioner, the children by now have developed a bond with him and it will not be in their interest to sever that bond. This is moreso as both children are nearing adulthood.

In the circumstance, I am of the considered view that the best interest of the children will be better served and preserved if they remain in custody of the Petitioner (their father).

The Petitioner has prayed for an order for the 1st Respondent to revert to her maiden name Etim Essien. The question is whether the parties have rights to any name and whether there is right to monopoly of names.

In the case of Banjoko & ors. vs. Ogunlaja & Anor. (2013)
LPELR – 20373 (CA), the Court Per Uwa J.C.A. held:

“No name has been ascribed to belong exclusively to any particular person, group of persons or family. I am not yet aware of any legislation to that effect in Nigeria. In my considered but humble view, anybody who fancies a name or title for whatever reason is free to adopt same...”

The Court proceeded citing the case of Offoboche vs. Offoboche (2006)13 NWLR (Part 997)
page 298 at 304 where the Court held:

“No person, group of persons or family has a monopoly of names. Persons have unrestrained liberty to pick and choose name that pleases them...No legislation in Nigeria restricts a person to a fixed number of names. In effect, even if names are identical or the same, no person in Nigeria has a legal right to

restrain another person from answering or bearing those names.”

Thus, this relief is refused as the Respondent has the constitutional right to whatever name she chooses to use as her surname.

On the whole, this petition succeeds. I hold that the marriage has broken down irretrievably pursuant to the provisions of Section 15(2)(c) and (d) of the Matrimonial Causes Act. I direct that a decree nisi shall issue dissolving the marriage between the Petitioner and the 1st Respondent contracted on the 27/11/2004 at St. Andrews Cathedral, Owo, Owo Local Government Area of Ondo State. It shall become absolute after the expiration of three months.

- The Petitioner shall have custody of the two children Onaopemipo Jasmine Abimbola Olajuyin and Oluwasinaayo Tehila Abimbola

Olajuyin while the Respondent shall have unfettered access to the children.

Hon. Justice M.A. Nasir

Appearances:

Petitioner in Court

B.S. Barau Esq – for the Petitioner

Respondent absent and not represented