

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY,
IN THE ABUJA JUDICIAL DIVISION,
HOLDEN AT COURT NO. 8 APO, ABUJA.
BEFORE HIS LORDSHIP: HON. JUSTICE O. A. MUSA.**

SUIT NO. FCT/HC/BW/PET/5/2019

BETWEEN:

KRISTINA AGBATAEKWE-RICHMOND PETITIONER

AND

SOLOMON IFEANYI AGBATAEKWE-RICHMOND RESPONDENT

JUDGMENT

DELIVERED ON 28TH OCTOBER, 2021

The Petitioner approached this Court by way of a Petition dated and filed on **20/11/2019** seeking a decree of dissolution of the marriage contracted between the Petitioner and the Respondent on **04/07/2015**.

The Petitioner subsequently filed a motion on notice dated **24/03/2020** but filed on **19/05/2020** with Motion No.: **M/6971/2020**, by which leave was sought to amend the Petition. On **25/06/2020**, this Court granted the application and granted leave for the amendment as sought and deemed same as properly filed.

The Petitioner thereafter filed an **Amended Petition for Decree of Dissolution of Marriage** on **19/05/2020**. This matter will therefore be determined exclusively on the basis of the said Amended Petition.

The reliefs as endorsed on the said Amended Petition are as follows:

- 1. A DECREE of Dissolution of the marriage between the Petitioner and the Respondent on the ground that the marriage has broken down irretrievable, the Respondent having deserted the Marriage for a continuous period of over Two years and Four months immediately preceding the presentation of this petition.**
- 2. AN ORDER for the joint custody of their only child.**
- 3. AN ORDER granting the Respondent reasonable access to the child with the prior notice to the Petitioner.**
- 4. AND SUCH FURTHER orders as the Honourable Court may deem fit to grant in the effectuation of the above prayers in the circumstances of the petition.**

The sole process filed alongside the Amended Petition is a document described as a "***Petitioner's Witness Statement on Oath***" of 25 paragraphs deposed to by the Petitioner on **19/05/2020**.

The Respondent did not file any process in reaction to the Petition.

On **09/12/2020** when the Petition came up for hearing, the Petitioner was both physically in Court and represented by her Counsel, **Ezekiel EgboEsq.** However, the Respondent neither appeared before the Court nor was he represented by his Counsel on record, despite there being evidence on record that the Respondent was served with hearing notices. The Court was not availed with any reason for the absence of the Respondent and/or his Counsel.

Learned Counsel to the Petitioner then drew the attention of the Court to a motion on notice dated **14/10/2020** with Motion No.: **FCT/HC/BW/M/485/20** filed by the Respondent's Counsel, praying the Court for an Order granting leave to Respondent's Counsel to withdraw their appearance and representation of the

Respondent in this Petition. Learned Counsel **Egbo Esq.** informed the Court that Respondent's Counsel had sent him a text message informing that a junior counsel would be in Court to move the said motion and requesting for a stand-down of the proceedings, but that over one hour after the text came in, Respondent's counsel was still not in Court. Counsel contended that it is not for the Court to wait for a litigant or counsel and urged me to permit the Petitioner's sole witness to give her evidence. It was Counsel's submission that another date may then be given to the Respondent to cross-examine the witness.

Having listened to the submission of Petitioner's Counsel, this Court directed the Petitioner to enter the witness box and lead evidence on the Amended Petition. The Petitioner thereafter adopted her witness statement on oath made on **19/05/2020** and was led to tender three documents, namely: Marriage Certificate dated **04/07/2015**, certificate of identification bearing the Petitioner's signature and birth certificate of the Respondent's son, all of which were admitted in evidence and marked as Exhibits **PG1**, **PG2** and **PG3** respectively. The Petitioner then prayed the Court to grant all the reliefs sought in the Amended Petition.

Learned Counsel to the Petitioner thereafter closed the case of the Petitioner and this Court adjourned to **23/02/2021** for cross-examination and defence.

On **23/02/2021** when the matter came up, **Ezekiel Egbo Esq.** appeared for the Petitioner while the Respondent was neither present nor represented by Counsel, despite having duly been served with notice of the day's proceedings. Petitioner's Counsel informed the Court that the Respondent had failed to file any Answer to the Amended Petition and prayed the Court to foreclose him from leading his defence. Upon this application, this Court having satisfied itself of the service of hearing notices on the

Respondent, ruled that the failure of the Respondent to appear in Court or file any reply to the Amended Petition is an indication the Respondent did not intend to defend the action. Accordingly, this Court made an order foreclosing the Respondent from the exercise of the right to enter a defence in this matter. The Court then adjourned the matter to **29/04/2021** for adoption of the Petitioner's final address.

The court did not sit on **29/04/2021** and the matter was subsequently adjourned to **30/09/2021**.

It was after this Court had foreclosed the Respondent and adjourned for the adoption of the Petitioner's final address that the attention of the Court was drawn to a process filed by one **G.N. EneyeEsq.** on behalf of the Respondent described as a "***Memorandum of Conditional Appearance***" filed on **18/06/2021**. I must observe straightaway that this is a most irregular process. As I have said earlier in this Judgment, upon the failure of the Respondent to file any Answer to this Petition or to appear before the Court in response to the service of hearing notices on him, this Court on **23/02/2021** foreclosed the Respondent in this matter. What any party who still desires to be heard in such circumstances ought to do is to approach the Court by way of an application seeking an order setting aside the order of foreclosure and granting leave to him to file the relevant processes out of time and to rely on same.

In this case, in what appears to be an act of blatant disregard and disdain for this Court, the Respondent merely filed a so-called memorandum of conditional appearance, without even bothering to file any answer to the Petition. The decision of the Respondent to file this process is even more puzzling to this Court, when it is considered that another set of Counsel had previously appeared for him in this matter and in fact filed an application to withdraw their representation, which they later abandoned. In my view, this

process is a manifest example of an abuse of the judicial process. For this reason, this Court finds no reason to countenance the purported memorandum of conditional appearance, same being ineffectual in the circumstances of this case. I hereby discountenance same and hold that that the order of foreclosure made against the Respondent subsists, the Respondent having taken no valid steps to reverse or set aside same.

On **30/09/2021**, in the course of the adoption of the Petitioner's final address, this Court drew the attention of Petitioner's Counsel to the absence of a verifying affidavit to the Amended Petition, in line with the provisions of **Order V Rule 10 (1)** and **Order VII Rule 11 (1)** of the Matrimonial Causes Rules and asked Counsel to respond as to the effect of this on the proceedings. In his response, Petitioner's Counsel referred the Court to the verifying affidavit in support of the initial Petition filed on **20/11/2019**. This Court will revisit this later in this Judgment.

Petitioner's counsel subsequently adopted the final written address dated **15/03/2021** but filed on **17/03/2021** and urged the Court to grant the reliefs sought in the Amended Petition. The Court thereafter reserved Judgment in this suit to a later date.

I will now proceed to the determination of the Amended Petition.

Upon the foreclosure of the Respondent by this Court, the Petitioner filed a final address in support of the Amended Petition, wherein the following sole issue for determination was raised:

“Whether from the totality of the unchallenged evidence before this Court the Petitioner has proved this petition to be entitled to the granting of all the orders as contained in the amended petition for Decree of Dissolution of Marriage.”

I must pause here to consider the effect of the Respondent's failure to file any process in this Petition. Ordinarily, the fact that the Petition was unchallenged and undefended by the Respondent, despite the existence of copious evidence of service of the processes on him, should entitle the Petitioner to judgment in the terms of the reliefs sought in the Petition, without any further judicial rigour. This in line with the general principle that where a defendant to an action fails to deliver his defence, such a defendant must be adjudged to have conceded to the case of the Plaintiff. Indeed, it is not the duty of a Court to assist a party who fails to file a defence in a matter to marshal a defence. See the decision of the apex Court in the recent case of **F.U.T MINNA & ORS V. OLUTAYO (2017) LPELR-43827(SC)**.

However, I am not unmindful of the fact that divorce proceedings are *sui generis*- see **BAKARE V. BAKARE (2016) LPELR-41344(CA)**. For this reason, it is my view that the Court must be careful in making a pronouncement on an issue as radical as dissolution of marriage, whether the adverse party has filed a defence or not, particularly as this Court has foreclosed the Respondent from leading his evidence. That, to my mind, is the prudent thing to do. Thus, I am of the view that the mere fact that the Petitioner's processes are uncontroverted by the Respondent herein does not relieve this Court of the burden to examine the Amended Petition in its own right. Consequently, I hold that this Court remains under a duty to still examine the Amended Petition. I shall now proceed to consider the case of the Petitioner.

The sole ground of the Amended Petition is as follows:

"The Petitioner and the Respondent have immediately before the presentation of this petition

lived apart for a continuous period of Two years and Four months.”

The facts in support of the Amended Petition are as elaborately set out in the witness statement of oath. In particular, the case of the Petitioner is that the parties have stopped co-habiting as man and wife since **10/07/2017** when the Respondent allegedly deserted the marriage. Accordingly, the Petitioner wants the marriage dissolved on grounds of desertion.

Now, I must start by reiterating the settled principle of law to the effect that that a Court faced with any action must first of all satisfy itself that it has the jurisdiction to entertain such an action, otherwise the entirety of its proceedings and its decisions, no matter how well conducted and delivered, will amount to a fruitless exercise. Please see the decisions in the case of **Madukolu v. Nkemdilim (1962) 1 ALL NLR 587 at 595**. In the case of **UTI v. ONOYIVWE (1991) 1 SCNJ 25**, the Supreme Court affirmed this position as follows:

“Jurisdiction is blood that gives life to the survival of an action in a court of law and without jurisdiction; the action will be like an animal that has been drained of its blood. It would cease to have life and any attempt to resuscitate it would without infusing blood into it would be an abortive exercise.”

Indeed, the issue of jurisdiction is so fundamental that this Court can rightly raise an issue of law affecting its jurisdiction to entertain this Amended Petition *suo motu* and determine same without recourse to the parties- see the case of **EFFIOM & 3 ORS. v. CROSS RIVER STATE INDEPENDENT ELECTORAL COMMISSION (CROSIEC) & ANOR. (2010) 4-7 S.C. (Pt. I) 32** and **TUKUR V. GOVERNMENT OF GONGOLA STATE (1989) 9 S.C. 1; (1989) 4 NWLR (PT. 117) 517**.

Nevertheless, as I have previously observed in this Judgment, on the date of adoption of final address, this Court drew the attention of the Petitioner's Counsel to the fundamental issue of the absence of a verifying affidavit in support of the Amended Petition and whether this Court can proceed to entertain the Petition in the circumstances, in the light of the provisions of **Order V Rule 10 (1)** and **Order VII Rule 11 (1)** of the Matrimonial Causes Rules which provide thus:

Order V Rule 10(1) of the MCR provides as follows;

“A petitioner shall, by affidavit written on his petition and sworn to before his petition is filed verify the facts stated in his petition of which he has personal knowledge.”

Order VII Rule 11(1) provides:

“(1) The Party filing a pleading shall, by an affidavit written on his pleading and sworn to within twenty-one days before his pleading is filed-

Verify the facts stated in his pleading of which he has personal knowledge, and depose as to his belief in the truth of every other fact stated in his pleading.”

Order VIII Rule 4 (1) (a) and (b) provides:

“(1) Subject to sub-rule (4) of this rule, an amendment shall not be made to a pleading so as to alter a fact alleged in the pleading or to include an additional fact in the pleading unless the party

on whose behalf the pleading was filed has filed an affidavit-

- (a) Verifying the altered fact or additional fact, as the case may be; or*
- (b) Depositing as to his belief in the truth of the altered fact or additional fact, as the case may be.”*

By the above provisions of the Rules, it is evident that the Matrimonial Causes Rules mandates a party to file a verifying affidavit in support of any extant Petition for dissolution of marriage.

Now, in answer to the observation raised by this Court, the Petitioner’s Counsel referred the Court to the verifying affidavit in support of the initial Petition which this Court granted leave to be amended upon the application of the Petitioner on **25/06/2020**. The question I must answer at this point is whether the verifying affidavit in support of a Petition which was subsequently amended ought to abide the Amended Petition. In resolving this issue, recourse must be had to the established principles of law governing amendment of pleadings. It is settled law that upon the amendment of a process, what stood before becomes extinguished. See the case of **Ilodibia v. N.C.C. Ltd. [1997] 7 NWLR (Pt. 512) 175** where the apex Court held:

“Where pleadings are amended, what stood before the amendment is no longer material in determining the issues between the parties.”

Also see **Jatau v. Ahmed [2003] 4 NWLR (Pt. 811) 499**.

To my mind therefore, upon the amendment of the Petition pursuant to the Order of this Court made on **25/06/2020**, all processes earlier filed in this matter lapsed and became

ineffectual. No aspect of the previous process can be used howsoever in these proceedings. In fact, it is as though no process was ever filed before the amendment. In my view, what the Petitioner ought to have done either prior to or upon the amendment of the Petition was to file a fresh verifying affidavit by which she will affirm and verify that the facts stated in the Amended Petition are true and correct, as required by the Rules. For whatever reason, this was not done. Instead what was filed alongside the Petition was a witness statement on oath by which the Petitioner sought to give evidence in support of the Petition. I do not need to state here that the said witness statement cannot constitute a verifying affidavit within the intendment of the Matrimonial Causes Rules, as Petitioner's Counsel himself did not make such an argument. Therefore, there is nothing before this Court to suggest that the Amended Petition in this case was accompanied by a verifying affidavit, in compliance with the relevant Rules. That being the case, I hold that the Amended Petition filed by the Petitioner on **19/05/2020** but deemed on **25/06/2020** was filed without a verifying affidavit.

The very simple query this Court must now resolve is whether it has the jurisdiction to entertain this suit, having regard to the absence of a valid verifying affidavit. The law is settled that the filing of a verifying affidavit is fundamental to the exercise of jurisdiction by a Court faced with a Petition under the Matrimonial Causes Act, it is not a mere irregularity. In **Unegbu v. Unegbu [2004] 11 NWLR (Pt. 884) 332 at 356**, the Court of Appeal held thus:

“Order V rule 10(1) of the Matrimonial Causes Rules, 1983 differs significantly from the English Matrimonial Causes Rules, 1957. The term "every petition shall be supported by an affidavit" in the latter rule is no longer in the former. In other

words, the affidavit now required under the rule should not be seen merely as an affidavit in support of the petition in the same way as an affidavit in support of a motion. The emphasis in the new rule is meant to stress the role of the affidavit required under the rule as a verifying affidavit to the petition rather than an affidavit in support of the petition.”

In the same case, their Lordships held (at page 358) thus:

“Compliance with Order V rule 10(1) of Matrimonial Causes Rules, 1983 is mandatory. In the instant case, the respondent did not comply with it in filing his petition. Therefore, the petition was not properly placed before the trial court which ought to have upheld the objection of the appellant.”

In the case of **Odusote v. Odusote (2012) 3 NLWR (Pt. 1288) 379 at 498-499**, the Court of Appeal, pronouncing on whether a Further Amended Petition was properly filed, held thus:

“Filing a verifying affidavit with a petition for dissolution of marriage is a condition precedent to the filing of the petition, in the sense that the affidavit must be sworn to by a petitioner before the petition is filed. The petition must contain the affidavit sworn to by the petitioner before it is, or can be, properly filed.

....

“As rightly pointed out by the learned counsel for the respondent, the verifying affidavit of the respondent was at pages 7 - 8 of the further amended petition which come immediately after the page on which the addresses for service of the petition were provided. The affidavit is on the petition which precedes it on pages 1 - 6 thereof and so manifestly satisfies the requirements of Order V, rule 10(1) above. The affidavit is not in a separate document or outside the petition itself, but forms part of it. For that reason the submission by the learned counsel for the appellant are grossly misconceived and I have no difficulty in finding that the respondent’s further amended petition has complied with the provisions of Order V, rule 10(1).”

In my view, the simple conclusion to be drawn from the above is that the absence of a verifying affidavit in an extant Petition for dissolution of marriage robs the Court of any jurisdiction to entertain and determine the matter. This fatal defect has tied the hands of this Court, so to speak, and the Court cannot proceed any further at this stage.

Having said all the above, I have no difficulty in coming to the conclusion that this Court lacks the jurisdiction to entertain the Amended Petition in its entirety, the Petitioner having not complied with the condition precedent as to the filing of a verifying affidavit to the Amended Petition.

The Petition is accordingly DISMISSED.

I make no order as to costs.

This is the judgment of this Court.

APPEARANCE:

Ezekiel C. Egbo, Esq. for the Petition

The Respondent / Counsel absent in Court.

Sign

Hon. Judge

28/10/2021