IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 13TH DAY OF JULY, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 6
SUIT NO: PET/260/2017

BETWEEN:

SUNDAY WADA ---- PETITIONER

AND

OMOYEMI TIJANI WADA ---- RESPONDENT

JUDGMENT

The Petitioner, Sunday Wada filed the instant petition on the 8th June, 2017 seeking for the dissolution of his marriage with the Respondent, Mrs. Omoyemi Tijani Wada celebrated at the Federal Marriage Registry, Abuja on the 5th December, 2013. The Petitioner has relied on the ground that since the marriage the Respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with her. The Petitioner also prayed for the custody of the only child of the marriage.

Upon service of the Notice of Petition, the Respondent filed her Answer and Cross-Petition on the 21st July, 2017.

The Petitioner in proof of the Petition testified on the 23rd September, 2020 as PW1. PW1 adopted his Witness Statement on Oath made on the 23rd March, 2020. The evidence of the Petitioner is that immediately after the marriage parties cohabited at Wuse II Abuja and thereafter at Plot 223, along ICR, FHA Lugbe, Abuja until 2015 when cohabitation between the parties ceased. PW1 further testified that since the marriage, Respondent has developed grave complex and imagines that the Petitioner is inferior and not worthy of her. That when she is in such state, the Respondent is consumed by unjustified hatred and throws tantrums.

PW1 also stated that in the course of the marriage the Respondent had displayed this particular embarrassing behavior severally in the office which has made the Petitioner subject of ridicule by colleagues in the office.

That the Respondent carries a permanently angry face and finds it impossible to forgive or forget perceived or actual wrongs.

The witness stated further that the Respondent is malicious, vindictive and prone to tempers and the Petitioner finds it intolerable to live with the Respondent. That sometime in 2014, the Respondent woke up and picked up bitter quarrel with him. The quarrel got to a point that the Respondent tore the certificate of marriage and threatened the Petitioner with fire and brimstone. According to the Petitioner, the Respondent's brother joined her in the fray and almost beat him up. That this state of affairs lingered on until the 10th March, 2015 when the Petitioner and the Respondent started living separately.

Under Cross-Examination, the Petitioner stated that the marriage was blessed with one child, Divine Ojone Wada born on the 25th September, 2015. He stated that he wants the custody of the child because the Respondent leaves the

child with people and travels. He said he did not know the present class of the child and he has not paid school fees since 2016. The witness further said that parties had a meeting where he agreed to find a cheaper school for the child and report back because he had in mind to pay N25,000.00 (Twenty Five Thousand Naira) as school fees, and N8,000.00 (Eight Thousand Naira) monthly as maintenance. That from August, 2018 till November, 2020, he has not paid any amount either as school fees or maintenance. He said he did not have access to the child and what he knows is that the child was staying with his mother inlaw in Lagos and he registered her in a school in Abuja. The Petitioner said he earns N72,000.00 monthly and he does not have any other source of income. He said he cannot recognize his daughter due to the fact that he had had no access to her. He agreed that he walked out on his daughter when she was only 14 months old. PW1 also

confirmed that there was a report of violence/assault meted on the Respondent.

At the close of the Petitioner's testimony, **Ademola A. Adeniran Esq** for the Respondent informed the Court that they are not defending the petition. Thus, parties were directed to file their final written addresses.

D.A. Momoh Esq. filed the Petitioner's final written address on the 25th January, 2021, wherein he raised a sole issue for determination as follows:

> *"Whether the Petitioner has discharged the onus of proof by the evidence led before this Honourable Court to entitle him to his claims."*

Learned counsel submitted that the Petitioner has discharged the burden of proof placed on him. He therefore urged the Court to proceed to grant the reliefs claimed by the Petitioner in the absence of a defence from the Respondent. Reference was made to some authorities.

Okafor vs. Okafor (1966 – 1979) Vol. 5 (Oputa LR) 102, International Nigerbuild Construction Co. Ltd vs. Giwa (2003) 13 NWLR (part 83) 78.

The Respondent filed a motion to put in her written address but nobody came to move the motion. On the date fixed for judgment, Mr. Adeniran was in Court and moved the motion he earlier abandoned. As there was no objection, the application was granted as prayed. Thus both learned counsel adopted their written addresses.

Ademola A. Adeniran Esq filed the Respondents final written address on the 8/3/2021. Three issues were formulated therein as follows:

"1. Whether the Petitioner has a valid final written address before the Court.

2. Whether the Court should grant the Petitioner's relief A on the ground that the Respondent has behaved in ways that he cannot be reasonably expected to live

with the Respondent, or simply on the ground that the Petitioner and the Respondent have lived apart for a continuous period of two years immediately preceding the commencement of the Petition and the Respondent does not object to a decree being granted, and

3. *Whether the evidence adduced during the trial of the Petitioner's witness and given the facts revealed during his cross examination, the Petitioner is entitled to relief B, and be granted the sole custody of the parties daughter."*

The learned counsel submitted that the Petitioner's written address was filed outside the 21 days statutory period allowed for filing final written addresses. He added that the Petitioner's omission to apply for and obtain regularization orders from the Court and pay the statutory default fees before he filed his address renders the Petitioner's final written address invalid. He urged the Court

to discountenance the final written address of the Petitioner.

On issues 2 and 3, counsel submitted that the evidence upon which the marriage of the parties can be and should be dissolved by the Court is that parties have lived apart for 2 years immediately preceding the presentation of the petition without objection. He further urged the Court to refuse the claim for custody. He cited plethora of authorities among which are:

- Isiaka vs. Ogundimu (2006) 13 NWLR (part 997) 401 at 415
- Bibilari vs. Bibilari (2011) LPELR – 4443 (CA)
- Ibrahim vs. Ibrahim (2007) 1 NWLR (part 1015) 383
- Nanna vs. Nanna (2005) LPELR – 7485
- Oshafunmi & anor vs. Adepoju & anor (2008) 17 NWLR (part 1114) 509
- Williams vs. Williams (1966) 1 All NLR 36

- Consolidated Breweries Plc & anor vs. Aisowieren (2002) FWLR (part 116) 949.

The only issue for determination in this instance therefore is whether the Petitioner has proved his case to be entitled to the reliefs sought.

It must be stated that proceedings in matrimonial causes are sui generic proceedings. The rules governing ordinary civil litigation do not apply. This is so because divorce proceedings are not governed by the High Court Rules but by the Matrimonial Causes Rules and the Matrimonial Causes Act. See Bakare vs. Bakare (2016) LPELR – 41344 (CA). Therefore, the submission of learned counsel for the Respondent to the effect that the Petitioner's written address was filed out of time outside the period provided by the Rules of Court is clearly misconceived, as the filing of written address is unknown to the Matrimonial Causes Rules and the Matrimonial Causes Act. Parties can only have

recourse to the High Court Rules only when the leave of Court has been sought and obtained.

Both the Petitioner and Respondent did not seek the leave of Court as stated under Section 54(3)(b) of the Matrimonial Causes Act and Order III Rule 1(8) of the Matrimonial Causes Rules. Assuming the Matrimonial Causes Act and the Rules envisage the filing of written address, the question is whether the Court can dispense with the need for compliance. It is noticed that Order XXI Rules 2 and 3 of the Matrimonial Causes Rule has a liberal attitude to non compliance with the Rules which non compliance is not to render the proceedings void. And the Court may at anytime upon such terms as the Court thinks fit relieve a party from the consequences of non compliance with the Rules, or dispense with the need for compliance by a party. As the days of technical justice are over, this Court is inclined to dispense with the need for compliance with the Rules i.e. seeking the leave of Court and I will have

recourse to both written address. The submission of the Respondent's counsel on this point is thus discountenanced.

Now, the law is trite that irretrievable break down is the sole ground of divorce in Nigeria, however, the Court cannot make a finding of irretrievable break down of marriage in the absence of proof of any of the facts specified under Sections 15(2)(a)-(h) and 16(1) of the Matrimonial Causes Act. It follows therefore that in the absence of proof of any of the facts listed, the Court cannot suo motu grant a decree on the ground that the marriage has broken down irretrievably. See: Harriman vs. Harriman (1989)5 NWLR (Part 119)6.

The standard of proof in any of the facts listed under Section 15(2)(a)-(h) and 16(1) of the Matrimonial Causes Act, is to establish the fact to the reasonable satisfaction of the Court. See: Section 82 of the Matrimonial Causes Act.

As stated earlier, the Petitioner relied on the ground of unreasonable behavior pursuant to Section 15(2)(c) of the Matrimonial Causes Act in bringing this Petition.

Unreasonable behavior is the term used to describe the fact that a person has behaved in such a way that their Partner/Spouse cannot reasonably be expected to live with them. It should be noted that there is no definitive list of unreasonable behaviors used in divorce Petitions. The behaviour means more than a state of affairs or state of mind. The conduct or act must be such that a reasonable man cannot endure. On what is reasonable, the Court must consider the totality of matrimonial history. See: **Ash vs. Ash (1972)2 WLR page 347.**

There are two limbs to the provision of Section 15(2)(c) of the Matrimonial Causes Act. The Petitioner should 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.

In the instant Petition, the Petitioner testified that since the marriage between the parties, the Respondent has developed grave complex and imagines that the Petitioner is inferior and not worthy of the Respondent. It is also in evidence before this Court that the Respondent carries a permanently angry face and finds it impossible to forgive or forget perceived or actual wrongs. That sometime in 2014, the Respondent picked up bitter quarrel with the Petitioner which got to a point that the Respondent tore the certificate of marriage. According to the Petitioner this is what led to the separation of parties and they started living apart.

This piece of evidence given by the Petitioner was not challenged or contradicted by the Respondent. Though the Respondent filed an Answer and Cross Petition, she did not lead evidence in support of same. In Omo – Agege v.s Oghojafor & ors (2010) LPELR – 4775 (CA), the Court held

that averments in pleadings are mere paper tigers and are not evidence. A party must lead evidence oral or documentary in support of facts stated in his pleadings. Thus the law is firmly settled that a party who does not give evidence in support of his pleadings, or in challenge of the evidence of the adverse party is deemed to have accepted the evidence of the adverse party notwithstanding the general traverse. See Akinlola vs. Balogun (2000) 1 NWLR (part 642) page 532 at 545. The Supreme Court in Newbreed Org. Ltd vs. Erhomosele (2006) LPELR – 1984 (SC) stated that such pleadings not supported by evidence, oral or documentary is deemed by the Court as having been abandoned. See also Miss Ezeanah vs. Alhaji Attah (2004) 2 SCNJ page 200 at 235. This Court will therefore deem the Answer and Cross Petition filed by the Respondent as abandoned.

However the trite position of the law in matrimonial proceedings is that, it does not matter whether a

Respondent filed an answer or not, or led evidence or not, it is still the duty of the Petitioner at the hearing to satisfy the Court by evidence of witnesses proving her case. Where the Petitioner fails to do that, the petition will be dismissed notwithstanding the fact that the Respondent failed to lead evidence. See Ibeawuchi vs. Ibeawuchi (1966 – 1979) 5 Oputa LR page 41 at 44.

The Petitioner has not shown that the conduct of the Respondent is such that he cannot reasonably be expected to continue to tolerate and cohabit with the Respondent. Marriage has always been for better or worse; it is still a gamble in which either party may not know what he or she is picking. Where, however the cruel conduct of one spouse gives rise to a state of personal danger; where the marital obligations cannot be discharged without danger of self preservation, where not only the comfort but also the health or even the life of the other spouse is placed in jeopardy, then and only in such cases can it be said that

legal cruelty entitling the other spouse to relief has been established. Then also the duty of self preservation must supersede and even displace the duties of marriage and the injured spouse will then be entitled to a decree. **Per Oputa J,** (as he then was) in **Uyelumo vs. Uyelumo & anor (1966 – 1979) Vol. 5 (Oputa LR) page 150**

In this instance, the Court is at one with the submission of counsel for the Respondent that the Petitioner failed to prove that he deserves dissolution of marriage as a result of the Respondents intolerable behaviour. This Court is not satisfied that the behaviour of the Respondent made it intolerable for the Petitioner to continue to live with her. On the flip side, it was the Petitioner who had cause per his admission under cross examination to be invited at the Police station concerning physical violence and assault meted twice on the Respondent.

In the circumstance, this Court is of the considered view that the conduct of the Respondent was not grave and weighty enough and falls short of that which will amount to a ground for dissolution under Section 15(2)(c) of the Matrimonial Causes Act.

In considering the evidence, this Court also discovered that parties in this suit had lived apart from 10/3/2015 and this petition was filed on the 8/6/2017. This is a period of more than two years immediately preceding the presentation of the petition. This is also a ground for dissolution under Section 15(2)(e) of the Matrimonial Causes Act. It is noted that the Respondent did not object to the prayer for dissolution of the marriage. Infact both learned counsel are agreed on the fact that parties had lived apart for more than two years. The law is once it is shown that parties to a marriage have lived part for a period of two years preceding the presentation of the petition and the Respondent does not object to the grant of

dissolution, then the Court has no discretion in the matter, but to grant dissolution. See Omotunde vs. Omotunde (2001)9 NWLR (Part 718), Santos vs. Santos (1972)2 WLR page 289. The Court held in Pleasant vs. Pleasant (1971)1 All ER 587, that separation or living apart *"is undoubtedly the best evidence of break down and the passing of time, the most reliable indication that it is irretrievable."*

I hold therefore that the marriage has broken down irretrievably pursuant to Section 15(2)(e) of the Matrimonial Causes Act and I order that a decree nisi shall issue which shall become absolute upon the expiration of three months.

The Petitioner has prayed for custody of the only child of the marriage. Generally, in deciding the issue of custody, the best interest of the child is what the Court seeks to achieve. The question here is, what will be the best interest of the child in this circumstance? In the case of Otti vs. Otti (1992)7 NWLR (Pert 252) 187 at 210, the Court of Appeal defined custody as essentially concerning the care, control

and preservation of a child physically, mentally and morally, it also includes responsibility for a child with regard to his needs like food, clothing, instruction and the likes see also Alabi vs. Alabi (2008) All FWLR (Part 418) page 245.

Section 71(1) of the Matrimonial Causes Act provides as follows:

> *"In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage the Court shall regard the interest of those children as the paramount consideration, and subject thereto, the Court may make such order in respect to those matters as it thinks proper."*

See also Section 1 of the Child's Right Act (CRA) 2003.

The issue of custody is delicate and of very high importance because it touches on the welfare of children, and any decision taken will determine their future, which is

the reason the Court places very serious priority on it. Where a party seeks custody of a child of the marriage he is required to set out the proposed arrangement for accommodation, welfare, education, upbringing and other arrangement for the child. At any rate, the determining factor ought to be what is best for the child.

In this instance, the Petitioner did not state the arrangement he has made for the child. Furthermore, under cross-examination the Petitioner admitted that the Respondent has been solely responsible for the payment of school fees and general upkeep of the child. He also said that the Respondent has denied him access to the child and he cannot recognize his daughter because he has not had access to her.

From the records, the only child of the marriage is a female and barely 6 years old. The child has always been living with the Respondent, eventhough the Petitioner said the child is left with the Respondent's mother. The question

is what arrangement has the Petitioner made regarding the custody of the child. This Court particularly notes that the child is a minor and psychologically need both the mother and the father figure presence for her to be nurtured to wholesome development. This, in the view of the Court is paramount and weighs much in the mind of the Court.

Therefore neither of the parties, nor the Court can tamper with that right. In the circumstance, and because of the bond that has already developed between the Respondent and the child, I hold that the best interest of the child Divine Ojone Wada will be better served if she remains in the custody of the Respondent, her mother. The child however needs to know and bond with her father. In that regard, I order that unhindered access be granted to the Petitioner. And the child in question shall be encouraged by the Respondent to spend some festive periods with her father (the Petitioner).

Hon. Justice M.A. Nasir

Appearances:

Parties in Court

D.A. Momoh Esq – for the Petitioner

Ademola A. Adeniran Esq – for the Respondent