IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS FRIDAY THE 24TH DAY OF SEPTEMBER, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

PETITION NO: GWD/PET/17/19

BETWEEN:

MR. EMMANUEL AYODELE OBAJUWONLO .....PETITIONER

AND

MRS. RHODA OLUWATOYIN OBAJUWONLO .....RESPONDENT

JUDGMENT

The Petitioner's claims against the Respondent as endorsed on the Notice of Petition dated 21st August, 2019 are as follows:

a. **A DECREE of dissolution of the marriage on the grounds that the marriage has broken down irretrievably and the Petitioner finds it intolerable to live with and cannot reasonably be expected to live with the Respondent.**

b. **And any such further Order(s) as the Honourable Court may deem fit to make in the circumstance.**

The Respondent filed an Amended Answer and a Cross Petition dated 13th July, 2020 where she sought for the following orders:

a. **A DECREE of dissolution of marriage between the Respondent/Cross-Petitioner and the Petitioner on the grounds that the marriage has broken down irretrievably and the Respondent/Cross-Petitioner finds it intolerable to live with and cannot be reasonably expected to live with the Petitioner.**

b. **An Order of court granting custody of the children of the marriage to the Respondent/Cross Petitioner.**

c. **An Order mandating the petitioner to pay the sum of N100,000.00(One Hundred Thousand Naira)only, monthly to the Respondent/Cross-Petitioner for the welfare, maintenance and upkeep of the children of the marriage.**

d. **A Declaration that the Petitioner shall be responsible for the education and healthcare of the children of the marriage.**

e. **An Order mandating the Petitioner to pay the sum of N1,500,000:00(One Million Five Hundred Thousand Naira) Only being the value of the Respondent/Cross-Petitioner's wound up business.**

f. **A Declaration that the two storey building situate at CDA 55A Latikay, bus stop, Lusada Road, Ogun State, is jointly owned by the parties.**

g. **An Order that every rent collected from tenant occupying the property situate at CDA 55A Latikay, bus stop, Lusada Road, Ogun State, shall be shared equally by the parties.**

h. **An Order prohibiting the Petitioner from ever selling, transferring or conveying the property situate at CDA 55A Latikay, bus stop, Lusada Road, Ogun State, without a written consent of the Respondent/Cross-Petitioner.**

The Petitioner filed a Reply to the Respondent's Amended Answer and cross petition dated 6th November, 2020.

In proof of his case, the Petitioner testified in person as PW1 and the only witness. The substance of his evidence is that he got married to his wife, the Respondent at the marriage Registry Office Ado Odo Ota, Sango Ota Ogun State on 22nd January, 2011. A copy of the marriage certificate of parties dated 22nd January, 2011 was admitted as **Exhibit P1.**

PW1 stated that after the marriage, they cohabited initially in Ogun State before moving to the FCT in 2016. That the marriage is blessed with 2 children:

1. Miss Janet Obajuwonlo who is now 4 years old and:

2. Miss Dorcas Obajuwonlo who is 2 years old.

The Petitioner stated that he is seeking for a dissolution of the marriage because of his disenchantment with the marriage. That the Respondent has become intolerable since the birth of their first child in 2013. That his wife has no respect for him or the marriage and does not abide by his instructions or directives but rather listens to her family members and her pastors.

That he tried to bridge the gap but because she is influenced by outsiders, his efforts were unsuccessful. That the marriage has broken down completely and irretrievably.

That he wants custody of the children and will take care of their education, feeding, health and provide shelter for them. That there is no property between them. Finally that he wants the marriage dissolved.

Under cross-examination, PW1 stated that before he filed the petition, he was responsible for taking care of the feeding, health and shelter of his children. That he paid for the rent where they stayed at Gwagwalada and that the rent for the apartment was **N420,000**. PW1 stated that he does not have any 2 storey building in Ogun State and does not have any landed property of his own.

PW1 stated that he is aware that his wife and the children were evicted from the FIGA Housing Estate they were staying. He further stated that he is not aware that the Respondent had any business when they were staying together. He stated that his take home pay after all deductions is **N300, 000** per month.

He stated further that his wife is a graduate but has never been gainfully employed. He stated that the house they stayed at FIGA was a 2 bedroom flat. That **N50,000** will be enough to take care of his children monthly.

With the evidence of the Petitioner, his case was then closed.

The Respondent testified as DW1 and the only witness in respect of her answer and cross-petition. She stated that she was formerly residing at FIGA Estate at Gwagwalada but has relocated to Ibadan now and does not do anything for a living.

She stated that they got married on 22nd January, 2011 at Ado Odo Ota, Sango Ota in Ogun State and that she knows that the Petitioner filed this action to dissolve the marriage. That she agrees to the divorce or dissolution of the marriage.

She stated that when they got married in 2011, they lived happily until after the birth of her daughter in 2013. That her mother in-law was unhappy because she had not informed her about the pregnancy and her daughter died in 2014. That it was not easy for her to conceive and she had several miscarriages which made them agree with her husband, the petitioner, that anytime she is pregnant again, that nobody will be informed.

DW1 stated that she finally conceived and gave birth in 2016. That her mother in-law was again angry for not been informed about the pregnancy. That they begged her mother in-law and her family also begged her telling her that even the Respondent's mum was not informed. That the mother in-law kept complaining that she, the Respondent wants to take her son from her and since then, there has been no peace in the marriage and that nothing she does is ever appreciated by his family. That she was enduring, thinking things will improve but there was no improvement.

She stated that the Almighty blessed her again with another baby and again they did not tell anybody. The mother in-law was again angry for not been informed and she rained curses on the Respondent and that her husband, the Petitioner joined his family members in making life unbearable for her. That the Petitioner suddenly asked for a divorce and she begged him and even went to his lawyer but that the Petitioner insisted he wants a divorce.

She further stated that the Petitioner left the matrimonial home in August, 2019 and abandoned her and the children and stopped feeding them and also stopped paying school fees and that in September, 2019, he came with hoodlums and packed away everything from the house, including the bed, T.V, DSTV, gas cooker etc and she reported the matter to the police station.

The Respondent stated that the Petitioner left them in the house till the rent expired in February, 2020 when they were forced to move out since the Petitioner did not renew the rent and she had to relocate to Ibadan with the 2 children of the marriage: Janet who is now 4 years and Dorcas who is 2 years. That they presently attend a private school in Ibadan. The first daughter Janet is in Nursery 2 while Dorcas is in pre-nursery. She stated that before the Petitioner filed for the divorce, he was paying school fees but since he left, she paid school fees for the 1st daughter once but that there are still outstanding school fees to be paid in the new school they now attend, Grace Field Private School. That she wants the girls to remain in her custody as they are still of tender age and that the father does not have the time for them. That when they were together, he gave her N50,000 for the monthly up keep for the house while he does other things. That he equally paid for the rent/accommodation.

She further stated that before they got married, she was into business of selling different soft drinks on wholesale and continued after the marriage because she said that the Petitioner told her not to look for a job despite the fact that she is a graduate who read accounting education at Olabisi Onabanjo University Ogun State. That he told her to concentrate on the business as it is lucrative.

She further stated that she advised him to buy a land which he bought for N500,000 at No. 55A Lahkay Igbasa Ogun State and they started building the house. That Petitioner was earning much but with what she was earning in her business, she contributed to the building of the house which is a 2 storey building with 2 bedrooms on both floors. That they moved to the house in 2014 even though it was not plastered, no toilets and no water. That they normally get water from their neighbours. That the value of her business then was **N1.500,0000**.

The Respondent further testified that her husband was transferred to Abuja in 2015 and he left her with her daughter but that he later asked her to join him in Abuja and she had to sell her business, the bottles, freezer and with the proceeds, they were able to roof the top floor of the 2 storey building. That while staying in the building, they were on the down floor. That the proceeds from the sale of her business was further used to put the house in order and they put tenants in it so that the house will not be empty.

The Respondent tendered in evidence the following document:

1. Cash receipt issued by Dayfol Basic School dated 28th January, 2019 and 20th January, 2020 were admitted as **Exhibit D1 a and b.**

2. 8 cash invoice receipts issued by Eriltesy Nig. Ltd in the name of Respondent were admitted as **Exhibits D2 (1-8).**

3. The school fees bills issued by Grace Field Private School for the two (2) daughters of the marriage were admitted as **Exhibits D3 and D4**

DW1 then gave a breakdown of the fees in the Exhibits for each term and finally then urged the court to grant all her claims in the cross- petition.

Under cross-examination, the Respondent stated that she sold the business in 2015. That she met her husband after she finished secondary school. She got married in 2011 and finished NYSC in 2013. That when she met her husband, he was not doing any business. That he did not assist her in any way when she was in school and also did not assist her family.

She stated that she went to the Gwagwalada Social Welfare Unit to complain when he came and packed things away from the matrimonial home. That she did not ask for his permission when she changed the school of the children.

That she has proof to show they built a house but she does not have it in court. That if the husband is to pay school fees, he has no right to determine the school the daughters attend.

With her evidence, the Respondent closed her case on the defence to petition and cross-petition.

The parties then filed and exchanged final written addresses. The Respondents final address is dated 19th February, 2021 and filed same date at the court's Registry. Two issues were raised as arising for determination as follows:

"1. **Whether this Honourable Court have the power to dissolve the marriage between the parties herein, the both parties having shown that the marriage has broken down irretrievably.**

2. **Whether the Respondent has satisfied the burden of substantiating her claims in her cross petition with credible evidence."**

The Petitioner on his part filed his address dated 8th March, 2021 and filed same date at the Court's Registry. Only one issue was distilled as arising for determination thus:

a) **Whether having regards to the circumstances of this case, the petition and cross petition have merit and their reliefs ought to be granted as sought.**

In the court's considered opinion and having considered both the petition and the cross-petition, the evidence and submissions of Counsel, two similar or identical issues arise for determination, to wit;

1. **Whether the petitioner has on a preponderance of evidence satisfied the legal requirements for the grant of his petition.**

2. **Whether from the evidence before the court, the respondent/cross petitioner is entitled to the reliefs sought on her cross-petition.**

The above issues has brought out succinctly and with clarity the point of the contest that has been brought to court for adjudication. Issue 1 raised by court conveniently takes care of all issues raised by petitioner arising from his petition while issue 2 does same for respondent/cross-petitioner. It is on the basis of the above two issues that I will now proceed to consider the evidence and submissions of Counsel.

ISSUE NO. 1

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

I shall treat the issue of dissolution of marriage raised by both sides together because of the confluence of facts on the issue. Now from the petition and the evidence led, the Petitioner from his petition seeks for the dissolution of the marriage on the ground that the marriage has broken down irretrievably and the Petitioner finds it intolerable to live with and cannot reasonably be expected to live with the Respondent. The Respondent/Cross Petitioner equally situates her cross petition on the same ground but slightly different facts vide paragraph 14 of the cross petition.

Now in the **Amended answer and cross petition of the Respondent**, the Respondent pleaded in paragraph 1 and 2 as follows:

1. **The Respondent admits paragraph 10 of the petition to the extent that the marriage between her and the petitioner has broken down irretrievably but contends that the Petitioner caused the breakdown of the marriage and denies the grounds put by Petitioner.**

2. **The Respondent denies paragraph 10a, b, c, d, e and f of the facts contained in the petition and puts the petitioner to the strictest proof thereof.**

The entirety of the remaining **paragraphs 3-13 of the Answer** then accentuated the contrary position that it is the Petitioner that caused the breakdown of the marriage. The implication of the above pleadings is that while she concedes that the marriage has broken down irretrievably, she however has categorically joined issues with the reasons advanced by Petitioner for the breakdown of the marriage. It is precisely because she does not agree with the Petitioner on his reasons for the dissolution and by implication joining issues with him that she filed not only an answer but a **cross petition** which is a **distinct claim** seeking for a dissolution of the same marriage on different facts and grounds contrary to that advanced by petitioner.

It is therefore erroneous as submitted by Petitioner that no issue was joined by Respondent with respect to his relief on dissolution of marriage. At the risk of sounding prolix, the Respondent stated categorically above (paragraph 1) **"…that the petitioner caused the breakdown of the marriage and denies the grounds put by petitioner"** and in paragraph 2, she denied specifically **"…paragraphs 10 a, b, c, d, e and f of the facts contained in the petition and puts the Petitioner to the strictest proof."**

In order to raise any issue of fact, there must be a proper traverse; and a traverse must be made either by a denial or non admission, either expressly or by necessary implication. Traverse in legal proceedings implies making a denial of pleaded facts. The law is that any traverse must be specifically pleaded so that the claimant is put on sufficient notice of the case he is to meet. Indeed the law has always been that in respect of essential and material allegations, there should be no general traverse, but rather they should be specifically traversed. See **Eke V. Okwaranya (2001)12 N.W.L.R (pt.726)181 at 203, 205 D-F; Adesanya V. Otuewu (1993)1 N.W.L.R (pt.270)414 at 455 G-H.**

In this case as demonstrated above, there is no doubt that Respondent has specifically denied the very basis of the claims of Petitioner on which he anchored his petition and therefore the contention that no issues were joined on the point on which considerable ink was spent in the final address of petitioner clearly will not fly. It is trite principle of the general application that where issues are joined in averments in pleadings, evidence is required to prove the contested assertions. The position of the law is clear that where an issue is specifically joined by parties over a matter in dispute, it is the person who has the burden of establishing that issue that must adduce clear and satisfactory evidence to prove same. Where he fails to do so, the issue is resolved against him. See **ONWUCHEKWA v. EZEOGU (2005) 18 NWLR (Pt. 799) 337.**

Similarly in law, it is also settled that it is one thing to aver a material fact in issue in ones pleading and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established

by credible evidence unless same is expressly admitted. See **TSOKWA OIL MARKETING CO. LTD v. B.O.N LTD. (2002) 11 NWLR (Pt. 777) 163 at 198A; AJUWON v. AKANNI (1993) 9 NWLR (Pt 316) 182 at 200.**

The combined effect of all these decisions is simply that it is only where a duly pleaded material fact is denied or disputed that an issue for determination or issue in dispute can be said to arise. As a necessary corollary, it follows also that it is only then that the onus of he who asserts proving can even be said to arise too. On the authorities, an issue in dispute between parties is an assertion of right, claim, or demand or one side which is met by contrary claims or allegations on the other side. See **ERHUNMWUNSE v. EHANIRE (2003) 13 NWLR (Pt 827) 353 at 373 (S.C).**

The burden clearly was on the both parties to therefore prove creditably the contents or the averments in both the petition ad cross petition. 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.**

In this case both the petition and cross petition were brought essentially within the purview of **Section 15(2)c of the Matrimonial Cause 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 in evidence, the Petitioner essentially only repeated what he averred in his pleadings vide paragraph 10(a) – (g) which the Respondent joined issues with in

her Answer. He stated that he is disenchanted with the marriage due to continuous disrespect by Respondent and failure to adhere to his instructions and directives and she listens only to her family and pastors for decisions in running the family. Beyond this evidence, nothing was really presented or streamlined showing what directive or instructions was given that was continuously disregarded by Respondent and how this then negatively impacted on the marriage. No single incident of disrespect or disregard for the instructions and feelings of Petitioner was identified before court. If the Respondent acts only on instructions of her family members and pastors over family matters, who are these family members and pastors? What is this family matter(s) which she acted on the instructions of these undefined and unidentified people contrary to the instructions of Petitioner? The evidence was curiously silent on the identity of these people.

The complaint of petitioner on the allegation of been deprived of "sexual intimacy" raises more questions than answers on the evidence. If the Petitioner has been "deprived of sexual relations from the Respondent from the first date of the marriage till date" vide paragraph 10(f), how then does one explain the various miscarriages Respondent had which the Petitioner in his reply to the Answer did not join issues with at all.

Again how does one explain the **two issues** of the marriage? In the reply to the answer, the Petitioner in **paragraph 3** stated that this was a result of the "few opportunities he had which led to the pregnancies." If that is the position in the reply, then it cannot be correct as pleaded in the petition that he has been deprived of "**sexual relations with the Respondent from the first date of the marriage till date."** Again this pleading is controverted by the Petitioner himself when he stated in evidence that the problem with the Respondent started after the death or **"loss of their first child in 2013 when the baby was 13 months old"**. So logically and prior to 2013, nearly 2 years after the marriage in 2011, the couple had no problem including the complaint of denial of **"sexual relations"** which petitioner pleaded began **"from the first date of marriage till date".**

On the whole it is clear that the Petitioner has not creditably established by evidence of value to the reasonable satisfaction of the court his entitlement to dissolution of the marriage on the facts/grounds pleaded within the threshold as earlier streamlined under **Sect5ion 82(1) and (2) of the Matrimonial Cause Act.**

With the failure of the relief for **dissolution of marriage by Petitioner** which is the only relief in his petition, there is now both factual and legal basis to consider the same relief sought by the cross-petitioner. This is because the principle has always been that where the court dissolves a marriage on the petitioner's petition where there is also a cross-petition by the respondent, the respondent's prayer for dissolution of the marriage becomes idle for there is nothing left to be dissolved on the respondent's cross-petition. The maxim is *Ex nihilo Nihil Fit* (something cannot be put on nothing and expect it to stand) see **OTTI v. OTTI (1992) 7 NWRL (Pt 252) 187 at 208.**

Where the main petition for dissolution however fails as in this case, then the court will now consider and determine the cross petition for dissolution of the marriage.

On the part of the Respondent/Cross Petitioner, the facts put forward to support the dissolution of the marriage are contained in paragraph 14 a-c of the cross petition thus:

14. The Respondent/Cross-Petitioner is not oppose to the Petitioner's claim for dissolution of the marriage on the ground that the marriage has broken down irretrievably on the basis of the following:

a. That since the marriage, the Petitioner has conducted himself in a manner that the Respondent/Cross-Petitioner cannot be reasonably expected to live with the Petitioner.

b. Cruelty and

c. Lack of love

The burden was equally on the Respondent to prove the contents of this aspect of the cross petition on the same threshold of proof earlier streamlined. Now in evidence, the allegations of harassment leveled against the mother of the Petitioner by Respondent borne out of the alleged failure to inform her whenever the Respondent conceives or gets pregnant and that the Petitioner supported his mother and made her life and the marriage unbearable and unhappy which were denied by Petitioner were not creditably established by Respondent. Her evidence in that

respect was met by the evidence of the Petitioner who countered otherwise that he is loving and caring.

In such circumstances, someone should have been produced privy to these developments to give evidence to tilt the scale of evidence one way or the other, particularly here where Respondent stated that her family members even intervened in the matter and "begged" the petitioner's mother and told her that even the Respondent's mother was not informed about the pregnancy.

In my opinion at least one member of the family of Respondent involved should have given evidence in this case. What however is clear from the trajectory of the narrative on both sides is that clearly at some point in the marriage, there were difficulties in the relationship which culminated in the petitioner leaving the matrimonial home in May, 2019. In **paragraph 13** of the Amended answer to the Petitioner, the Respondent pleaded as follows:

"13: The Respondent states that sometimes in May, 2019, the Petitioner brought some hooligans to the matrimonial home and they left with all his belongings and the electrical gadgets in the house including, the television set, DSTV Multi-choice decoder and power Generator."

In the Reply filed by the Petitioner, he pleaded in paragraph 4 thus:

"The petitioner denies paragraph 8 to 13 of the Amended answer and put the Respondent to the strictest proof."

I had earlier in the main petition treated the import of a traverse. The traverse of Petitioner in paragraph 4 above to the allegation of Respondent that he sent hooligans to the matrimonial home to remove all his belongings is clearly a mere denial, insufficient and contrary to the rule that every defence, reply or answer to an averment in a pleading must be pleaded specifically. The effect of the Rule is for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to prove. In other words essential allegations should be specifically traversed. See **Salisu V. Odumade (2010)6 N.W.L.R (pt.1190)228 at 238-239 G-A.** A denial of a material allegation of fact therefore must not be general or evasive but every allegation of fact if not denied specifically

or by necessary implication shall be taken as established at the hearing. See **Oshodi V. Eyifunmi (2000)12 N.W.L.R (pt.684)298 at 337B.**

In this case, flowing from the above and on the unchallenged evidence, there is no doubt that the petitioner has indeed left the matrimonial home and removed all his belongings. The petitioner himself agreed under cross-examination, that he cohabited with Respondent at FIGA Housing Estate and that he is aware that the Respondent and his children have been evicted.

It is equally obvious on the evidence, that the Petitioner has stopped paying the rent for the apartment which he himself under cross-examination stated was N420,000 which led to the eviction of his wife and the children and the complete dislocation of the hitherto stable family life, his wife and children were living which led to their relocation back to Ibadan. The petitioner was ware that the tenancy was about to expire yet refused to take steps to renew or secure a new accommodation for them. He was equally aware of the eviction but did nothing to alleviate the inconvenience and embarrassment they will certainly have gone through during the eviction. The conduct of Petitioner here appears particularly cruel when he himself stated that though his wife is a graduate but that she is not gainfully employed. The question is if she is not gainfully employed, how is she to pay for the rent of the apartment or get new apartment in the F.C.T and properly take care of the children. The actions of Petitioner leaving his family stranded, as it were, clearly is an exhibition of extreme ill treatment and complete lack of love and care for both the wife and his children.

Again it is strange that even after the eviction and their relocation to Ibadan, the Petitioner did not take any identified steps to ensure their comfort and safety as they relocated and to know what happened to them when they got to Ibadan.

All these streamlined actions by petitioner show conduct which the Respondent cannot be reasonably expected to live with in an institution which ought to be a bastion of love and care. A marriage in such circumstances can be said to have broken down irretrievably.

Cruelty it must be stated is a conduct which is grave. It could be physical or mental meted out to a partner and it is sufficient to be described as a behavior unacceptable in a marriage. The accumulation of acts of ill treatment causing or likely to cause a breakdown under strain certainly constitutes cruelty. See **Bibilari V. Bibilari (2011)13 N.W.L.R (pt.217)232 A-B; Damulak V. Damulak (2004)8 N.W.L.R (pt.874)151.**

On the whole, it is clear that this marriage exist only in name. As stated earlier, any of the facts under **section 15(2) a-h of Matrimonial Cause Act** if proved by credible evidence is sufficient to ground a petition for divorce. The prayer for divorce under the cross petition clearly falls within the purview of **Section 15(2)c** and has been creditably established by the Respondent. The marriage in this case has no doubt broken irretrievably and parties clearly have no desire to continue with the relationship. 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, especially here where they have a shared bond through the two (2) lovely kids of the marriage.

Relief (a) on the cross petition succeeds.

I will now accordingly proceed to consider whether the Respondent has satisfied the legal requirements for the grant of the other reliefs sought by her in the cross-petition.

Relief (b) seeks for an order of custody of the children of the marriage. This is not an issue to waste time on since no issue was joined on it or the pleadings. Indeed the Petitioner concedes or agrees that the Respondent/Cross Petitioner who has been in custody of the young and tender children of the marriage who are 4 and 2 years respectively should have custody. In paragraph 14 of his petition, he stated or pleaded as follows:

"CUSTODY

The Petitioner will allow the Respondent to take custody of the two children, while the Petitioner provides for their welfare."

Although the Petitioner in evidence stated he wanted custody, but this was evidence clearly at variance with his pleadings and thus inadmissible. The law is settled that evidence of any facts which are not pleaded in a given case is not admissible for it would have no foundation to support it. Indeed any evidence of a matter not pleaded will have no bearing on the decision. See **Okoko V. Dakolo (2006)14 N.W.L.R (pt.1000)401 at 422A; Balogun V. Adejobi (1995)2 N.W.L.R (pt.376)131 at 158F.** The evidence of Petitioner that he now wants custody is clearly not based on the facts he pleaded and therefore such evidence goes to no issue. See **Adesanya V. Otuewu (1993)1 N.W.L.R (pt.270)414 at 438F.**

In the circumstances, since there is no issue raised on the question of custody arising from the pleadings, the interest of justice will be better served to leave the young children with the mother, the Respondent/Cross-Petitioner. It does not appear fair or right to make any alterations or cause any further dislocations to their young life at this point or stage. **Relief (b)** has merit and is granted.

Relief (c) mandating the petitioner to pay N100,000 monthly for the welfare, maintenance and upkeep of the children and **Relief (d)** seeking a declaration that the Petitioner shall be responsible for the education and healthcare of the children of the marriage will be taken together particularly on the context of the concession of Petitioner in the same **paragraph 14** of his petition (above) that he will provide for their **"welfare."** Indeed in evidence, the petitioner stated that he has always been responsible for **"taking care, feeding, health and shelter of my children"** and indeed he was also the one who was paying rent for the family home at FIGA Housing Estate, Gwagwalada.

There is therefore no reason why the Petitioner should not continue to live up to his responsibilities particularly where here again, the evidence is clear that the Respondent/Cross Petitioner though a graduate is not **gainfully employed**. The only issue is the fair amount to be awarded monthly in the circumstances for maintenance. The cross-petitioner as stated earlier claims N100,000 monthly.

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 this case, all the Respondent/Cross Petitioner in paragraph 36 of her cross-petition pleaded is that the petitioner works with Nestle Bottling Company in Abaji, Abuja as the **"Supply Chain Manager and is well paid in the Region of N400,000."**

In evidence, nothing was really put forward to substantiate the above averments. The manner in which the amount he earns was described to wit: **"...in the region of N400,000"** indicates absence of certainty on the earnings of petitioner.

The evidence here clearly is insufficient with respect to the means and earning capacity. 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 cross-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 respondent 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.

Notwithstanding the flaws mentioned above particularly as regards the fact that no satisfactory evidence of petitioner's means has been adduced in this case, I however 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."***

Now as stated already in this judgment, in assessing maintenance, it is a discretion that obviously is to be exercised judicially and judiciously. I must however also state for the sake of clarity and to avoid confusion bearing in mind the observations I made in this judgment that there was no clear pleading and evidence on the claim of maintenance that the order of maintenance is not to be likened to a claim for special damages where the claimant must strictly prove his entitlement to such an award before same can be awarded by court. See **NANNA v NANNA (SUPRA) 41 D.**

I must state that the observations made by court is simply to 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.

I do not think that in law the order for maintenance fee in the sum of ₦100,000.00 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 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 saving grace in this case is that the petitioner under cross-examination stated that his earnings after all deductions is **N300,000** per month. There is no counter-evidence by the Respondent cross-petitioner challenging or impugning this earning. I therefore accept the sum of **N300,000** as the take home earning of petitioner monthly, after deductions. The economic indicators are no doubt difficult in Nigeria, but the claim of **N100,000** monthly allowance for the two children appear to me excessive in the light of other obvious important and competing priorities and the fact as earlier alluded to that there is nothing in evidence to show the standard of life parties lived before they parted company. In deciding the award to make, i have taken into consideration the evidence of PW1 that N50,000 will be enough to take care of his children monthly.

I have equally noted the concessions made by Petitioner through his final address vide paragraphs 4.19, 4.20 and 4.21 to the effect that he will provide for the welfare, maintenance, education and health care and up keep of the marriage in addition to providing food and other basic needs of the children.

This is in addition to the pleading in par 12(a) where the Petitioner stated thus:

"The Petitioner has agreed to provide shelter, feeding and school fees for his children as long as he lives."

The above is clear and in my opinion speaks volumes as to the disposition and attitude of Petitioner to do the needful for his children notwithstanding the parting with their mother.

I have equally noted the entries in the school bills **Exhibits D3 and D4** tendered by the Respondent and the amounts covering fees for 1st and 2nd terms for the 2 children at Grace Field Private School, Akobo in Ibadan. I have carefully read the entire pleadings of Respondent and there is no where it was pleaded that the children attend the said **Grace Field Private School** in Ibadan and her pleadings was not amended at any time. In the Answer to the Petition and cross petition, the schools the children were said to attend is **Dayfol Basic School**. If there was a relocation and schools were then changed, there has to be an amendment to reflect theses to allow for reception of these pieces of evidence. Again the law is settled that evidence led of matters not pleaded goes to no issue.

There is however nothing in the relief of cross-petitioner where she claimed any specific amount for the education and health care of the children of the marriage. Indeed what was sought was even a declaration that the Petitioner be responsible for the education and health care of the children. No more.

The only point to make and which the court must point out is the wide disparity between the fees paid while the two children were in Abuja F.C.T and the fees been charged in the schools they are now attending at Ibadan.

By **Exhibit D1(a)** the school fees paid for the 1st daughter Janet Obajunwolo while she attended Dayfol Basic School was **N41,000** for first term compared to the amount now charge at Grace Field Private School, **Exhibit D3** which is now about **N92,500** nearly double what was paid when they were in Abuja.

By **Exhibit D1(b)** what was paid as 2nd term fees for Janet was N21,000 compared to the N42,500 now been paid in Ibadan. The Respondent it must be stated do not enjoy the liberty to take the children of the marriage to schools clearly beyond the capacity of the father. I leave it at that.

In the circumstances, since the Petitioner has always been responsible for the educational needs of his children and has agreed to keep up with his

responsibilities the court will make appropriate orders in the interest of justice to take care of their specific need(s).

Having regard to the above and what is fair and equitable, particularly the difficult economic realities of the present day and indeed also the competing societal realities and expectations of the African Society and or the extended family responsibilities which are all factors that can conveniently come within the purview of "all other relevant circumstances" under **Section 70(1) of the Act**, I am of the considered opinion that the sum of ₦60,000.00 monthly is reasonable under **Relief (c)** for the maintenance of the two children of the marriage. **Relief (d)** will be granted but on terms as formulated hereunder.

Relief (e) is for an order mandating the Petitioner to pay the sum of N1, 500,000 only being the value of the Respondent/Cross-Petitioners' wound up business.

Now again, and as stated severally in this Judgment, credible evidence must be led to support averments pleaded in a claim or cross petition as in this case. It is the case of the cross-petitioner that she had a provision store where she carried on a medium scale business with a value of N1,500,000 which Petitioner prevailed on her to wind up. Now on the evidence, nothing was really produced by the cross petitioner situating this business, its value and how the Petitioner led to it been wound down. These are not matters that can be left to speculation and or conjecture or guess work.

Yes, the petitioner may have tendered invoices vide **Exhibits D2(1-8)** to show supplies made to her but the receipts for 2014 and the total amount for the 3 receipts for example vide **Exhibit D2(1)** dated 8th July, 2014 for N138,000; **Exhibit D2(2)** dated 15th May, 2014 for N138,000; **Exhibit D2(3)** dated 21st October, 2014 for N60,000; do not show a business of the value of **N1,500,000**. Again the 3 receipts tendered in 2015 vide **Exhibit D2 (4)** dated 16th May, 2015 for N95,500; **Exhibit D2 (5)** dated 20th February, 2015 for N103,000 and **Exhibit D2 (6)** dated 14th January, 2015 for N94,500 do not support the claimed value of the business. Finally, the receipts for 2016 vide **Exhibit D (7)** dated 13th January, 2016 for N149,000 and **Exhibit D2(8)** dated 9th February, 2016 for N103,500 equally do not support the value of the business claimed by Respondent.

These receipts clearly only show that the Respondent engages in some form of business but there is nothing put forward showing or streamlining the value of the business.

Most importantly, the Respondent stated that when the Petitioner told her to join him in Abuja, she sold the business including bottles, freezer etc. It is strange that absolutely no evidence of this sale was demonstrated in court and to who these items were sold and for how much. If this was done, it will have given the court some insight as to the value of the business.

Again, it is to be noted as Respondent stated that when Petitioner was transferred to Abuja, he asked her to join him. This is not an unusual demand in any marriage. It is difficult therefore in the situation to envision in the absence of credible evidence any forced directive to wound up the Respondent's business as alleged. In any event, the court cannot fathom any difficulties in continuing with the same business in the event of the relocation. It is really difficult on the basis of absence of evidence to situate any valid ground(s) to sustain this relief. It is unavailable.

Relief (f), is a declaration that the two storey building situate at C.D.A 55A Latikay, Bus stop, Lusada Road, Ogun State is jointly owned by the parties.

The Respondent may have in her evidence alluded to the fact that she advised the Petitioner to buy the said plot and contributed in the building of same; but unfortunately there is nothing in evidence to support the purchase of any land or even any building on any land. The Petitioner both in his petition and cross-examination stated categorically that he does not have a storey building in Ogun State and also that he does not have any landed property of his own.

It is logical to hold that for the court to hold that any property is jointly owned, there has to be credible evidence of the existence of the land and building first.

There is in this case absolutely no evidence of the existence of any **allocation of land** or **property** either in the name of Petitioner or Respondent. There is equally no sale agreement or deed of assignment disclosing the sale of land to Petitioner by anybody. Nobody was produced by Respondent to support her case that any property was built jointly by parties and where it was built or even evidence that she contributed to the building of any property. The point to **underscore** is that a

declaration as sought here is not granted as a matter of course. It is equally not granted on admissions in pleadings or the stance of the adversary as wrongly or erroneously submitted in the Reply address of Respondent. A party seeking **declaratory relief** must adduce credible evidence upon which the relief is granted or denied, notwithstanding that there is even on admission in the Defendant's pleadings which is not even the case here. The court has to be satisfied on the evidence led by the party that he is entitled to the declaratory Relief sought. The claimant must succeed on the strength of his case, and not on the weakness or even admission of his opponent. See **Onoro v. Musa (2014)14 N.W.L.R (pt.1427)391; Morunwase V. Sorungbe (1988)5 N.W.L.R (pt.92)90.**

In this case there is absolutely no scintilla of evidence to situate that any **two storey building is situated at CDA 55A Latikay bus stop, Lusada Road Ogun State which exists and is jointly owned by parties**. In conclusion on this point, the contention by Respondent that because the parties cohabited at the said house from **2013 – 2015 in paragraph 7 of the Petition** meant that the house belongs to Petitioner must be dismissed without much ado. The fact of cohabitation in a premises is not an allocation paper sale agreement, Deed of Assignment or a certificate of occupancy over the property; and neither does it without more translate to ownership. If it were otherwise, why did the Respondent not lay claim to the other 4 houses they cohabited in between **2016 to 2019** pleaded in paragraph 7 of the same petition and also in **paragraph 18 of her Answer and Cross Petition**. The rather misplaced enthusiasm in seeking to aggregate cohabiting in a place to ownership without more most be discountenanced and dismissed as completely lacking in merit. **Relief (f)** thus fails.

With the failure of **Relief (f)**, the **Relief (g)** for sharing of rent collected from the premises must equally fail. If there is no evidence of the existence of the house in the first place and shown to belong to petitioner, from where will rent be collected? I just wonder. Again the Respondent did not present any documentary evidence showing for example a tenancy agreement between the Petitioner and any tenant in respect of the said property. If a tenancy agreement was tendered, it will have perhaps given some indication as to the existence of the property in the first place; who the landlord is and the rate of rent for the tenancy. In such very unclear circumstances, the claim for sharing of rent covered by **Relief (g)** must fail.

With the failure of both **Reliefs (f)** and **(g)**, the final **Relief (h)** seeking to prohibit the Petitioner from selling the property without the written consent of Respondent clearly has no foundation and must equally fail. An order of prohibition cannot be granted in a vacuum.

Without a positive establishment of the existence of any property in the first place, any claim seeking to prevent the sale of a non existence property is clearly a redundant claim. **Relief (h)** equally fails.

In the final analysis and in summation, having carefully evaluated the evidence adduced on both sides, I accordingly make the following orders:

ON THE PETITION:

1. **The petition fails and is dismissed.**

ON THE CROSS-PETITION:

1. **I grant an order of Decree Nisi dissolving the marriage celebrated between the Petitioner and Respondent on 22nd January, 2011.**

2. **The Respondent/Cross-Petitioner is granted custody of the two children of the marriage: Miss Janet Obajuwonlo born on 12th February, 2016 and Miss Dorcas Obajuwonlo born on 31st March, 2018.**

3. **It is hereby ordered that the Petitioner shall contribute the sum of N60,000 (Sixty Thousand Naira) monthly towards the welfare, maintenance and up keep of the two children of the marriage.**

4. **It is hereby declared that the Petitioner shall be responsible for the education of the children and shall continue to pay the school fees and or provide for the educational needs of the two children of the marriage and this will by way of settlement of bills to be presented by Respondent as and when due.**

5. **Reliefs (f), (g) and (h) fail and are dismissed.**

6. **There shall be no order as to cost believing that parties who appear both eager and anxious to give affection and proper guidance to their children would eschew any bitterness and now fully cooperate towards making these children citizens they would be proud of in the future**.

…….
Hon. Justice A. I. Kutigi
(Hon Judge)

Appearances:

1. **Dominic Njoku, Esq., for the Petitioner**

2. **A.I. Malik Esq., for the Respondent/Cross Petitioner.**