

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON WEDNESDAY THE 16TH DAY OF MARCH, 2022.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO-
ADEBIYI

SUIT NO: FCT /HC/PET/233/2021

MARY OSOKOGUYELIMAH -----PETITIONER

AND

SAMUEL IGIEBA YELIMAH -----RESPONDENT

JUDGMENT

The Petitioner filed this petition on the 5/2/21 against the Respondent seeking for the following reliefs:

- a. The Petitioner seeks the following Orders against the Respondent.
- b. A Decree of Dissolution of the Marriage between the Petitioner and the Respondent on the ground that same has broken down irretrievable in that the Respondent has behaved in such a manner the Petitioner cannot reasonably be expected to live with the Respondent.
- c. A DECREE NISI of dissolution of marriage between the Petitioner and the Respondent by reason of matters herein before stated.
- d. A DECREE that the custody of the child of the marriage who is a female and minor should be granted to the Petitioner since she is currently in the Petitioner's custody.
- e. AN ORDER that the visitation rights of the Respondent apply only during holidays.
- f. A quarterly allowance expenses of N500,000.00 (Five Hundred Thousand Naira) only for the schools, medical expenses and maintenance of the child of the marriage.

- g. AN ORDER that the said sum as contained in paragraph (e) is subject to upward review every two years by the Petitioner and the Respondent.
- h. The sum of N5,000,000.00 (Five Million Naira) only being the cost of this suit.
- i. Such further Order/Relief as this Honourable Court may deem fit to make or grant in the circumstance of this Suit.

The facts upon which the Petitioner shall relies upon to prove that the marriage has broken down irretrievably is that:

- (a) The Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

The Petitioner opened her case on the 10th day of November, 2021, wherein she testified as a sole witness. Petitioner adopted her witness statement on oath as her evidence in this case. In the course of her testimony, one exhibit was tendered and admitted in evidence. That is, exhibit A which is the certificate of marriage No. 00041558 dated 13/12/2018. The Respondent's counsel cross examined her and after re-examination the Petitioner thereafter closed her case. The Respondent was served with all the processes in this suit but the Respondent did not file an Answer to the petition nor a witness statement on oath. At the close of the Petitioner's case the Respondent's counsel informed the court that they rest their case on that of the Petitioner and case was adjourned for adoption of final written address.

The Respondent's counsel filed the final written address on 17/01/2022 wherein he raised a sole issue for determination to wit:

“Whether given all the facts and circumstances of this case, especially having regard to the state of pleadings and evidence on record, the Claimant has proved his claims as required by law so as to be entitled to the reliefs sought by him in this suit”.

Learned counsel submitted that given the state of pleadings and evidence in this case, the Petitioner has failed woefully to establish her claims against the Respondent and is therefore not entitled to any of

the reliefs sought by her in this suit. He submitted that the law is that he who asserts must prove, and the Petitioner is required by law to establish her claims on a balance of probabilities, or on a preponderance of evidence. He submitted that the pleadings and evidence in Court did not make an iota of reference to the station in life of the Respondent to enable the court to a just and equitable decision on the matter of maintenance cost. He further submitted that cost in the circumstances is at the discretion of the Court which discretion is bound to be exercised judiciously and judicially. He then urged the Honourable Court to resolve this issue in favour of the Respondent and against the Petitioner, and hold that the Petitioner has not established her claims in this suit and is therefore not entitled to the reliefs sought in this suit. He relied on the following authorities amongst others; **Section 134 and 136 of the Evidence Act, 2011; Mrs. Vidah C. Ohochukwu V A. G. (Rivers State) & 2 Ors. (2012) 6 NWLR (pt. 1295) 53, @ 84; Leadway Assurance Co. Ltd. v Zeco Nig. Ltd. (2004) 22 WRN 1, @ 12; Section 70 (2) of the Matrimonial Causes Act; Tabansi v. Tabansi (2018) 18 NWLR (Pt 1651) 279 SC and Nig Brewries Plc v NUFBTE (2020) 7 NWLR (Pt1724) pg 509.**

The Petitioner's written address dated 20/12/2021 and filed 21/12/2021 was duly adopted wherein counsel raised two (2) issues for determination to wit;

1. Whether the leave of this Honourable Court ought to have been sought and obtained before filing this Petition by the Petitioner.
2. Whether the Petitioner has proved her case to be entitled to the reliefs sought before this Court.

Learned counsel submitted that leave of Court is only mandatory where the marriage in issue vis-a-vis a petition to set aside the marriage was brought before two (2) years of the said marriage and that there are exceptions to this rule. Counsel further submitted that the interests of the child under **Section 7(1) of the Matrimonial Causes Act** would include her welfare, education, security and overall wellbeing and development. Counsel submitted that it is settled law that unchallenged pleadings signifies admission of the facts stated in

the pleadings and that the burden of proof is on the preponderance of evidence. Counsel urged the court to hold that the Petitioner having established succinctly that the marriage with the Respondent has broken down irretrievably same having not been controverted by the Respondent by way of evidence should be nullified by this Honourable Court thereby entitling the Petitioner all the reliefs sought against the Respondent. Counsel cited the following authority: **Section 30(1) of the Matrimonial Causes Act as well as Order IV of the Matrimonial Causes Rules; FISHER V. FISHER (1948) PROBATE 263, 264 (CA); TABANSI V. TABANSI (2018) 18 NWLR (PT. 1651) 279 SC (P. 296 PARAS G-H); Section 15(1) (2) of the Matrimonial Causes Act; BIBILARI V. BIBILARI (2011) 13 NWLR (PT. 1264) 207 CA P.234, para. F-H and U.T.C NIG. PLC V. PHILIPS (2012) 6 NWLR (PT. 1295) 168.**

In this case, the Respondent failed to file an answer although the Respondent and his Counsel were present on the date the Petitioner opened her case and was cross-examined by the Respondent's Counsel. It is the well settled principle of law that where evidence given by a party in proceedings is not challenged by the adverse party who had the opportunity to do so, the Court ought to act positively on the unchallenged evidence before it. This was the position of the Supreme Court as held by Per Rhoades Vivour J.S.C in the case of **Cameroon Airlines V. Otutuizo (2011) LPELR 82-(SC)**. The evidence of the Petitioner in this case is not challenged or contradicted by the Respondent. The effect is that the evidence of the Petitioner ought to be taken as accepted or established.

I have examined the evidence and read the final address of both Counsel and this Court will adopt the sole issue for determination which is:

“Whether from the unchallenged and uncontroverted evidence and circumstances of this case the marriage between the Petitioner and the Respondent has not broken down irretrievably as to warrant a decree of dissolution of marriage sought”

The fact that a marriage has broken down irretrievably is a sole ground for the presentation of a divorce petition, and the Court cannot make such findings unless one or more facts specified under **Section 15(2) (a-h) of the Matrimonial Causes Act 2004**, is or are proved to support the fact that the marriage has broken down irretrievably. The facts as stated in **Section 15 (2) (a-h) of the Matrimonial Causes Act**, that can be basis for grounds for dissolution of marriage are as follows:

- a. That the respondent has 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 a way that the petitioner cannot be reasonably 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.*

The Petitioner has relied on unreasonable behaviour pursuant to **Section 15(2)(c) of the Matrimonial Causes Act**. The Section provides:

"15(2) The Court hearing a Petition for a decree of dissolution of marriage shall hold the marriage to have broken down

irretrievably if, but only if, the Petitioner satisfies the Court of one or more of the following facts: -

(c) That since the marriage the respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the respondent. "

"Unreasonable behavior" is the term used to describe the fact that a person has behaved in such a way that their partner/spouse cannot reasonably be expected to live with the other. It is not easy to prove unreasonable behaviour. Such behaviour has to be negative. Allegations of some negative behaviour of a spouse is not enough to warrant the Court holding that the spouse is guilty of unreasonable behaviour. What is the nature of the behavior envisaged under **Section 15(2)(c) of the Matrimonial Causes Act**? The Act did not define the phrase "behaved in such a way". However, the behavior has to be negative. It must be such that a reasonable man cannot endure. The conduct must be grave and weighty in nature as to make further cohabitation virtually impossible. See: **Oguntoyinbo vs. Oguntoyinbo**(2017) LPELR - 42174 (CA).

The duty on the court is to consider whether the alleged behaviour is one in which a right-thinking person would come to the conclusion that the Respondent has behaved in such way that the Petitioner could not reasonably be expected to live with him taking into account the whole of the circumstances, and the matrimonial history of the parties. **Ibrahim vs. Ibrahim 2007) I NWLR (part 1015) page 383**. Now **Section 82(1) of the Matrimonial Causes Act** provides that:

"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".

The standard of proof required therefore is no more than that of preponderance of evidence. The Court in **Nanna vs. Nanna (2006) 3 NWLR (pt. 966) pg. 1** held that the Petitioner must prove:

a) *The sickening and detestable or condemnable conduct of the Respondent; and*

b) *The fact that the Petitioner finds it intolerable to continue to live with the Respondent.*

These two facts are separate and distinct from each other and therefore must both be proved. The evidence of the Petitioner is that she got married to the Respondent at the Federal Marriage Registry Ikoyi, Lagos State on the 13th of December, 2018. That the marriage is blessed with a baby girl Elizabeth Yelimah, born 5/3/2019 who lives with the Petitioner since she left the Respondent. That she has suffered substantial dehumanization, stress, agony, and does not command any single respect from the Respondent any more. As a result, she has suffered serious health deterioration, losing weight uncontrollably and has developed unprecedented increase in blood pressure and other related complications due to the Respondent's maltreatment. That the Respondent has been violent towards her and his violent conduct has caused her so much pain, emotionally, psychologically, physically, and otherwise. That the Respondent has always been in the habit of threatening to kill her. That at regular intervals she has received from the Respondent behaviours that connote hatred, disgust, and insincerity of love, thereby affecting the Petitioner's psychological, emotional cum social well-being. That her family as well as the Respondent's family has intervened on several occasions, but it appears that the Respondent will not yield, instead of the situation getting improved it keeps getting worse each preceding day. That the Respondent gets angry at any slightest argument and could be mean, ruthless and could go to any length to have his way. That the Respondent has been callous and disrespectful to the Petitioner and refused to carry out his traditional duties as a husband. That the

Respondent has willfully refused to provide for the welfare of the only child, leaving the whole responsibility to the Petitioner prior to the filing of this Petition. That the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. Hence the Petitioner considers that the marriage between her and the Respondent has broken down irretrievably as there is no

longer love between the parties to sustain the marriage.

During cross examination of Petitioner, the following answers were elicited from the Petitioner:

Q – How long have you lived apart.

A – 6 months

Q – Your marriage was contracted 2018?

A – Yes

Q – In paragraphs 8, 9 & 10 you said Respondent has been threatening to kill you. Do you have evidence?

A – No written evidence

Q – Did you report to any security agency?

A – No

Q – In paragraph 27 you said the Respondent would be allowed to have access to the child during school holidays?

A – I agree

And under re-examination, the Petitioner was asked the following questions: -

Q – You said you did not report the matter to any security agency?

A – Yes

Q – Did you report to anybody at all

A – I reported to my parents.

It should be noted that the test of whether the behaviour complained of is intolerable to expect the Petitioner to continue to live with the

Respondent is objective and not wholly subjective. The burden is on the Petitioner to prove not only the undesirable behaviour of the Respondent which she is averse to, but also that she finds it intolerable to continue living with the Respondent. If she is unable to prove any of these allegations, her petition cannot succeed and it will be dismissed even if the divorce is desired by both parties. See **Oguntoyinbo vs. Oguntoyinbo (2017) LPELR-42174 (CA)**,

The Respondent rested his case on that of the Petitioner and only filed a final written address. It should be noted that no matter how well written the final written address is it cannot take the place of evidence. The Respondent did not challenge the evidence of the Petitioner on his conduct which she found unreasonable. The cross examination was only on the claim of threat to life and on other issues not relevant to the Petitioner's case. I find the unchallenged evidence of the Petitioner in respect to intolerable behavior satisfactory and in conformity with the law and hold that the marriage between the parties has broken down irretrievably.

The Petitioner has claimed in Relief (f) for quarterly allowance expenses of N500,000.00 (Five Hundred Thousand Naira) for the schools, medical expenses and maintenance of the child of the marriage. **Section 14 of the Child's Right Act** state that every child has a right to parental care, protection and maintenance. Parents have the primary responsibility for the up bringing and general welfare of their child/ren and shall have the duty to secure within their abilities and financial capacities, conditions of living necessary to the child's development. In granting maintenance there are factors which should guide the Court. In the case of **Hayes vs. Hayes (2000) 3 NWLR (part 648) page 279** the Court stated the principles guiding the assessment of maintenance in matrimonial proceedings to include:

- a) The stations in life of the parties and their lifestyle;
- b) Their respective means;
- c) The conduct of the parties;
- d) Existence or non-existence of a child/children of the marriage.

However, in assessing maintenance, **Section 70(1) of the Matrimonial Causes Act** gives the Court the discretionary power to order and assess maintenance of a party. **See Nanna vs. Nanna (supra)**.

The Petitioner did state that the Respondent is a baker with Shoprite Abuja Gateway along Airport Road. The Petitioner on her side did not state what she does for a living but from the Marriage certificate attached, it states that she was a trader as at the time of their marriage and in her Petition stated that “the Petitioner is a responsible mother and has comfortable accommodation for herself and the child”. Therefore, there is certainly a means of income for the Petitioner presently. In my view both the Petitioner and the Respondent are capable of making contributions towards the maintenance of their child. **Sections 13, 14 and 15 of the Child's Right Act, 2003** place upon parents the duty and responsibility for providing for their children as of right. It is in the light of this that I hereby order that the Petitioner and the Respondent should contribute towards the payment of the child's school fees, and in the upkeep and maintenance of the child.

To attain wholesome development, children of every marriage need the father and mother figure presence around them. Neither parent can all alone provide that. In line with this, the Court consider that it will be a proper exercise of discretion if an order is made allowing the Respondent access to the child of the marriage. The Petitioner is not contesting access to the child of the marriage.

Consequently, I hereby dissolve the marriage and order as follows: -

- i. I hereby pronounce a Decree Nisi dissolving the marriage celebrated between the Petitioner, **MARY OSOKOGU YELIMAH**, and the Respondent, **SAMUEL IGIEGBA YELIMAH** at the Federal Marriage Registry Ikoyi, Lagos State, Nigeria on the 13th day of December, 2018.
- ii. I hereby pronounce that the decree nisi shall become absolute upon the expiration of three (3) 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 the only child of the marriage **Elizabeth Yelimah** to the Petitioner, till the child attains the age of 18 years.
- iv. The Respondent is granted a supervised visitation rights to the only child of the marriage **Elizabeth Yelimah** during school holidays.
- v. I hereby order that the Petitioner and the Respondent should contribute towards the payment of the child's school fees, and in the upkeep, medical and maintenance of the child in the ratio of 70% (for the Respondent) and 30% (for the Petitioner) bearing in mind that Petitioner presently shoulders the burden of accommodation for both herself and the only child.
- vi. Each party shall bear their cost of action.

Parties: Petitioner was present. Respondent was absent.

Appearances:Uche Ibiamfor the Petitioner. S. I. Imokhe appearing with Elizabeth Adodoakouete for the Respondent.

**HON. JUSTICE M. OSHO-ADEBIYI
JUDGE**

16THMARCH,

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