THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS WEDNESDAY, THE 15TH DAY OF JUNE, 2022

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/GWD/PET/06/21

BETWEEN:

OMONIYI AKINGBADE MICHAEL.....PETITIONER

AND

OMONIYI OKAGBANE LYDIA.....RESPONDENT

JUDGMENT

By a notice of Petition dated 8th February, 2021, the Petitioner claims the following Reliefs against the Respondent as follows:

"**i. A decree of dissolution of marriage contracted with the Respondent on 17th April, 2010 on ground that the marriage has been broken down irretrievably on the following grounds:**

ii. That the Respondent and the Petitioner have not lived together for a continue (sic) period of 7 years immediately proceeding this petition, and the respondent has behave in such a way that the petitioner could not reasonably be expected to live with the Respondent any longer.

iii. That since 2013 the respondent has consistently torment, embarrass, threaten the Petitioner and the Petitioner finds it intolerable to live with the respondent.

iv. Custody of the 3(three) children of the marriage for proper care and maintenance.

v. A perpetual injunction restraining the Respondent or her agents, privies or any person acting on her behalf or instruction from threatening, harassing, molesting, embarrassing, intimidating, and or assaulting the petitioner.

On been served the petition, the Respondent filed an answer and a cross petition, wherein she claims the following Reliefs against the Petitioner as follows:

"**i. An order granting custody of the three children of the marriage to the Respondent.**

ii. An order for the Petitioner to pay the sum of N200,000.00(Two Hundred Thousand Naira) monthly for the upkeep of herself and the three children.

iii. An order that the Petitioner should pay the school fees, medical bills and other necessaries of the three children.

iv. Any order legal remedies or equitable reliefs which this Honourable court may find that the Respondent is entitled to having regards to the justice and/or circumstances of this case."

The Petitioner filed a Reply to the Respondent's answer on 13th September, 2021. I note immediately that in the Reply, the Petitioner appear to have formulated or made fresh claims in addition to the claims made in the substantive petition. A Reply properly understood is not an originating process through which Reliefs/ Claims can be made as done here. A Reply is simply a process through which the Petitioner can respond to new issues raised in the Respondents answer to avoid a situation where he would be taken to have admitted those issues. It is however no conduit or platform to file or seek new claims or Reliefs. The new claims or Reliefs formulated at pages 5-6 of the Relief should accordingly be discountenanced.

The matter thereafter proceeded to **hearing**. The Petitioner testified in person as **PW1** and the only witness. The substance of his evidence is that he got married to the Respondent, his wife in 2010 when he was working then in Warri. That in 2012, they had a misunderstanding in which she used a knife and he reported her to her father and her defence was that she acted in self defence. That due to the problems in the marriage, her father came in 2013 to take away the children of the

marriage and he told the father to return the children. That as a result, his brother-in-law threatened him and because of the threat, he had to seek for a transfer out of Warri to Abuja.

PW1 testified that after the transfer, his wife, the Respondent came to Abuja once and stayed a week in 2013 and left and that since she left, she has remained in Warri and refused to come down to Abuja. That even when he suffered a stroke, she refused to come and stay with him and he had to call his brothers to stay with him. Further that when she eventually came he told his brothers to leave but that immediately they left, she abandoned him. That they have now lived apart for over eight(8) years and wants the marriage dissolved.

PW1 testified that he wants joint custody of the three (3) children of the marriage. That one of them is at the Afe Babalola University Ado Ekiti and that he has spent over 2 Million Naira on him. That the other 2 children are in secondary school and that he is responsible for their education. That he pays over one million naira every year and gives money for their upkeep. Also that their medical needs are under him and he intends to continue to take care of them.

PW2 tendered in evidence the following documents:

1) Marriage certificate between parties admitted as **Exhibit P1**.

2) Copy of statement of account of Petitioner with Access Bank admitted as **Exhibit P2**.

Cross-examined, PW1 stated that he made several moves to have issues in the marriage resolved. That he sponsored Respondent to America in 2019 and that he brought her to Abuja to stay with him but that her mother impressed on her to stay away from the marriage. That he has been responsible for her upkeep since 2013 but that she has refused to change.

With his evidence, the **Petitioner** closed his case.

The Respondent and Cross Petitioner also testified as **DW1** and the only witness. The substance of her evidence is that she is a petty trader and the Petitioner's, her husband. That she never moved out of the matrimonial home but that it was the Petitioner that left her and the children in Warri when he moved to Abuja.

She stated that in 2020, her husband had a stroke and she was not informed by anybody from his family and that it was when he called his daughter three days

later when he informed her that he had a stroke and the daughter started crying that she knew about his health challenge. That he later sent her a text to come and take care of him but she could not travel immediately because of the then ongoing SARS protest and there was a 2 days curfew in Warri. That she called his half brother and told him of the situation and that after the EndSars protest, she came to Abuja even though he told her not to come again.

DW1 further testified that nobody threatened her husband when he comes to see his children and that he moved to Abuja so that he will continue to chase girls and that she never abandoned her husband in 2013. That the truth is he did not want them to come and stay with him in Abuja. That she does not have any government work in Warri, so why would she not follow her husband.

She stated that even in 2013 when she came to Abuja, she bought the curtains for the house before he told her to leave. Further that she did not leave him when he had stroke but that he told her to leave. That she had always taken care of him at all times. That she does not want joint custody. That the eldest can see his father anytime he wants but the two (2) younger children do not know their way round and should be with her. That she wants **N200,000** for their upkeep.

Under cross-examination, she stated that she was not informed by his family when he had stroke. That he left Warri for Abuja when he was transferred. That she came to see him in Abuja when he got his accommodation and she stayed for 3 days in a hotel. That it was not the only time she came to Abuja. She stated that after she went back, it took him another 10 years before he invited them to Abuja with the children and that even then he had relocated to another apartment.

That the relationship with the Petitioners' family members is good. Finally, she stated that she is also not interested in the marriage since he is also not interested.

With the evidence of DW1, the Respondent closed her case.

The court ordered for the filing of final addresses. The Respondent did not file any address despite the ample time given for filing of addresses. Indeed H.E Okosun of counsel for the Respondent stated that they will be relying only on the evidence elicited at the hearing.

On the part of the Petitioner, the final address is dated 10th January, 2022 and filed on 17th January, 2022. In the address, one issue was raised as arising for determination to wit:

"Whether the Petitioner is entitled to the Reliefs sought based on the evidence before this Honourable Court?"

I have carefully considered the address filed by the Petitioner and the evidence led on both sides. There is in this case a petition and a cross-petition. The cross-petition in law is like a cross-action or in the nature of a counter-claim which is a separate, independent and distinct cause of action and the cross-petitioner like the Petitioner in an action must prove her case against the person she cross petitioned before obtaining judgment on established legal threshold.

In view of this state of the law, both the Petitioner and Cross-Petitioner have the burden of proving their petition and cross-petition respectively. This being so, the narrow issue for determination is simply **whether the petitioner and cross-petition have established their claims on a preponderance of evidence to entitle either of them to the Reliefs they each claim.**

It is therefore on the basis of this issue that I will now proceed to resolve this dispute. In furtherance, I have read the address of the Petitioner and in the course of this Judgment and where necessary or relevant, I shall refer to submissions of counsel and resolving any issues arising therefrom.

ISSUE 1

"Whether the petitioner and cross-petition have established their claims on a preponderance of evidence to entitle either of them to the Reliefs they each claim?"

At the commencement of this judgment, I had stated that there is a petition and a cross-petition. Both parties have the evidential burden of proving their respective claims on established legal threshold. It is settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See **Section 131(1) Evidence Act.** By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings 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 now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

Indeed 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.**

Now in the extant case, the 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 the fact that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

It was also further averred as a ground that the Respondent used a knife when they had a quarrel and that she left the matrimonial home at the prompting of her parents sometime in 2013 when they were living in Warri and has refused to return home and even when he relocated to Abuja when he had a stroke, she refused to come and take care of him. That they have lived apart now for nearly 8 years. It is doubtless therefore that the petition was brought within the purview of **Section 15 (1) (c) and (e) 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 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.

The Respondent in the **Reliefs** claimed in the Cross-Petition did not pray specifically for dissolution of the marriage but she essentially both in the pleadings and evidence denied the allegations that she had behaved in a manner that the Petitioner cannot be reasonably be expected to live with her and denied that she abandoned the matrimonial home in 2013. She indeed made the case that it is Petitioner that abandoned her and the children of the marriage. She also stated that the petitioner was never threatened by anybody.

Now in evidence, beyond the bare challenged oral testimony by Petitioner that his problems with Respondent started in 2013, when they had a fight and she used a knife nothing was really put forward before court to support, show or establish this untoward behaviour of the Respondent he complained of. Indeed the allegations that the father of his wife took away the children due to the misunderstanding they had and the allegation that he was threatened by the brother of Respondent and that led him to seek a transfer to Abuja were not creditably established beyond bare challenged oral assertions. No independent or corroborative evidence was proffered to situate or support these actions and or threats. The question to ask here is this: Is there nobody who knows about these incidents? The parties obviously do not live in an island so neighbours or relations should be able to say something about the nature of the relationship of parties. If the Petitioner was threatened as alleged by the Respondent's brother, did he report to the police or indeed to anybody?

As stated earlier, the Respondent denied all these allegations. The Petitioner has clearly not provided evidence of probative value to support these allegations.

Now on the question of living apart as contended by the Petitioner for eight (8) years, he indicated that since he moved to Abuja in 2013, the Respondent came over and stayed for 3 days before she left and that since then she had remained in Warri and that even when he had a stroke, she refused to come and stay with him and he had to call his brothers and that even when she came eventually, she did not stay long to take good care of him.

On the other side of the aisle, the case of Respondent is that it is the petitioner that abandoned his family and did not want them to come to Abuja. She stated that she does not work for Government so that if he wanted her to move to Abuja, she will have done so. She also started that when he had stroke, she was not informed and even when she knew and came to Abuja he told her to leave.

Now from the evidence of parties, there is no real clarity as to the precise duration of time parties have lived apart even though it is clear on the evidence parties do not stay together and they meet only intermittently. On the evidence for example, she was in Abuja in 2013, when he moved initially. Again on the evidence, he comes to Warri on and off and takes care of his children. Furthermore, under-cross-examination, the Petitioner stated that in 2019, he even sponsored her trip to America and brought her to Abuja to stay. Also on the evidence when he had a stroke in 2020, she came and stayed with Petitioner even if briefly. There is therefore no clarity with respect to a clear time frame that parties have lived apart even if on the evidence, the relationship appears to be a rather unusual one without a discernable pattern.

On the evidence, it is common ground that parties do not live together. It is equally common ground that parties are essentially on their own in different towns living essentially independent lives. Indeed on the evidence of Respondent, she stated that after she visited the Appellant in Abuja in 2013, it took him another 10 years before he invited them back to Abuja. She also stated that if the Petitioner is not interested in the marriage, she is equally not interested in the marriage.

By a confluence of these facts, it is clear that this marriage has broken down irretrivably since parties have expressly shown no desire to live together in a marital union with its attendant duties and responsibilities and falls within the purview of **Section 15 (2) (c) of the MCA**. The point to underscore is that two sets of facts call for proof under **Section 15 (2) (c) of the MCA** and they are:

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

b. The facts that the petitioner finds it intolerable to continue to live with Respondent.

These two facts are severable and independent and both must be proved. The petitioner must prove the detestable act and condemnable conduct and then proceed to prove that he finds it intolerable to live with Respondent. The petitioner is under a duty to establish these matters. See **Damulak V Damulak (2004) 8 NWLR (pt.874) 151**.

The test as to whether a petitioner for dissolution of a marriage can or cannot be expected to live with the Respondent is objective. It is not sufficient for a

petitioner to merely allege that he or she cannot live with the Respondent because of respondent's behavior. The behavior alleged must be such that a reasonable man cannot endure.

In this case, the incidence of parties living apart for stretches at different times; the petitioner says 8 years at a point and the Respondent says 10 years; the complete cessation of cohabitation and fulfillment of marital responsibilities; everybody on his own and doing his thing as is said in popular parlance is a clear indication and admission with respect to unacceptable behavior and that the marriage exists only name. Neither party or a reasonable person should be expected to continue to live in such intolerable and very fluid situation.

As a logical corollary, as stated earlier, any of the facts under Section **15(2)a-h** if proved by credible evidence is sufficient to ground a petition for divorce. The established pattern of living apart for stretches as earlier alluded to with no desire on either party to come together and with the expressed desire by parties that the divorce be ordered shows clearly that this marriage has broken down irretrievably and parties have no desire to continue with the relationship. This fact alone without more can ground a decree of dissolution of marriage within the confines or purview of **Section 15(2)(c) and (d) of the Act**. 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. The court here will simply defer to the wishes of parties and grant the divorce.

The next substantive **Relief** sought by Petitioner is that of **custody** of the three children of the marriage. As stated at the beginning of this judgment, the petitioner sought for custody of the children of the marriage but in the Reply to the answer and cross-petition of Respondent, the petitioner now seeks for joint custody. I had found that such approach was not tenable. We are thus left now to deal with the question of custody which I will take together with the claim of **custody** sought by the Respondent.

Now in law, particularly in proceedings relating to custody, guardianship, welfare etc of children of a marriage, the interest of the children is of paramount consideration to the court and whatever order a court makes is guided by these considerations and no more. See **Section 71 of the Act** which provides guidelines the courts are expected to follow in proceedings in respect of custody of children of a marriage.

It is therefore incumbent on parties seeking custody to help the court in the discharge of this delicate and sensitive responsibility to clearly plead and lead credible evidence on what arrangements they have that will further the physical and mental well-being of the children.

In deciding matters of custody, the court does not proceed on the assumption that the claims of either party is superior or inferior, the welfare of the child or children is the first and foremost, the most important of all considerations. Therefore whatever superior benefit(s) or added advantage(s) to be derived from each of the alternative arrangements presented for the children by the competing parents, the court will now have to carefully consider these arrangements and make any order(s) as it thinks necessary in the overall interest of the children.

Now from the pleadings and evidence, all that petitioner put forward to further his claim of custody is that he is their father and that they are currently attending schools and he is solely responsible for their educational up-bringing. The petitioner, both in his evidence and under cross examination agreed that since he left respondent in 2013, the children have been with the respondent, and that he has been responsible for their well being.

Now the supposition is quite reasonable that the best arrangement for the welfare of any child or children would be with both parents. In all normal situations, psychologists have proffered that this usually is the best arrangement for the children.

Now in this case, apart from the scanty pleadings and evidence referred to above, there is absolutely no evidence that the children who have been living with respondent since 2013 when they were at their very tender years are unhappy or are suffering unduly because they are staying with their mother in Warri. There is also no allegation of misconduct either against the respondent of proved dereliction of her parental duties and responsibilities towards the children to the extent that her job as a petty trader permits. There is also nothing to show that they are not making good progress at school or medical evidence to show that the children's health would suffer if they continue to stay with respondent. From the established evidence before the court and which I accept, she had done all that is necessary for the children as her peculiar circumstances allow or dictate. Without any other evidence, there is clearly no evidence to support the allegation that the respondent

puts the children through difficulty and hardship or that their health, growth and development is seriously impaired or indeed that they are unhappy.

The position in the court's considered opinion therefore is that there is no evidence before the court impugning the conduct of the respondent in the exercise of care, control and supervision of the children or indeed anything disqualifying respondent from being awarded the custody of the children despite the submissions of the petitioner's counsel. I must however confess that there is really little to choose between the plans or proposals offered by parties, indeed not much was said by both parties, especially the petitioner who has not told the court who is going to be with and take care of the children if custody is granted him but the fact that the children have been in custody of respondent since 2013 tilts the scale of justice substantially in her favour. The **Petitioner's relief for custody fails**.

The **final relief** of Petitioner seeks for a **perpetual** injunction restraining the Respondent or her agents, privies or any person acting on her behalf or institutions from threatening, harassing, molesting, embarrassing, intimidating, and or assaulting the petitioner.

On the evidence as earlier alluded to, no scintilla of evidence was adduced by Petitioner to support these allegations. The principle bears repeating that averments in pleadings do not constitute evidence and must therefore be proved by credible evidence. In the absence of any evidence to support the assertions of petitioner, the averments therein lack credibility and accordingly discountenanced.

I now briefly turn to the **cross-petition** and the reliefs sought. As stated earlier, there is no relief for divorce in the cross-petition. For the other set of reliefs, the Respondent has to satisfy the legal requirements for the grant of the reliefs she seeks.

Now the issue of custody covered by her Relief (1), I had already dealt with the issue at some length in the **main petition**. I need to repeat myself.

It is only apposite to say that in evidence, it is common ground as already found that the children have always been with Respondent while the Petitioner has been responsible for the upkeep and educational needs of the children.

For me, the welfare of the children both moral and physical is of paramount consideration. These key elements it is undoubted from the evidence that the

respondent has provided right from the early days. This to me clearly counts in respondent's favour. In addition and as indicated earlier on in this judgment, there has never been any suggestion by the petitioner that the respondent is not a fit person capable of looking after the children. There was also absolutely no suggestion that the mother was promiscuous or a bad mother or bad housekeeper or reference made to anything which made it undesirable for her to continue to look after the children. I am therefore extremely reluctant to disturb this state of affairs and break the tie that must have existed between the children and the respondent, particularly since the petitioner has always had a right of access to the children.

Furthermore and this is crucial, there is no evidence by petitioner on who will be with and take care of the children if custody is granted him. Indeed from the evidence there is no evidence of where petitioner lives, stays or the type of accommodation he has. It is not clear from evidence and there was no submission on what arrangements, if any, that he has made for the children assuming custody is granted to him. Even though as I stated in this judgment that there is little to choose between the plans and proposals offered by parties, I do not however conceive that I can exercise my discretion and substitute the certainty of the love, warmth and care of the respondent for an unclear and uncertain situation. All the evidence in the case is strongly in favour of leaving the children with the respondent with a continuation of right of access to the petitioner at reasonable times.

I now proceed to the order for **maintenance** in the sum of ₦200,000 monthly for the upkeep of Respondent and the three children.

I have carefully scrutinised the pleadings and evidence of the Respondent/Cross-Petitioner and it is really difficult to situate the basis of this Relief.

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 the petition in this case, there was no proper pleading of the above relevant factors and the court was not provided either with the facts or premise on which the court is asked to make the order of maintenance sought. There is equally no evidence led by Respondent to provide basis for the award of the amount claimed.

The pleadings and evidence appears grossly insufficient and failing to provide a firm and clear template to make fair order(s) of maintenance in this case. There is nothing either in the pleadings or evidence of Respondent to show what for example is the means and earning capacities of parties or in particular the Petitioner.

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.

Now apart from the bare evidence that the Respondent is a petty trader, no where was the necessary particulars to do with her means or her earning capacity pleaded or evidence led thereupon. These in the court's considered opinion are material facts which ought to have been properly pleaded in the petition and then established. On the authorities, a material fact is one which is essential to the case without which it cannot be supported. In other words that which tends to establish any of the issues raised. See **WEST AFRICAN PORTLAND CEMENT PLC v MAYINAT ADEYERI (2003) 12 NWLR (PT 835) 317 AT 533.**

It is important therefore to state that while any pleading is not expected to plead evidence, it is expected that all material facts that a party relies on for his claim must be pleaded because a party is only allowed to establish what he pleaded and to obtain only such relief that was prayed for on the basis of his pleadings and creditably established by evidence. See **AJIKANLE v. YUSUF (2000) 2 NWLR (Pt 1071) 301.**

It is really difficult in the prevailing circumstances to situate what is a reasonable amount to take care of the educational and other needs of the children of the marriage. Furthermore, if the children attend schools now for example, there ought to be pleading and then evidence of what kind of schools they attend and the fees paid. There ought also to be pleadings and evidence of the reasonable expenses incurred by Respondent with respect to other needs of the children every month and generally the kind or standard of life under which they live.

If these have been done by Respondent, it would have provided some basis to make an award notwithstanding the obvious and daunting challenge that the earning capacity of petitioner has not been identified beyond the assertion he works with NNPC.

I appreciate the reality on the basis of the unchallenged pleadings and evidence that the Petitioner is the father of their three children with a responsibility and indeed duty to take care of their educational, clothing, feeding, housing and other needs. It is a responsibility, the court does not take lightly. Indeed judicial authorities

wholeheartedly 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."***

The only challenge here is that the court cannot make an order for maintenance in a vacuum or in the absence of materials as sufficiently demonstrated above.

I must therefore 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.

At the risk of sounding prolix, I do not think that in law, the order for maintenance 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 sentiments, 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 Respondent clearly has not pleaded and led any evidence on the amount claimed for maintenance and the earning capacity of the petitioner and the Relief accordingly stands compromised.

The only saving grace in this case is that the Petitioner himself has pleaded and given evidence that he has been responsible for the upkeep, school fees, medical bills, feeding and general welfare of the children and that he intends to continue doing so. It is only right and fair that he continues to do so.

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

ON THE PETITION:

1. **I grant an order of Decree Nisi dissolving the marriage celebrated between Petitioner and Respondent on the 17th April, 2010.**

2. **Reliefs (ii) and (iii) are not Reliefs known to law or properly formulated and they are struck out.**

3. **Reliefs (iv) and (v) fail and they are dismissed.**

ON THE CROSS-PETITION:

1. **An order that the Respondent/Cross-Petitioner is granted custody of the three children of the marriage until they each reach the age of maturity when they can elect or decide who to stay with between the parties with the Petitioner having access to the children at all reasonable times during vacations and public holidays as has been the case.**

2. **Relief (ii) fails and is dismissed.**

3. **The Petitioner is to continue to pay for the upkeep, school fees, medical bills and other necessaries of the three children as has been the case.**

4. **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)

<u>Appearances:</u>

1. A.D Aliyu, Esq., for the Petitioner

2. A.E Okosua, Esq., for the Respondent/Cross-Petitioner.