IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA

SUIT NO: FCT/HC/PET/368/2018

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN:

ALEX IDOWU OGUNLADE……PETITIONER

AND

FAITH OLUWATOBILOBA OGUNLADE……..RESPONDENT

JUDGMENT

The petitioner has filed this petition against the respondent and seeks for the following reliefs:

i. A decree of dissolution of marriage on the ground that since the marriage the respondent has behave in such a way that the petitioner could not reasonably be expected to live with the respondent.
ii. Custody of the children.

In his petition, the petitioner averred that he was then a bachelor and was lawfully married to the respondent then a spinster at First Baptist Church Offa, Kwara State on the 15th October, 2005, and the surname of the respondent immediately before marriage was Miss Farinde.

It is stated that, the petitioner was born on the 13th June, 1976 at Imeko in Imeko Afo Local Government Area of Ogun State and the respondent was born on 1st May, 1980 in Igosun in Oyun Local Government Area of Kwara State.

It is stated that the petitioner is within the meaning of the Act domiciled in Nigeria, and after the marriage the petitioner and the respondent were residing at Plot 6 Tudun Nasara, Dakwa Abuja and currently lived together at plot

E11, Peace Court Estate, FHA Lugbe Abuja and has remained within the jurisdiction of Abuja FCT till date until the respondent absconded from the said house.

It is averred that the petitioner and the respondent co-habited immediately after the marriage at former Sauki Hospital building, Town Hall, Suleja, Niger State, moved to plot 6 Tudun Nasara, Dakwa Abuja in 2007 and moved to plot E11, Peace Court Estate, FHA Lugbe, Abuja since 2015. That the petitioner no longer cohabit with the respondent. That the circumstances in which cohabitation between the petitioner and the respondent first ceased are that the respondent left the matrimonial home at plot E11, Peace Court Estate, Lugbe, Abuja in September, 2017 with the children without consent and knowledge of the petitioner.

It is stated that the marriage produces two children namely:

1. Emmanuel Oluwashina Ogunlade (male) born on the 8th March, 2011 in Primary 2; and
2. Elijah Oluwaseun (male) born 27th November, 2012 in Primary 1.

That the two children are in school at St. Aloysius Catholic Primary School, Area 3 Garki, Abuja (before the respondent without the petitioner's consent or knowledge took them away to an unknown place of abode and school) and in good health.

It is averred that since the marriage, there have not been any divorce proceedings in court before the petitioner and respondent.

It is averred that the facts relied on by the petitioner as constituting the ground specified above is as follows:

i. The respondent has failed woefully in her duties as a wife;

ii. The respondent stops having sexual intercourse with the petitioner completely;
iii. The respondent has become very unfriendly and antagonistic to the petitioner in the house;
iv. The respondent has been very quarrelsome and troublesome and has made life difficult for the petitioner;
v. The respondent left the matrimonial house with the children without the consent or knowledge of the petitioner in September, 2017; and
vi. The respondent changed the children school from St. Aloysius Catholic School, Area 3, Garki, Abuja without the consent and knowledge of the petitioner and put the children in a Primary boarding school.

It is averred that the petitioner has not condoned or connived at the grounds specified above and is not guilty of collusion in presenting this petition.

It is averred that the petitioner has been responsible for the upkeep of the children of the marriage and their education, and he will continue to be responsible for their upkeep and education and they will progress to higher institution in future to the best of their ability, and he will continue to bring the children up in Catholic Christian faith. That the petitioner has been responsible for the upkeep, school fees, and medical expenses of the children and will continue the same way. That the petitioner resides at Plot E11, Peace Court Estate, FHA Lugbe, Abuja which is his personal house and pray the court for the custody of the children in the same address.

The counsel to the respondent entered appearance for her by filing his memorandum of appearance dated the 1st day of November, 2019, and which was filed on the 14th of November, 2019.

In the trial, the petitioner gave evidence on the 5th day of March, 2019, and he stated that he and the respondent were married in Kwara State in 2015 and settled in Abuja together, and that sometime in September, 2017, he left for work on the site and upon getting there, he called the respondent, and when he got back, he met no one at home but he suspected nothing was wrong as there was no quarrel. But after a while he discovered that the maid and the children were not in their room. He later found a note from the respondent saying she had left and he should not bother to look for her and the children. The petitioner then called the respondent's father to complain to him but the father told him not to worry and should remain calm.

The PW1 further told the court the next day he had to go to the hospital as he would not sleep and he has a history of high blood pressure. He then later went to the church where they both attend and met with the president of their society who called the respondent in his presence but she refused to answer the call. That he later advised the president to text her and which he did and after which the petitioner left the church.

It is in his evidence that on the 23rd of September, 2017 being Monday, the said president called him that he had spoken to the respondent and they have an appointment to meet but that she said even if he comes, she does not want to see him.

The PW1 told the court that during the meeting with the president, the petitioner was told that the respondent said she was no longer interested in the marriage and that she

has reported the matter to Lagos Police Station and that he would be invited. He testified that he honoured the invitation and went in the company of the president, and that there he met the respondent with the IPO. He told the court that the respondent stated there that she was not interested in the marriage anymore and so she has left with the children. The respondent also requested there that the petitioner should write an undertaking that nothing will happen to her. The PW1 said that it was at that time that he told the IPO that when he was to marry the respondent, the IPO was not there and that the matter was being handled at the church, and the IPO then gave them five days to go and return.

The PW1 told the court that despite the intervention of both the church and the FCT Social Welfare Department which he approached with a view to settling their disputes, the respondent still maintained that she was no longer interested in the marriage anymore, and that the respondent said to have told the tribunal that whatever the petitioner wanted to do, he could go ahead to do it as she would not release the children.

The PW1 stated that he knows the respondent being a banker will not have the time to take care of the children and this he knew because even while they were still living together as a couple, he was the one that took care of the children by taking them to school. He said on the few occasions that he is unable to take them to school and he asks her to take care of them, she would refuse and because of that experience, and he is convinced that she cannot take care of the children.

The PW1 went ahead to state that all efforts to see his children were refused by the respondent and he found out that she had put the children in Boarding school

Gwagwalada. That he went to the school and found out that the school only runs boarding programme for Secondary School students only but that the respondent brought them because she does not have time to take care of them.

The PW1 told the court that he enquired about the said school at the department of policy and implementation and found out that the school does not have a facility for boarding.

The PW1 stated further that despite all his findings, he still intended to make peace with the respondent at his next visit to school, he saw his eldest son with dried tears on his face and was washing the cloth of his junior brother, and he then collected the cloths from them and washed them himself. He further stated that afterwards, he went to report the matter at the police station and thereafter, the respondent was invited.

That it was then that he discovered, through the respondent that the children were no longer in Abuja as she had taken them to Lagos to live with a friend and not even a relative. That he went together with the police afterward to get the children from Lagos and since then the children have been with him.

The matter was adjourned to some dates to enable the respondent attend to court and to cross-examine the PW1, and instead she instructed her lawyers to withdraw her answer to the petition which was filed on the 14th day of January, 2020, and thus she was instructed by her pastor to do so.

The respondent or her counsel could not cross-examined the PW1 inspite of the fact that her counsel by name T.D. Maih Esq attended the court that time before the withdrawal of the respondent's answer to the petition.

The counsel to the petitioner in his final written address raised this issue for determination, thus:

Whether the marriage between the petitioner and the respondent has broken down irretrievably?

The counsel submitted that by virtue of section 15(1) of the Matrimonial Causes Act LFN 2004, the only ground for dissolution of marriage is that the marriage has broken down irretrievably but the fact that has to be proved for the court to hold that the marriage has broken down irretrievably as is stated, in section 15(2) (a) – (h), of the Act. He submitted further that the petitioner anchored his case under two of the factors enumerated under section 15(2) (a)-(h) and that the obvious implication of this is that the petitioner will succeed if he proves one or more of the factors in the said section. The counsel cited the case of **Ugbotor V. Ugbotor (2007) 35 WRN 147 at 162-163 lines 35 – 40** and opined that in the instant case, the petitioner averred that the respondent was very quarrelsome and troublesome thereby making life difficult for the petitioner. He argued that nagging and verbal abuse amounts to mental torture and the law recognises that the petitioner is entitled to lead a happy life.

The counsel argued that the petitioner has proven that the respondent left their matrimonial home one year preceding the filing of this petition which has not been controverted by the respondent, and to him, the law is that facts admitted needs no further proof, and he cited the case of **Owena Mass Transportation Co. Ltd V. Okonogbo (2018) LPELR – 45221 (CA).**

The counsel further submitted that the answer of the respondent shows that she was the one that brought cohabitation between her and the petitioner to an end, and in this, he cited the case of **Ekerebe V. Ekerebe (1999) 3**

NWLR (pt 596) 514 where the court held that for a divorce petition to succeed, the petitioner must plead and prove one of the facts contained in section 15(2) of the Matrimonial Causes Act. The counsel went further to opine that the petitioner has proved that the marriage has broken down irretrievably and that the parties have lived apart for a continuous period of one year immediately preceding the presentation of this petition and on the strength of it that the respondent has behaved in such a manner that the petitioner cannot reasonably be expected to live with her, and he urged the court on this ground to hold that the marriage has broken down irretrievably.

On desertion, the counsel submitted that the petitioner has led evidence to show that the respondent has moved out of their matrimonial home since September, 2017 and the respondent in her answer to the petition admitted the fact even though she claimed therein that she moved out due to her deteriorating health conditions and neglect by the petitioner. He submitted that the respondent has failed to support her answer to the petition with any evidence, and he cited the case of **Abah & Ors V. Jabusco Nig. Ltd (2007) LPELR-4325 (CA)** where it was held that pleadings cannot constitute evidence and a defendant who does not give evidence in support of his pleadings or in challenge of the evidence of the plaintiff is deemed to have admitted them.

Let me adopt the issue for determination already formulated by the counsel to the petitioner, to wit:

> **Whether the marriage between the petitioner and the respondent has broken down irretrievably?**

Thus, the petitioner has to prove his case as pleaded, and prove the truth of the contents of the paragraphs in order to succeed in the return. If he fails to prove his case on

the pleadings to the satisfaction of the court, his case crumbles. Proof is by calling oral evidence. See the case of **Motoh V. Motoh (2011) All FWLR (pt 584) p. 49 at 116; paras. E-G.**

It saddled with the burden of proving the truth of his complaint in this suit.

The petitioner called one witness being himself as the PW1 and has testified before the court, and the respondent could not deem it appropriate to cross-examine the PW1 with a view to contradict the evidence to test its veracity and even to test the position in life of the petitioner, and therefore the evidence becomes unchallenged. See the case of **M.W. T. (Nig.) Ltd V. P.S.T.F. (2008) All FWLR (pt 439) p. 516 at 529; paras. C-D** where the Court of Appeal, Ilorin Division held that where piece or parcel of evidence is elicited by a party and such is neither challenged nor controverted, the court is bound to ascribe credibility to it, except if it is inherently incredible or offends rational conclusion or state of physical things. In the instant case, the evidence of the PW1 was never challenged as there was no cross-examination on the part of the respondent, and there has not been any evidence controverting that of the PW1, and the implication thereof is to accept the evidence of the PW1, and it is hereby accepted in proof of the claim that the marriage between the petitioner and the respondent has broken down irretrievably.

It is in the pleadings that the petitioner got married to the respondent on the 15th day of October, 2005, and in the course of giving oral evidence, the petitioner tendered the copy of the Certificate of Marriage on point of the fact that there is a valid marriage between him and the respondent, and this certificate was admitted and marked as EXH. 'A1'.

It is also in evidence that in September, 2017 the respondent left the Matrimonial home without the knowledge and consent of the petitioner and since then she has not returned. By this, it can be inferred that the respondent has deserted the matrimonial home from September, 2017 to the time of filing this petition being the 24th September, 2018, which is barely one year.

Thus, section 15(2)(d) of the Matrimonial Causes Act provides:

> **"The court hearing a petition for a decree of dissolution of a 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:**
> **(d) That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petitioner"**

By the above quoted provision, it can be inferred to mean that the petitioner has been able to establish that the respondent has deserted the matrimonial home for at least one year preceding his presentation of the petition, and to this I therefore so hold.

It can also be inferred that, since the respondent has not returned throughout this period, the petitioner and the respondent can be treated to be living apart. See the case of **Idowu V. Idowu (2016) All FWLR (pt 863) p. 1745 – 1747; paras.B – A per Adesanya J.** relying on the English case of **Hopes V. Hopes 1948 2 All ER 920** where it was held that where intercourse between parties ceased and they slept in separate bedrooms. The court also relied on the English case of **Walker V. Walker (1952) All ER 132** where it was held that the parties lived in the same house but the wife

withdraw to a separate bedroom, which she kept locked. She refused to perform any domestic duties for her husband, who therefore did the household chores for himself. He had most of his meals outside, but on Sundays, the parties were compelled to use the same kitchen, though at different times.

They communicated with each other by the exchange of notes, it was held that the parties were not living together in the same household and the wife was guilty of desertion. It is on the above premise, I hold that the respondent has been guilty of desertion, having established by the petitioner that the respondent has deserted the matrimonial home for at least one year preceding the presentation of the petition.

Thus, it is part of the claim of the petitioner for him to be granted the custody of the two children. It was held by the Court of Appeal, Ilorin Division in the case of **Alabi V. Alabi (2008) All FWLR (pt 418) p. 258 at 291; paras. E-H** that award of custody of the children of a marriage that has broken down irretrievably is governed by section 71(1) of the Matrimonial Causes Act, 1990, (Now Matrimonial Causes Act Cap. M7 LFN, 2004) which enjoins the court in proceedings relating to custody, guardianship, welfare, advancement or education of children of the marriage, to take the interest of the children as paramount consideration and the court in this regard is given wide discretionary powers which it can exercise according to the peculiar circumstances of each case. The welfare of the infant is not only the paramount consideration but a condition precedent. See section 71(1) of the Matrimonial Causes Act. In the instant case, the PW1 has told the court that the respondent took the children to Lagos to stay and live with her friend who is not even a relative, and he had to travel to

Lagos bring them back to Abuja to live under his care, and now they are with him. This evidence has not been challenged and not controverted by any evidence, and therefore, the court has no option than to act upon it. See the case of **Okoro V. Okoro (2011) All FWLR (pt 572) p. 1759 at 1787; paras. B – D** where the Court of Appeal, Port Harcourt Division held that evidence that is not successfully challenged or discredited and which is relevant to the issues in controversy is entitled to be relied on.

I am therefore to rely on the evidence of the petitioner and to hold that he has established that in considering the welfare of the child, he is most entitled to have the custody for now. See the case of **Obajimi V. Obajimi (2012) All FWLR (pt 649) p. 1174 at 1187; paras. D-F** where the Court of Appeal, Ibadan Division held that custody of children is an ongoing exercise alien to recurrent decimal. It is a day to day or revolving affair. Whenever any of the spouses discovers conditions have changed or altered for the worse in respect of the interest, benefit and welfare of the children or child in the custody of another person or spouse, he or she can apply to the court to review the custody order. The court upon hearing the parties would reach a decision in the best interest of the child or children as the case may be.

As I said earlier that, for now, the petitioner is now entitled to the custody, and to this, I so hold, and if he changes or alters, the respondent is at liberty to apply to the court to review the custody to be given.

In the circumstances of this case, and based upon the foregoing analises, a decree nisi of the dissolution of the marriage between the petitioner and the respondent is hereby granted.

The custody of the children of the marriage is hereby awarded to the petitioner for now.

Hon. Judge
Signed
23/05/2022

Appearances:

No appearances.

CT – Registrar: Have the parties been informed of today's date for judgment?

REG – CT: I sent text messages to both counsel. Even this morning, I spoke with the petitioner's counsel.