IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON TUESDAY THE30THDAYOF MARCH, 2022.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO -ADEBIYI
SUIT NO: FCT /HC/PET/410/2019

KENNEDY UWAIFIOKUN UWAGBOE----------PETITIONER

AND

DENISE DIAN UWAGBOE ----------RESPONDENT

JUDGMENT

By a Notice of Petition dated 10/10/2019, and filed same day, the Petitioner herein, seeks the reliefs set out in Paragraph 11 of the Petition as follows;

1. A decree of dissolution of the marriage on grounds that:
    i. The marriage has broken down irretrievably.
    ii. The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with her.
    iii. That parties to the marriage have lived apart for a continuous period of at least two (2) years immediately preceding the presentation of this petition and the respondent does not object to a decree being granted.
    iv. That the respondent has deserted the petitioner for at least a continuous period of two (2) years immediately preceding the presentation of this petition.
    v. Irreconcilable differences.
2. The custody of the three children, Osasumwen, Osabohien and Orobosa on ground that:
    i. The Respondent hardly has time for the children as she often travels out of Freetown, Sierra Leone for business trips and Tourism at the expense of the two children with her who are always left at the care of neighbours. ThePetitioner who has a good plan for the welfare and

future well-being of the children of marriage, finds that awful.

ii. The Respondent lacks the moral rectitude and financial capacity to give the children the good education they deserve. My son, Osabohien had called me on different occasions to express the Respondent's inability to shoulder the responsibility of their school fees.

iii. Petitioner's factual knowledge of Freetown where theRespondent presently resides with the Osabuohien and Orobosa is reputed for being prevalent with incidences of child rape. The Petitioner does not desire his child to be a victim of a perpetrator.

The Petition along with other court processes were served on the Respondent in Freetown, Sierra Leone by substituted means to wit by delivering same through DHL. The Respondent then filed an Answer dated 23/10/2020. In the said Answer the Respondent reiterate the fact that Respondent is not opposed to the dissolution of the marriage, but praying this Honourable Court to dissolve the marriage based on the facts constituting the Answer to this petition rather than on the facts as was presented by the Petitioner with the order for upkeep, school fees and maintenance in favour of the two children out of the three children of the marriage and grant the custody of the two children Osabuohien (M) 11years and Orobosa (F) 8years to the Respondent.

The Petitioner filed his reply to the Respondent's Answer on 17/11/2020. Pleadings having been filed and exchanged, the Petition went into trial. Petitioner opened his case and testified as PW1. The Petitioner adopted his witness statement on oath dated 22/01/2020 and his further witness statement on oath dated 17/11/2020 respectively. It is the case of the Petitioner that he got married to the Respondent on the 8th day of December, 2007 at Samaria West African Methodist Church, Waterloo Street, Freetown, Sierra Leone and were blessed withthree (3) children of the marriage namely:

a. OsasumwenPrince Uwagboe born on the 15thof April ,2005 (M)
b. OsabohienPhil Uwagboeborn on the 24thof July, 2009 (M)

c. OrobosaPhoebe Uwagboeborn on the 10thof August, 2012(F)

That towards the end of 2014, Respondent started behaving strangely and shunning him without just cause whatsoever.That all his efforts to unravel the cause of Respondent's strange behavior proved abortive.That Respondent continued in that attitude and also abandoned her responsibilities at home, until early January, 2015, when she told him that she could no longer continue with the marriage and did not offer any reason whatsoever rather than saying she no longer lovedhim and requested to know how the care for the children would be handled. That he was surprised, when on 8th December, 2015, upon arrival from official trip, he found that the Respondent had gone with two oftheir children Osabohien and Orobosa.That he was later called by the Respondent's father, Pa Denise King, that the Respondent was in Freetown with two children of the marriage.That about the month of February 2019, his family called a meeting between him and the Respondent wherein Respondent and her father, were flown from Sierra Leone to Abuja. That at the meeting, they agreed to reunite in marriage and the respondent promised to return to Abuja to live with him and the children.That he was stunned when he later received a call and WhatsApp chat from the Respondent renouncing her promise to return to the marriage after she had return to Freetown, Sierra Leone.That the children are currently being subjected to moral debasement contrary tohis family standard, moral and social values as the children are made to dance in public places, including cat walking at social events at night clubs at their current age ostensibly for monetary rewards. The current behavioural conducts of the children of the marriage currently in Respondent's custody are in contrast with his Christian and cultural values.That the Respondent hardly has time for the children as she often travels out of Freetown, Sierra Leone, at the expense of the two children leaving them in the care of neighbours. That the Respondent lacks the moral rectitude and financial capacity to give the children the good education they deserve. That his son, Osabohien had called him on different occasions to express the Respondent's inability to shoulder the responsibility of their school fees.

That by his factual knowledge of Freetown where the Respondent presently resides with Osabuohien and Orobosa, heknows as a fact that the city is reputed for being prevalent with cases of child rape and abuse and he does not desire his child to be a victim of such predatory act.That he is a private legal practitioner with office at No.2 Libreville Street, Aminu Kano Crescent, Wuse Il, Abuja. That he earns an average sum of (Five Million Naira) per annum from his legal practice and about (Two Million Naira) from his investments. That he pays (Two Million Naira) per annum for the duplex helives in at Citec Villas Estate, Gwarimpa, Abuja. That his son Osasumwen, who currently lives with him attends Igbinedion Education Centre, Benin City with school fees at the rate of N1,000,000.00 (One Million Naira) per annum. That he knows as a matter of fact that the marriage has broken down irretrievably due to irreconcilable differences owing to the refusal of the Respondent who had deserted him since 2015 to return back to their matrimonial home. In his further witness statement on oath, he denies the Respondent's averments and puts the Respondent to the strictest proof.

In the course of the Examination-in-chief of PW1 – the Petitionertenders the Certified True Copy of marriage certificate held in St. GeorgesChurch in the State of Sierra Leone between parties dated 8/12/2007 which was admitted and marked Exhibit A.

At the close of the evidence of the Petitioner, he was Cross-examinedby the Respondent's counsel. Under cross examination, Petitioner stated that he has been giving Respondent money for upkeep and maintenance of the Children and have also visited Respondent and children several times in Freetown. That when Respondent promised to come back to her matrimonial home after family members waded in and settled their dispute, Petitioner under re-examination stated that he had gone ahead to pay the tuition of the Children of the 2 children in a school in Gwarinpa FCT Abuja, Nigeria named Starview International School only for Respondentto renege on her promise and decided she will rather stay in Sierra-Leone. Case was then adjourned to 9/3/2021 for examination in chief of the Respondent. On the said date Respondent had not complied

with the order of court to file witness statement on oath and her counsel applied for date to comply and also be able to set up a virtual hearing. Case was further adjourned to 3 different dates, once his counsel was present but asked for another adjournmentfor virtual hearing and other days (twice)the Respondent was not represented by counsel. In all Respondent shunned the courts order for virtual hearing and failed to take up the opportunity accorded the Respondent to conduct her case from Freetown virtually. Upon the application of Petitioner's counsel, the court ordered the foreclosure of the Respondent from defending the Petition and therefore adjourned for filing and adoption of Final Written Address.

On 23/2/2022, Bofede Okporu Esq. counsel for the Respondent apologized for his absence on the previous adjourned dates and restated that the Respondent was no longer responding to his calls. The Petitioner's counsel adopted their Final Written Address dated 18/02/2022, but filed on 22/02/2022 as their oral argument in support of the Petition.In the said Written Address, Petitioner's Counsel formulated a lone issue for determination namely;

> "Whether the petitioner is entitled to the reliefs sought in this petition?"

Learned counsel submitted that it is settled law that where evidence is not lead in support of averments made in pleading; the pleading is deemed abandoned. He then cited**Owners of M/V Gongola Hope v Smurfit Cases Nigeria Ltd (2007) All FWLR (Pt. 388) page 1005 at page1018, D – F, Alao v. Akano (2005) All FWLR (Pt. 264) 799, 814, F – G and Balogun V. UBA (1992) 6 NWLR (Pt. 247) 355 at 344.**Counsel submitted that the Respondent's reply to the notice of petition is deemed abandoned and the averments therein are of no consequence and urgedthe court to so hold.Counsel further submitted that in the light of the abandonment of the reply to the notice of petition, what is left for consideration by this Honourable Court is the averments in the notice of petition and the testimony of PW in support of the said averments thereof.Counsel submitted that the effect of an unchallenged and uncontroverted piece of evidence is that the court ought to take the said unchallenged and uncontroverted piece of evidence as true. He relied on**Alhassan v ABU**

Zaria (2010) All FWLR (Pt.538) 962 at 1005, D – E and Bua v. Dauda (2003) LPELR-810 (SC), 29, counselurged the court to hold that the testimony of PW having not being challenged or controverted is taken to be true.Counsel also submitted that in the determination of the issue of custody of a child, the welfare and educational well-being of the child must be paramount. In order, words, the court must consider in whose custody will the welfare and educational well-being of the child be better guaranteed. See: **Alabi v. Alabi (2008) All FWLR 245**. Counsel submitted that the petitioner has led evidence to prove that therespondent hasn't thefinancial capacity to care for the children's educational well-being and welfare and to bring them up in a morally acceptable way which evidence was neither challenged nor controverted and that the Petitioner has also given evidence of his financial capacity to care for the educational well-being and welfare of the children, and his capacity to bring them up in a manner that they will be useful to the society. That the evidence of the financial capacity and ability of the petitioner was neither challenge nor controverted. Consequently, counsel urged the court to grant the reliefs claimed and dissolve the marriage between him and the Respondent and grant custody of the two children; Osabuohien and Orobosa to himwhile the respondent is to have visitation right. Counsel also cited **Section 15(2) (c) and (e) of the Matrimonial Causes Act.**

Having carefully considered the evidence of the Petitioner, the submission of counsel and the judicial authorities cited, the court finds that only one (1) issue calls for determination that is;

> **"Whether the Petitioner has successfully made out a case to warrant the grant of the relief sought"**

First and foremost, it is on record that the Respondent filed an Answer challenging the Petition, but failed to lead evidence in support of the pleadings filed on 28/10/2020. It is trite law that pleadings not supported with evidence is deemed abandoned. See the case of **Bongo Vs Gov. Adamawa State (2012) All FWLR (PT.633) 1908 @ 1939 Para B-C**. It is settled law that pleadings in support of which no evidence is led is deemed abandoned and must be discountenanced by the Court as held in **Ogbumgbada V. Ogbumgbada&Ors (2018) LPELR-44291 (CA)**. The court therefore deemed the Respondent's Answer as abandoned.The implication

of this is that the evidence of the Petitioner in proof of the Petition is unchallenged and uncontroverted. The court is enjoined to deem such unchallenged and uncontroverted evidence as true and correct and act on it. In the case of **Afribank Nig Ltd V.Moslad Enterprises Ltd & Anor (2007) LPELR-5126 (CA)** it was held thus;

> *"Where a defendant does not produce evidence or testify or call witnesses in support of his defence, slight or minimum evidence which can dischargethe onus of proof would be required to ground the plaintiff's claim."*

I am, however, quick to add that, that minimum evidence must be credible enough for court to grant the claim of the Petitioner as heldin**Zenegal Ltd Vs Jagal Pharm Ltd (2007) All FWLR (PT. 387) 950 Para F – G**.

Now, in the determination of a Petition for dissolution of marriage, under **Section 15(1) of the Matrimonial Causes Act**, it is competent for a marriage to be dissolved once a court is satisfied that the marriage has broken down irretrievably and to come to that conclusion, the Petitioner must prove to the reasonable satisfaction of court any of the facts as prescribed by **Section 15(2) (a-h) of the Matrimonial Causes Act**as follows: -

> "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-
>
> *(a) that the respondent has wilfully and persistently refused to consummate the marriage;*
>
> *(b) that since the marriage the Respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*
>
> *(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;*
>
> *(d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;*

(e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;

(f) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;

(g) that the other party to the marriage has, for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under this Act;

(h) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

In the instant case, the Petitioner place reliance upon the grounds of **Section 15 (2) (c) and (e) of the Matrimonial Causes Act.**

Section 15 (2) (c) reads;

> *"That since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent"*

To succeed under this ground the Petitioner must lead evidence to the reasonable satisfaction of the court of such particular act or conduct of the Respondent which would warrant the grant of the relief sought and such acts must be weighty and grave in nature to make further cohabitation virtually impossible. See the case of **Ibrahim Vs Ibrahim (2007) All FWLR (PT. 340) 474 @ 489 Paras H –B.**in proof of **Section 15 (2) (c)of the Matrimonial Causes Act,** "Unreasonable Behaviour" as laid down in **Section 15 (2) (c)**must be proved by the Petitioner by establishing a sickening and detestable behaviour on the part of the Respondent, andthe fact that the Petitioner cannot reasonably be expected to live with the respondent See: **NANNA v NANNA(2005) LPELR-7485(CA).**The Matrimonial causes Act in Section 16 (1) lists a number of acts in prove of

Section 15 (2) (c), Although the list as stated in **Section 16 (1)Matrimonial Causes Act**is not exhaustive, but the court must ensure that "Unreasonable Behaviour" outside the ones listed in **Section 16 (1)Matrimonial Causes Act**must be commensurate with that listed in **Section 16 (1).**

Section 16 (1)of theMatrimonial Causes Actlists the following as unreasonable behaviour.

a. That Respondent has committed rape, sodomy, bestiality since the marriage.
b. That Respondent has been a habitual drunkard and also intoxicated by the use of excess narcotics, sedative or simulating drugs.
c. That Respondent has been convicted and sentenced to imprisonment for not less than 3years.
d. That Respondent has habitually left Petitioner without reasonable means of livelihood.
e. That since marriage, Respondent has been in prison for not less than 3years after conviction for an offence punishable by death or life imprisonment or for a period of 5years or more and still in prison.

Like I stated earlier, the list is not exhaustive but it should be noted that by **Section 82 of the Matrimonial Causes A**ct a matter of fact shall be taken as proved if it is established to the reasonable satisfaction of the Court. Petitionermerely stated "she started behaving strangely and shunning him for no reason". It is elementary law that he who asserts must prove. The burden in this instance rest squarely on the Petitioner to prove the fact of his petition. He has failed to state any act or conduct of the Respondent which a right-thinking person would come to the conclusion that the Respondent has behaved in such a way that is of equal gravity to facts listed in **Section 16 (1)Matrimonial Causes Act.** Consequently, Petitioner failed to prove facts in favour of **Section 15 (2) (c)Matrimonial Causes Act.**

However, on the second fact relied on, which is **Section 15(2)(e) of the Matrimonial Causes Act**, which reads;

"*That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted*"

To succeed on this ground the Petitioner must establish that he has been forsaken and abandoned by the Respondent. In the case of **the Nnana Vs Nnana (2006) 3 NWLR (PT. 966) 1 @ 10 Ratio 3** the court said.

> *"It is not enough to show that the parties have lived apart for a continuous period of two years immediately preceding the presentation of the Petition, but the desertion within Section 15 (2) (e) and (f) must be one where any of the parties have been abandoned and forsaken without justification thereby renouncing his or her responsibilities and evading its duties"*

In proof of this ground, Petitioner informed the court that co-habitation between parties ceased since 2015, that Respondent moved toFreetown SierraLeoneand presently lives there while he resides in Abuja.That he had exhausted every avenue to make the marriage work and they have lived apart since then. This fact has not been denied by the Respondent who filed an answer to the Petition but abandoned same hence there is nothing on the other side to challenge the claim of the Petitioner.The law is that once it is clear that the parties have lived apart for the statutory period of 2 years without objection to a decree being granted, the fault of the party who created the situation that necessitated the living apart is irrelevant. The Court is not concerned at this stage with the reason for the "living apart" by the parties to the marriage. In effect the Court is not to be bothered as to whose fault it is among the partiesas held in**OMOTUNDE v OMOTUNDE (2001) 9 NWLR (Pt. 718) 252.** In any case, what is required of the Petitioner is to prove his case to the reasonable satisfaction of the court. And I find this unchallenged and uncontroverted evidence of the Petitioner sufficient and in conformity with the law for court to hold that the marriage has broken down irretrievably.On the whole, this Petition succeeds on this fact.

On the issue of custody of the last two children of the marriage (Osabohien Phil Uwagboe (M)born on the 24th of July, 2009and Orobosa

Phoebe Uwagboe (F)born on the 10th of August, 2012)the court is guided by the Provision of **Section 71 of the Matrimonial Causes Act andSection 1 of the Child's Right Act 2003**, the Court is bound to have regard to the interest and welfare of the children as the paramount consideration in the grant of this custody and maintenance of children. The Respondent having abandoned her answer to Petition or led evidence in challenge of the reliefs sought by the Petitioner implies she is not averse to the Court granting the reliefs.Although children are minorsOsabohien was born 24th July, 2009 and OsoboraPheobeUwagboe (f) was born 10th August, 2012. Both children would be 13 years and 10 years old respectively this year 2022. All though in Petitioner's evidence in Chief, he was particular about both children being subjected to moral debasement by dancing in public places and cat walking at social events to raise money. That Respondent hardly has time for the children as she travels often out of Freetown, Sierra Leone leaving the 2 children in the care of neighbours. That where the Respondent currently lives is prevalent with cases of child rape and abuse. That Respondent lacks the moral and financial capacity to give the children the good education they deserve. That Petitioner is a legal practitioner who earns over N5,000,000.00 (Five Million Naira only) per annum and N2,000,000.00 (Two Million Naira only) from his investments and pays N2,000,000.00 (Two Million Naira only) per annum for his house rent.

At the initial stage before trial proceeded, Respondent Counsel did a virtual hearing of Court proceedings (not trial) wherein Respondent informed the Court of her willingness to go ahead with virtual hearing and her inability to attend physical Court hearing due to the distance. Having heard from the Respondent, this Court granted the prayers for virtual hearing which was ultimately shunned by the Respondent. The Court in a short ruling on the 30/11/2021 wherein Petitioner Counsel urged the Court to close the case of Respondent ruled as follows:

> "I will give a last opportunity for the fact that two children are involved. In case the Respondent is finding it difficult to depose to a witness statement on oath, the Respondent Counsel has the permission of the Court to send the witness Statement on oath down to the Respondent in Freetown, thereafter put the Respondent on a

video call with the Commissioner for Oath (here in FCT High Court), the Respondent signs before the commissioner for Oath who's on video call and thereafter the Respondent sends the statement on Oath and all other necessary processes down to Nigeria".

The Respondent did not take advantage of this ruling. Rather on 23/02/2022 Respondent Counsel stated in open Court "I had earlier informed this Court that Respondent was no longer responding to my calls".

Respondent attitude to this trial is rather unfortunate considering the fact that custody of two of her children is on trial. Respondent carefree and lackadaisical attitude to the trial and more importantly to the issue of custody of her two children merely confirm the testimony of the Petitioner about Respondent's irresponsible attitude to take care of the children. Respondent left her first child with the petitioner while she left for Freetown with 2 of the children. This act was done while the Petitioner was not at home and from his evidence was shocked when he got home to discover that Respondent had left with 2 children and left the first child with Petitioner. It is worthy to note that at the time Respondent left Petitioner in the year 2015 the first child was just 10years old hence all 3 children were minors. It is only logical for this Court to assume that if Petitioner was incapable of taking care of the 1st child, Respondent would not have risked leaving a 10 years old minor with the Petitioner. I am of the view that Petitioner is a responsible family man capable of taking care of his children. Petitioner in his evidence has also stated that the first child Osasumwen Prince Uwagboe who was 10 years old when Respondent left him is currently in Igbinedom Education Centre Benin City with School Fees of N1,000,000.00 (One Million Naira only) per annum paid by Petitioner. Petitioner evidence that his son Osabuohren who lives with Respondent in Freetown called him on different occasions to express Respondent's inability to shoulder the responsibility of their school fees and maintenance is unchallenged and uncontroverted. In line with **Section 1 of Child's Right Act** which enjoins the Court to make interest of the child paramount, this Court had on the 30/03/2022 interviewed the Petitioner in open Court. Petitioner stated that he had

gone to Freetown 3 weeks prior to visit the Respondent and children and was not happy about the state or their living condition nor their educational level. Petitioner further informed the Court that his first son had since graduated from Igbinedom Educational Centre and proceeded to Canada to further his education. That currently his first son lives and schools in Canada. From the interview conducted by this Court with Petitioner in open Court, I am of the opinion that Petitioner lacks the capability or emotional experience to take care of his girl child. It is my view that the girl child Osobosa Phoebe Uwagboe continues to reside with her mother in Freetown as a girl child needs the care, attention and experience of a mother. While the Osabohien Phil Uwagboe would be better off staying with his father (the Petitioner) in Nigeria considering that Petitioner has been able to adequately take care of Osasumwen Prince from the age of 10 years old until he became a graduate without any negative report. Moreover, the fact that Osabohien Phil Uwagboe has complained to the Petitioner that his mother is unable to adequately shoulder his responsibility particularly his School Fees is unchallenged and uncontroverted.

Consequently, I therefore hold that the marriage between the Petitioner and Respondent has broken down irretrievably.I hereby dissolve the marriage and make the following orders:-

i. I hereby pronounce a Decree Nisi dissolving the marriage celebrated between the Petitioner, **KENNEDY UWAIFIOKUN UWAGBOE** and the Respondent, **DENISE DIAN UWAGBOE** at Samaria West African Methodist Church, Waterloo Street, Freetown SierraLeone on the 8th of December, 2007.

ii. I hereby pronounce that the decree nisi shall become absolute upon the expiration of three months from the date of this order, unless sufficient cause is shown to the court why the decree nisi should not be made absolute.

iii. I hereby grant custody of **Osabohien Phil Uwagboe**to the Petitioner until heattains the age of maturity of 18years old; however, custody of **Orobosa Phoebe Uwagboe**is hereby granted to the Respondent. Petitioner shall be granted access to visit his child at the Respondent's residence in Freetown and likewise the Respondent is granted access to visit her son at Petitioner's residence in Abuja after due consultation with the person who has custody. The children will spend holidays intermittently with each parentto bond with their older sibling (Osasumwen Prince Uwagboe) after both parents have due consultation with each other.

iv. I hereby Order that both parties shall be responsible for the education of **Orobosa Phoebe Uwagboe** on a 60/40 basis. Petitioner to pay 60% of the school fees while Respondent to shoulder 40% of the school fees of **Orobosa Phoebe Uwagboe**.

v. Petitioner is hereby ordered to pay to the Respondent the sum of N50,000.00 monthly for the maintenance and upkeep of **Orobosa Phoebe Uwagboe**.

Parties: Petitioner is present. Respondent is absent.

Appearances: Gideon Nnaji appearing for the Petitioner. BofedeOkporu appearing for the Respondent.

HON. JUSTICE M. OSHO-ADEBIYI
JUDGE
30TH MARCH, 2022