IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

THIS WEDNESDAY, 8TH DAY OF JUNE, 2022.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: GWD/PET/11/2019

BETWEEN:

MR. DOMINIC OKONDU …………………………. PETITIONER

AND

MRS. ERDOO OKONDU ....…………………… RESPONDENT

JUDGMENT

By a Notice of Petition dated 7th June, 2020 and filed same date in the Court's Registry, the Petitioner claims the following Reliefs against the Respondent as follows:

i. **An Order that the marriage celebrated between the Petitioner and the 1st Respondent on the 1st day of June, 2007, do and shall be dissolved upon the ground stated in Sections 15(1), 15(2)(b) and 15(2) of the Matrimonial Causes Act (Cap M7 Laws of the Federation of Nigeria 2004) as disclosed by the facts averred in this petition with provision made for, an order of Decree Absolute upon the effluxion of time stipulated in the Matrimonial Causes Act, after the pronouncement of the Order of Decree Nisi aforesaid.**

ii. **That the Respondent be granted custody of the children of the marriage, Miss. Isioma Okondu aged 12years, born on the 16th day of April, 2007 and Master Ashley Okondu aged 10years, born on the 25th March, 2009.**

iii. **That the Respondent is to ensure the children are given a good spiritual and moral upbringing according to Christian biblical doctrine, particularly under the Roman Catholic Doctrine.**

iv. **That the Petitioner should be granted undisturbed access to children of the marriage anytime he makes a request to the Respondent to see them, and pending when the children reach the age of maturity to make their own decisions.**

v. **That the Respondent should make available to the Petitioner, the address of Residence of the Respondent where the children of the marrisge will be resident at all times.**

vi. **That the Respondent should make known to the Petitioner the schools the children of the marriage are attending at all times, including their term results and performance reports in the stated schools by any medium as may be ordered by the Hon. Court.**

vii. **An order of this hon. Court directing the Respondent to use the proceeds of the family property jointly purchased by the parties in the course of the marriage for the maintenance, upkeep and educational requirements of the children of the marriage.**

viii. **Cost of this Petition.**

The Respondent on the record was duly served with the petition by substituted means vide DHL Courier Service but she did not respond to the petition or file any process in opposition. She was also served with several hearing notices yet she did not appear in court.

The matter thus proceeded to hearing. In poof of his case, the Petitioner testified as PW1 and the only witness. The substance of the unchallenged evidence is that he

got married to the Respondent on the 1st June, 2007 at the Abuja Municipal Area Council Registry, Abuja in accordance with the Marriage Act and tendered a copy of the Marriage Certificate which was admitted in evidence as **Exhibit. "P1".**

PW1 stated that after the wedding they set up a matrimonial home and cohabited at Plot 173, Kado Fish Market Road, Abuja and at Yayale Ahmed Estate, Apo, Abuja and the marriage is blessed with two (2) children:

1. Isioma Okondu born on the 16th April, 2007; and
2. Ashley Okondu born on the 25th March, 2009.

PW1 stated also that problem started between when he travelled for a business trip in 2012, and on his return on the 17th August, 2012, he discovered that the flat was shut and after enquiry, he was informed that his wife had travelled with the 2 children and her luggage.

PW1 stated that the two parties jointly own a two bedroom flat situate at Road 1, Block 5, Flat C, at Yayale Ahmed Estate, Dutse District, Abuja, bought through PW1 from Shelter Initiatives Limited, but the said property is under the control of the Respondent

PW1 testified also that since the Respondent deserted her home, she has refused to return to the Matrimonial home with the children of the marriage for more than 9 years now and that all efforts at reconciliation has failed. He stated that his family approached the family of the Respondent severally to make peace but all to avail. That the Respondent at a point filed a petition in suit No. PET/219/2013 which she subsequently abandoned. PW1 stated also that since the Respondent has abdicated her responsibility and deserted the matrimonial home, the Petitioner urged the court to grant the petition since the marriage has broken down irretrievably and as parties have lived apart for nearly 10 years now.

On the application of the Counsel to the Petitioner, the right of the Respondent to cross examine PW1 and defend the action was foreclosed and the Court ordered the Counsel to the Petitioner to file a written address.

The Petitioner then filed a written address dated 9th September, 2021 and filed same date at the Court's Registry. Two issues were raised as arising for the determination as follows:

1. **Whether from the evidence adduced by the Petitioner, since the marriage the Respondent had committed desertion and the Petitioner found it intolerable to live with the Respondent?**

2. **Whether the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent?**

I only wish to briefly state here that the Respondent from the records has had more than ample time to defend this action if she wanted. She never availed herself of the opportunity. The principle appears settled that while the right to be heard is of wide application and great importance in any well conducted proceedings. It is however a right that must be confined within a circumscribed limits and not allowed to run wild. See **LONDON BOROUGH OF HOUSLOW VS TWICKENHAM GARDEN DEVELOPMENT LTD (1970)3 All ER 326 at 347. A** party certainly does not have till eternity to prove or defend any action as the case may be.

Having carefully considered the petition, the unchallenged evidence led and the address of counsel, the narrow issue is whether the Petitioner has on preponderance of evidence established or satisfied the legal requirements for the grant of this petition. It is on the basis of this sole issue that I would now proceed to consider the evidence and submission of counsel.

ISSUE 1

Whether the Petitioner has on a preponderance of evidence established/satisfied the legal requirements for the grant of the petition.

I had at the beginning of this judgment stated the claims of the Petitioner. Similarly, I had also stated that the Respondent despite the service of the originating court processes and severally hearing notices did not file anything or adduce evidence in challenge of the evidence adduced by the Petitioner. It is now accepted principle of general application that in such circumstances, the Respondent is assumed to have accepted the evidence adduced by Petitioner and the trial court is entitled or is at liberty to action the Petitioner's unchallenged evidence. See the case of **Tanarewa (Nig.) Ltd V Arzai (2005)5 NWLR (Pt.919) 593 at 636 C-F; Agagu v. Dawodu (1990) NWLR (pt.160) 169 at 170**.

Notwithstanding the above general principle, the court is however still under a duty to examine the established facts of the case and then see whether it entitles the claimant to the relief(s) he seeks. I find support for this in the case of **Nnamdi Azikiwe University v. Nwafor (1999) 1 NWLR (pt.585) 116 at 140-141** where the Court of Appeal per Salami JCA expounded point thus:

"The plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence…the mere fact that a case is not defended does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant…"

A logical corollary that follows the above instructive *dictum* is the attitude of court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. The Apex Court in **Duru v. Nwosu (1989) 4 NWLR (pt.113) 24** stated thus:

"…a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory then he had not made out what is usually referred to as a *prima-facie* case, in which case the trial judge does not have to consider the case of the defendant at all."

From the above, the point appears sufficiently made that the burden of proof lies on the plaintiff or petitioner in this case to establish his case on a balance of probability by providing credible evidence to sustain his claim irrespective of the presence and/or absence of the defendant/respondent. See **Agu v. Nnadi (1999) 2 NWLR (pt.598) 131 at 142.**

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 provides 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.**

Now in the extant case, Petitioner from his petition seeks for the dissolution of the marriage with Respondent on the ground that the marriage has broken down irretrievably and essentially predicated the ground for the petition on that fact that the Respondent left the matrimonial home in 2012 without any notice and has refused to return despite all his efforts and intervention of his family members and that of the Respondent. That they have continuously live apart now for over a period of nine years.

It is doubtless therefore, that the petition was brought within the purview of **Section 15 (1) (c), (e)** and **(f)** of the 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 part may apply for 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 a petition for divorce.

Now from the uncontroverted evidence of the Petitioner before the court, I find the following essential facts as established to wit:

1. That parties got married on 1st June, 2008 vide **Exhibit P1**.

2. That the Respondent deserted her matrimonial home on the 17th August, 2012 with the children of the marriage.

3. That since 2017, a period of nearly 10years now, cohabitation has effectively ceased between parties.

4. That the Respondent has completely abandoned her responsibilities to her husband as a wife.

5. That she has behaved in an intolerable manner by her actions in leaving the matrimonial home with the two children, and that he cannot any longer live with her in peace and harmony.

6. That the Respondent has since moved on with her life with the two children completely independent of the Petitioner.

The above pieces of evidence and or facts have not been challenged or controverted in manner by the Respondent who was given all the opportunity of doing so. The law has always been that where evidence given by a party to any proceedings is not challenged by the opposite party who has the opportunity to do so, it is always open to the court seize of the proceedings to act on the unchallenged evidence before it. See **Agagu v Dawodu (Supra) 169 at 170, Odunsi v Bamgbala (1995) 1 NWLR (pt.374) 641 at 664 D-E, Insurance Brokers of Nig. V A.T.M Co. Ltd (1996) 8 NWLR (pt.466) 316 at 327 G-H**.

This is because in civil cases, the only criterion to arrive at a final decision at all time is by determining on which side of the scale the weight of evidence tilts. Consequently, where a defendant chooses not to adduce evidence, the suit will be determined on the minimal evidence produced by the plaintiff. See **A.G Oyo State V Lakes Hotels Ltd (No.2) (1989) NWLR (pt.121) 255, ABU VsMolokwu (2003) 9 NWLR (pt.825) 265.**

Indeed the failure of the Respondent to respond to this petition confirms in all materials particulars the fact that the marriage has broken down irretrievably and that they have lived apart now for nearly ten (10) years.

By a confluence of these facts, it is clear that this marriage exists only in name. As stated earlier, any of the facts under **Section 15(2) a-h (supra)** if proved by credible evidence is sufficient to ground a petition for divorce. The established fact of living apart for nearly ten (10) years show clearly that this marriage has broken down irretrievably and the parties have no desire to continue with the relationship; this fact alone without more can ground a decree of dissolution of marriage. If

parties to a consensual marriage relationship cannot live any longer in harmony, then it is better they part in peace and with mutual respect for each other. The unchallenged petition on dissolution of the marriage in the circumstances has considerable merit.

Relief (ii) is for custody but the petitioner is not contesting the issue of custody with Respondent. He wants the custody of the children of the marriage to be with Respondent. So be it.

Relief (iii) flowing from Relief (ii) is equally not in contest. There is however no evidence with respect to what Christian doctrine the Respondent practices with the children. It appears to me reasonable to make only an order that will ensure they are brought up as good Christians under Christian Biblical doctrine.

Relief (iv) relating to access appears to me reasonable. The petitioner should be able to have access to the children of the marriage at reasonable times during weekends and holidays. It cannot be right or fair that since the Respondent left the matrimonial home in 2012, the Petitioner has not set eyes on his children.

Reliefs (v) and **(vi)** seeking for orders relating to where the children reside and the schools they attend appear to me a fair demand. It is an indication that the petitioner as father wants to be involved in the life of his children.

The only challenge her is that the petitioner on the evidence does not know where the Respondent lives with the children. Indeed on the record, service of the originating processes was a herculean task. The court is therefore loathe to make orders in vain and which cannot be enforced. On this important consideration, these reliefs will not be availing. They will be struck out.

Relief (vii) seeks for an order directing the Respondent to use the proceeds of the family property jointly purchased by the parties in the course of the marriage for the maintenance, upkeep and educational requirements of the children of the marriage.

On the evidence, the petitioner stated that the parties jointly bought a family property but there is absolutely no scintilla of evidence whatsoever to situate that the parties jointly paid for the purchase of any two bedroom apartment situate at

Road 1, Bloch 5, Flat C, Yayale Ahmed Estate, Dutse District, Abuja. It is logical to hold that for the court to make any pronouncement that any property is jointly owned, there has to be credible evidence of the existence of the property and evidence that it is owned jointly by parties. In this case, there is absolutely no evidence of any kind to support the averment of any jointly owned property. The law is settled that where evidence is not led to support averments in pleadings, the averments is deemed abandoned and will be discountenanced. This is settled principle in law.

Relief (vii) clearly having not been established fails.

Having carefully evaluated the un-challenged evidence adduced by the Petitioner, I accordingly make the following orders:

1. **An order of Decree Nisi is granted dissolving the marriage celebrated between the Petitioner and Respondent on 1st June, 2007.**

2. **The Respondent is hereby granted custody of the two children of the marriage: Miss. Isioma Okondu aged 12years and Master Ashley Okondu aged 10years.**

3. **The Respondent is to ensure that the children of the marriage are given a good spiritual and moral upbringing according to Christian Biblical doctrines and or tenets.**

4. **The Petitioner is hereby granted access to the children at all reasonable times during vacations and public holidays.**

5. **Reliefs (v) and (vi) are hereby struck out.**

6. **Relief (vii) fails and is dismissed.**

7. **No order as to cost.**

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Hon. Justice A. I. Kutigi

<u>Appearances</u>

Anthony O. Chukwurah, Esq., for the Petitioner