IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT MAITAMA – ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE S. U. BATURE

COURT CLERKS:	**JAMILA OMEKE & ORS**
COURT NUMBER:	**HIGH COURT NO. 24**
CASE NUMBER:	**SUIT NO. FCT/HC/PET/482/2020**
DATE:	**6/6/2022**

BETWEEN:

DR. UZONNA LINUS ONYIA.....PETITIONER

AND

DAMILOLA RUTH ONYIA (MRS).....RESPONDENT

APPEARANCES:
M. O. Obhahinmejel Esq with C. Eze Esq for the Petitioner/Cross-Respondent.
H.H. Bassey Esq with J. A. Olise Esq for the Respondent/Cross-Petitioner.

JUDGMENT

The Petitioner herein filed this Petition on the 25th day of September, 2020 seeking for the following Orders:-

> ***"(a). An Order for a decree of dissolution of marriage between the Petitioner and the Respondent on the ground that the marriage has broken down irretrievably, as there is no more love between both parties.***
>
> ***(b). Any Other or Further Orders as this Honourable Court may deem fit to make in the circumstances."***

The Petition which was settled by Fredrick E. Itula Esq of Remedium Chambers, legal practitioner for the Petitioner, is supported by a Verifying Affidavit of 7 paragraphs deposed to by the Petitioner himself, as well as the Petitioner's Witness Statement on Oath sworn to on the 18th day of December, 2020; as well as an annexture marked as Exhibit A.

Meanwhile, upon being duly served with the Notice of Petition, the Respondent herein through her Counsel Hokaha Hope Bassey, Esq, filed an Answer/Cross Petition on the 4th day of February. 2021 supported by the Respondent's Verifying Affidavit of 6 paragraphs and Respondent's Witness Statement on Oath deposed to on 4th February, 2021.

During trial, the Petitioner testifying as Pw1 adopted his Witness Statement on Oath, and tendered a photocopy of the parties' marriage certificate, which was admitted in evidence and marked Exhibit A.

Petitioner (Pw1) was duly cross-examined by learned Respondent's Counsel.

Meanwhile, on 13th February, 2021, the Respondent testified as Dw1 and adopted her Witness Statement on Oath and equally tendered an original copy of the parties marriage certificate which was admitted in evidence and marked Exhibit B.

Respondent was duly cross-examined by learned Petitioner's Counsel.

Final Written Addresses were filed and exchanged. Petitioner's final Written Address filed on 16th February, 2022 was duly adopted on 7th April, 2022, while in the Respondent's absence, this Court deemed Respondent's final Written Address dated and filed 16th February, 2022 as duly adopted on the same date being the 7th day of April, 2022.

Now, under and by virtue of Section 15(1)(2) of the Matrimonial Causes Act, Cap M7, LFN 2004, a Court hearing a Petition for dissolution of a marriage, shall hold the marriage to have broken down irretrievably if and only if, the Petitioner satisfied the Court of at least one of the grounds contained under Section 15(2) a – h, thereof:

> ***"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:-

(a). That the Respondent has wilfully and persistently refused to consummate the marriage;

(b). That since the marriage the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent;

(c). That since the marriage the Respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the Respondent;

(d). That the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

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

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

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

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

In the instant case as glimpsed from the Notice of Petition as well as Petitioner's Witness Statement on Oath, the ground relied upon and facts predicating the Petition are as follows:-

"That the Petitioner and the Respondent have lived apart for a continuous period of more than 3 months preceding the presentation of the Petition; that the marriage has broken down irretrievably and the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent."

In paragraphs 10 and 11 of his Witness Statement on Oath, Petitioner states as follows: -

"Paragraph 10: That, after the Respondent moved out of the house, we've had several meetings including one held at my lawyer's office with both our lawyers present and we have resolved to go our separate ways.

Paragraph 11: That the marriage between the Respondent and/ has broken down irretrievably by reason of all the grounds stated in this Petition."

On what a Petitioner must prove to be entitled to a decree of dissolution of marriage, the Court has held in the case of **IKE V IKE & ANOR (2018) LPELR-44782 (CA) per EKPE, J. C. A at pages 10-16, paragraphs C-A**, as follows:-

"For a Petition for the Dissolution of marriage to succeed, the Petitioner has to prove at least one of the ingredients contained in Section 15 (2) of the Matrimonial Causes Act, even if the divorce is desired by both parties".

See also the cases of ***IBRAHIM V IBRAHIM (2007)1 NWLR PT 1015 @ (Pg. 405 Paras F-H);*** **AKINBUWA V AKINBUWA (1998) 7 NWLR (PT. 559) 661.**

On the Respondent's part, it is averred in paragraphs 2, 3, 5, 7a – i, of the Answer and Cross-Petition as follows:-

"Paragraph 2: The Respondent/Cross Petitioner admits paragraphs 1, 2, 3, 4 and 5 of the Petition.

Paragraph 3: ***The Respondent/Cross Petitioner admits paragraph 6 to the extent that the Respondent has reason to believe that the Petitioner has constantly behaved in a manner suggesting the existence of another family elsewhere.***

Paragraph 5: ***The Respondent/Cross Petitioner admits paragraph 8 of the petition.***

Paragraph 7. ***In reply to paragraph 7 of the petition, the Respondent/Cross Petitioner states as follows:***

(a). The Respondent/Cross Petitioner has never in any way demonstrated any form of unreasonable behaviour through the period of marriage.

(b). That since the marriage was contracted between the parties, the Petitioner has behaved in such a way that the Respondent/Cross Petitioner cannot be expected to live with him.

(c). That the Respondent/Cross Petitioner has never travelled from the home of the marriage without duly informing the Petitioner of her whereabouts.

(d). That it is the Petitioner instead who has always been in the habit of leaving the house for weeks without an explanation as to his whereabouts to the Respondent/Cross Petitioner, since the marriage was contracted and on several occasions the Petitioner has continually abandoned his family without reaching out vide phone call or any other means or ever bothered as to the upkeep and wellbeing of the family.

e. That the Respondent/Cross Petitioner had continued to live in distress of not knowing the whereabouts of the Petitioner for several weeks and had been in constant emotional drain, torture and had constantly battled depression, emotional and psychological abuse, as a result of the Petitioner's abandonment.

f. That the Respondent/Cross Petitioner needed a minor surgical breast lift procedure to be done on her breasts after weaning the only child of the marriage in order to recover her emotional and psychological wellbeing. Every time the Respondent/Cross Petitioner needed to discuss any major plans for herself (the discussion on the surgery inclusive) or the only child of the marriage, the Petitioner was nowhere to be found. The Respondent/Cross Petitioner went ahead to get the minor surgical breast lift procedure in 2018.

g. That Respondent/Cross Petitioner only moved out of the house with the only child of the marriage in May, 2020 when it became obvious that the Petitioner was no longer interested in the marriage, as communication and consummation had broken down for a couple of months prior and the Petitioner was no longer providing upkeep, neither was he bothered any longer with checking up to know how the Respondent/Cross Petitioner and child fared.

h. That on account of the Petitioner's conduct and behaviour, the Respondent/ Cross Petitioner cannot reasonably

continue to carry on with the Petitioner as his wife.

(i). That the marriage between the Respondent/Cross Petitioner and petitioner has broken down irretrievably by reason of all the grounds stated in this cross petition."

In the Petitioner's final Written Address; Petitioner's Counsel Godswill D. Nwani Esq, formulated two issues for determination to wit:-

"(i). Whether having regards to the evidence adduced before the Honourable Court in this case, the Petitioner/ Respondent to the Cross- Petition is entitled to the dissolution of the marriage with the Respondent/Cross-Petitioner?

(ii). Whether the Respondent/Cross-Petitioner is entitled to the reliefs sought as contained in paragraph 11(a) – (e) of the Cross-Petition?

In arguing issue one learned Counsel submitted that from the facts grounding the Petition, as well as Petitioner's Witness Statement on Oath, the Petitioner/Respondent to the Cross-Petition has proved that the marriage herein has broken down irretrievably under Section 15(2)(c) of the Matrimonial Causes Act.

Learned Counsel relied on the case of ***MR. TOBIAS C. OKARA V MRS. BERNADNIE NKECHI OKORO (2011) ALL FWLR (Pt. 572) 1749 @ 1768-1769, Paras C - B.***

Reference was equally made to paragraphs 2, 3, 5 and 6 of the Petitioner's Witness Statement on Oath on the alleged intolerable behaviours of the Respondent making it unreasonable for the Petitioner to be expected to live with the Respondent.

More especially since the Petitioner alleges that the Respondent/Cross-Petitioner had an implant surgery which made the Respondent/Cross-Petitioner unattractive to the Petitioner.

That at paragraph 7(f) of the Respondent/Cross- Petitioner's Answer and Cross- Petition, the Respondent/Cross- Petitioner stated that she had surgical operation in 2018, to enhance a part of her body.

That according to the Petitioner, the Respondent moved out of their matrimonial home since May, 2020. Reference was made to paragraph 4 of the Petition and paragraph 7 of the Witness Statement on Oath of Pw1, which fact was admitted by the Respondent under cross examination.

It is submitted further that the implant surgery has drastically changed Respondent/Cross Petitioner's appearance, which was done without consultation with the Petitioner. As such the Respondent/Cross- Petitioner no longer appeals to the Petitioner sexually which made it difficult for the Petitioner to have sex with the Respondent.

Submitted moreso that consummation of marriage via sexual intercourse is an integral part of a marriage and in this case the change in Respondent/Cross- Petitioner's appearance has made her unappealing to the Petitioner.

Submitted that although as individuals we have rights to make our bodily features/figures the way it pleases it. However, the decision to have an implant by a man or a woman in a marital relationship is a major decision which requires the consent and approval of the spouse or partner, and that same was not done in this case.

In addition, learned Counsel argued that the Respondent's action of unilaterally moving out of the matrimonial home without the Petitioner's consent is another behaviour that Petitioner/Respondent to the Cross-Petition cannot reasonably be expected to live with the Respondent/Cross-Petitioner.

Learned Counsel referred the Court to Section 15(2)(c) if the Matrimonial Causes Act as well as the case of ***OKORO V OKORO (supra) at page 1785, paras E-F.***

Consequently, learned Counsel argued that the Petitioner/Cross-Respondent has discharged the burden placed on him by leading evidence to prove that the Respondent/Cross- Petitioner has behaved in such a manner that the Petitioner/Respondent to Cross- Petition cannot

reasonably be expected to live with the Respondent/Cross- Petitioner is not averse to the dissolution of the marriage, as seen in paragraph 11(h) of her cross-petition. That it is clear from the above that both the Respondent/Cross- Petitioner and the Petitioner/Respondent to the cross-petition have come to the conclusion that their marital relationship had reached an inevitable end.

Learned Counsel urged the Court to resolve issue one in favour of the Petitioner/Respondent to the Cross- Petition.

On issue two, learned Counsel referred to the reliefs sought by the Respondent/Cross- Petitioner, and argued with reference to paragraph 11(a) of the Cross- Petition that the Respondent/Cross-Petitioner did not lead in evidence to show that the Petition is incompetent or lacks merit. But that in fact she has admitted the two main facts put forward by the Petitioner as grounds predicating the Petition.

Submitted that it is trite law that facts admitted need no further proof. Reliance was placed on the cases of ***MUSLIM FOLORUNSHO V THE STATE (2020) ALL FWLR (Pt. 1058) 896 at 911, Para E; ADEOKIN RECORDS & ANOR V MUSICAL COPYRIGHT SOCIETY OF NIGERIA LTD GTE (2020) ALL FWLR (Pt.1049) 508 at 511.***

Argued further that no evidence was presented by the Respondent/Cross-Petitioner to prove the facts contained in paragraph 11(b)(i) and (ii) of the Answer/Cross- Petition. Reliance was placed on Section 131(1) of the Evidence Act, 2011.

On the issue of maintenance of the only child of the marriage and the reliefs sought by the Respondent/Cross- Petitioner, Counsel referred the Court to Sections 70, 71(1) and (4) of the Matrimonial Causes Act as well as Order XIV Rule 4(4) of the Matrimonial Causes Rules and the cases of ***MULLER V MULLER (2006) 6 NWLR (Pt. 977) 627 @ 645 (CA); IDOWA V IDOWA & ORS (2016) ALL FWLR (Pt. 863) at 1755, Para E – F.***

Learned Counsel submitted that the Respondent/Cross-Petitioner did not furnish the Honourable Court with her income and the income of the Petitioner/Respondent to Cross- Petition as required by Order XIV Rule 4(4)(a) – (d) of the Matrimonial Causes Rules.

That with respect to the first ancillary relief as endorsed in paragraph 11(c) of the Cross- Petition, it is submitted that the Petitioner/Respondent to the Cross- Petition is willing to remit the sum of N50, 000.00 (Fifty Thousand Naira) only, monthly for the upkeep of the only child of the marriage, master Zimife Uzor-Onyia.

On the 2nd ancillary relief as endorsed in paragraph 11(d) of the Cross-Petition, it is submitted in that regard that the claim is unreasonable on the grounds stated in paragraph 4.27 of address.

The Court is urged to consider the financial capabilities of the Petitioner/ Respondent to Cross- Petition in line with the Rules on payment of the school fees of the child of the marriage. With regard to the 3rd relief as contained in paragraph 11(e) and 8(b) of the Cross- Petition learned Counsel adopted their arguments in paragraph 4:27 – 4:28 thereof.

On the 4th limb of the 3rd relief which is captured in paragraphs 11(e) and 8(f) of the Cross- Petition, learned Counsel submitted that the persons whom the child of the marriage would spend holidays with in his hometown and at Aba, Abia State alone is tantamount to imputing mistrust on the Petitioner/Respondent to Cross- Petitioner's sisters. That Petitioner sisters love his son very much and the fear being expressed by the Cross-Petitioner over the safety of the child of being left with his sisters alone is uncalled for. The Court is urged to refuse this relief as well as relief 11(a) and (b) as lacking in merit and to grant reliefs 11(d) and (e) with variations.

In conclusion, learned Counsel urged the Court to resolve the issues in favour of the Petitioner.

Meanwhile in the Respondent/Cross- Petitioner's address Hokaha Hope Bassey Esq, learned Respondent/Cross- Petitioner's Counsel formulated a sole issue for determination to wit:-

> ***"Whether the Respondent/Cross-Petitioner herein has made out a case for the grant of all her prayers in this petition before this Honourable Court."***

In arguing the issue, learned Counsel submitted, that both the Petitioner and the Respondent have shown in this case that they are uninterested in the continuance of this marriage. And that the Respondent/Cross-

Petitioner has presented grounds for dissolution of the marriage authenticated in Section 15(2) of the Matrimonial Causes Act.

It is submitted that there's nowhere in the Petition that Petitioner has raised the issue of custody of the child of the marriage but Petitioner rather requested/prayed for proposed arrangement for the child of the marriage i.e that considering his tender age, the Respondent be granted custody of the child till he is of reasonable age to decide whom to stay with. Reference was made to paragraph 8(d) of the Respondent's Cross- Petition.

On this issue, learned Counsel referred the Court to the cases of ***NWOSU V NWOSU (2012) 8 NWLR (Pt. 1301) 1 at 32; TABANSI V TABANSI (2009) 12 NWLR (Pt. 1155).***

Learned Counsel submitted in that regard that the Respondent's conduct cannot be classified as reprehensive in this circumstance, as she has displayed full responsibility towards the upbringing of the child since he was birthed.

The Court is urged to grant full custody to the Respondent and also to consider that there's nowhere the Petitioner claims his incapability of meeting the monthly financial and academic needs of the child of the marriage. The Court is also urged to note the fact that under cross-examination of the Respondent, the Petitioner's other businesses and means of income were mentioned including his lecturing job where Respondent stated that Petitioner's earnings in totality are significantly higher than hers.

On this issue of maintenance, reference was made to paragraph 8(b)(d)(c) and (f) of the Cross- Petition. Reliance was equally placed on the case of ***OLOWOFOYEKU V OLOWOFOYEKU (2011) NWLR (Pt.1222) 177 at 203, Paras D –F.***

In conclusion learned Counsel urged the Court to exercise its discretion in favour of the Respondent by granting all the prayers sought in her Answer/Cross- Petition.

Now, under and by virtue of Section 15(2) of the Matrimonial Causes Act Cap M7 LFN 2004, 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 grounds enumerated under subsections (a) – (h) thereof.

I refer to the cases of **IKE V IKE & ANOR (2018) LPELR-44782 (CA) per EKPE, J. C. A at pages 10-16, paragraphs C-A**; ***IBRAHIM V IBRAHIM (2007)1 NWLR PT 1015 @ (Pg. 405 Paras F-H);*** **AKINBUWA V AKINBUWA (1998) 7 NWLR (PT. 559) 661.**

Likewise the case of ***BIBILARI V BIBILARI (2011) LPELR-4443, (SC) per Galinje JSC, at PP: 33 – 34.***

Therefore, where as in this case, the parties have expressed their wishes for their marriage to be dissolved, one of the facts shown under Section 16(1) of the Matrimonial Causes Act (supra) must be proved by the Petitioner for the marriage to be dissolved.

A close look at the grounds predicating this Petition/Cross- Petition will show that the Petitioner and Cross-Petitioner are both relying on intolerability of the other party as one of the grounds for seeking of the dissolution, under Section 15(2)(c) of the Matrimonial Causes Act.

On the Petitioner's part, as clearly glimpsed from the grounds predicating the Petition as well as his Witness Statement on Oath, it is alleged among other things that the Respondent had a breast implant surgery and that he no longer finds the Respondent appealing to him and it has even affected the sex life of the married couple. As such Petitioner cannot reasonably be expected to live with the Respondent.

The Respondent on her part admitted during cross-examination that she had had the surgery in question but added that she couldn't consult with the Petitioner prior to the surgery as there was no communication between the parties. Therefore consultation was impossible, as the Petitioner was not available to be aware of the impending surgery.

Now for the Court to consider dissolving this marriage on the grounds of intolerability under Sections 15(2)(c) and 16(1) of the Act, one of the facts listed under Section 16(1) of the Act must be proved by the Petitioner.

For ease of reference, I hereby reproduce the said Section which provides thus:

"16(1). Without prejudice to the generality of Section 15(2) of this Act, the Court hearing a petition for a decree of dissolution of marriage shall hold the Petitioner has satisfied the Court of the fact mentioned in the said Section 15(2)(c) of this Act if the Petitioner satisfies the Court that:-

(a). Since the marriage, the Respondent has committed rape, sodomy, or bestiality; or

(b). Since the marriage, the Respondent has, for a period of less than two years: -

(i). Been a habitual drunkard, or

(ii). Habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation, or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or

(c). Since the marriage, the Respondent has within a period not exceeding five years:-

(i). Suffered frequent convictions for crime in respect of which the Respondent has been sentenced in the aggregate to imprisonment for not less than three years; and

(ii). Habitually left the Petitioner without reasonable means of support; or

(d) Since the marriage, the Respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of

five years or more, and is still in prison at the date of the petition; or

(e). Since the marriage and within a period of one year immediately preceding the date of the petition, the Respondent has been convicted of:

(i) Having attempted to murder or unlawfully to kill the Petitioner; or

(ii). Having committed an offence involving the intentional infliction of grievous harm or grievous hurt on the Petitioner or the intent to inflict grievous harm or grievous hurt on the Petitioner; or

(f). The Respondent has habitually failed, throughout the period of two years immediately preceding the date of the Petition, to pay maintenance for the Petitioner:-

(i). Ordered to be paid under an Order of, or an order registered in, a Court in the Federation; or

(ii). Agreed to be paid under an agreement between the parties to the marriage providing for their separation; or

(g). The Respondent:-

(i). Is, at the date of the Petition, of unsound mind and unlikely to recover, and

(ii). Since the marriage and within the period of six years immediately preceding the date of the Petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness

of mind in accordance with law, or in more than one such institution."

Now, although I understand the position of the Petitioner and his grievances about his wife undergoing the breast implant surgery without his consent, and the attendant consequences to their relationship and the marriage as a whole, this Court does not have the power to dissolve the marriage on this ground as it is not one of the grounds enumerated in Section 16(1) of the Matrimonial Causes Act. I so hold.

On this premise I refer to the case of ***EMMANUEL V FUNIKE (2017) LPELR-43251 (CA)*** where it was held thus:

> ***"Given the wordings of this Section 15(2)(c), it is clear that the Petitioner who relies on this ground must establish by cogent evidence that it would be unreasonable to require him to live with the Respondent. In that wise, the rest of whether those behaviours are intolerable to expect the Petitioner to continue to live with the Respondent is objective and wholly subjective. Therefore, there is every possibility that what the Petitioner terms "intolerable" may not pass this objective test. However Section 16(1)(a)-(g) exhaustively listed the various behaviours that qualifies as intolerable behaviour that will be unreasonable to require the Petitioner to continue to cohabit with the Respondent under Section 15(2)(c) Matrimonial Causes Act, indeed, the operative word in Section 16(1) Matrimonial Causes Act is "shall" and shall implies compulsion and divestment of discretion on the part of the Court. In other words unless and until any of the conditions listed in Section 16(1)(a) – (g) exist where credible evidence: the Court shall refuse to make an order of dissolution of marriage.....per Abdullahi J.C.A. (PP: 16 -19) Paras A.***

Secondly, a glimpse at the Notice of Petition will show that one of the grounds highlighted predicating this Petition is that parties have lived apart for at least three months preceding the presentation of this Petition.

Now, with all due respect to the learned Counsel who filed this Petition, there are only two grounds of "living apart" envisaged under Section15(2)

of the Matrimonial Causes Act. Namely the two grounds under Section 15(2)(e) and (f) of the Act which provide as follows:

> ***"15(2)(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.***
>
> ***15(2)(f). That the parties to the marriage have lived a part for a continuous period of at least three years immediately preceding the presentation of the petition."***

Therefore, the closest a Court can come to dissolving a marriage under the act on the ground of living apart as seen in the above provisions is that the parties must have lived apart continuously for a period of at least 2 years immediately preceding the presentation of the petition and the Respondent does not object to a decree being granted. And that has not been proved in this case.
In the circumstances therefore, I find that the Petitioner has equally failed to satisfy the Court on this ground. I so hold.

Lastly, Petitioner also alleges that the Respondent/Cross- Petitioner had unilaterally left the matrimonial home since March, 2020.

Now, desertion itself is one of the grounds upon which a party may bring a Petition for dissolution of a marriage. This is contained in Section 15(2)(d) of the Matrimonial Causes Act (supra).

The Section provides:

> ***"Section 15(2)(d): That the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition."***

Therefore, for the Petitioner to succeed on this ground, the desertion by the Respondent must have been for a period of at least one year immediately preceding presentation of the Petition. From the evidence before this Court the Respondent left the matrimonial home in May of 2020. And from the

record of this Court, Petitioner filed this Petition on the 25th day of September, 2020. The period therefore falls short of the one year envisaged under Section 15(2)(d) of the Act.

It is my humble view that the Petitioner has equally failed to satisfy the provision of Section 15(2)(d) of the Act to show that the marriage herein has broken down irretrievably.

In my humble view, although both parties desire the dissolution of the marriage (since same is one of the reliefs sought by the Respondent in the Answer/Cross Petition), this Petition was brought rather pre-maturely as none of the grounds enumerated under Section 15(2) of the Matrimonial Causes Act has been proved to the satisfaction of the Court. In view of this, the Petition for dissolution of marriage fails and it is hereby struck out.

However, on the issue of custody and maintenance of the only child of the marriage, the Court has wide discretionary powers to make any order it deems fit in the best interest of the child.

Section 71(1) of the Matrimonial Causes Act (supra) provides:-

> ***"In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage the Court shall regard the interests of those children as the paramount consideration; and subject thereto, the Court may make such order in respect of those matters as it thinks proper."***

See the case of **MRS. LYDIA OJUOLA OLOWUNFOYEKU V MR. JAMES OLUSOJI OLOWUNFOYEKU (2011) NWLR (PT. 227) 177** at 203, paragraphs E-F. Where the Court held thus: -

> "***In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, Court of Law, or administrative or legislative authority, the best interest of the child of the marriage shall be the primary consideration ……..custody is never awarded for good conduct, nor is it ever denied as punishment for the guilty party in Matrimonial offences. The welfare of the child of the marriage***

that has broken down irretrievably is not only paramount consideration but a condition precedent for the award of custody."

In addition, Section 1 of the Child Rights Act, 2003 provides:-

"In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, Court of law or administrative or legislative authority, the best interest of the child shall be primary consideration."

Section 2(1) provides:-

"A child shall be given such protection and care as is necessary for the well being of the child taking into account the rights and duties of the child's parents, legal guardians, or other individuals, institutions, services, agencies, organizations or bodies legally responsible for the child."

Therefore, although this Court has not dissolved this marriage, the Court shall make an interim order regarding the maintenance and welfare of the child since both the Petitioner and the Respondent are currently living apart.

On the issue of custody, I have observed from the Petitioner's evidence as well as Petitioner's address that he has no reservations about the Respondent having full custody of the child of the marriage as he's of tender age. This is contained in the proposals made by the Petitioner in the Notice of Petition.

Petitioner also proposed therein to continue to pay for the educational needs of the child and that where there's a change of school both parties must agree to it.

The Respondent on her part in her Answer/Cross- Petition seeks order of the Court among other reliefs, for the Petitioner to pay the sum of N80, 000.00 upkeep of the child of the marriage as well as the child's school fees in the mount of ₦485, 000.00.

I have noted the arguments canvassed for the Petitioner in the address on the issue of maintenance of the child as well as his earnings. Learned Counsel also urged the Court not to grant the relief as it relates to the sum of N485, 000.00 as it is unreasonable according to the Petitioner having regard to his earnings.

Indeed the Court has considered the provisions of Order XIV Rule 4(4) a-d of the Matrimonial Causes Rules cited by learned Petitioner's Counsel in support of their submissions as well as other authorities cited in that regard.

Although it is stated that Petitioner is willing to remit the sum of N50, 000.00 only monthly for the upkeep of the child of the marriage. Learned Counsel urged the Court to consider some grounds contained in paragraph 4:27 of the Petitioner's address.

It is submitted therein among other things that the Petitioner used to be an entrepreneur, but due to prevailing economic realities that have strangled many businesses including that of the Petitioner, he had to secure a job as a lecturer with the University of Nigeria Nsukka .
That his monthly salary will not be more than N180, 000.00 that by calculation the total annual remittance of the maintenance of the child of the marriage is the sum of N600, 000.00 only. And if deducted from the Petitioner's salary of N2, 000, 000.00 he will be left with the sum of N1, 560, 000.00 only.

That Respondent/Cross Petitioner who works with an NGO earns far more than the Petitioner which was admitted by the Respondent/Cross Petitioner under cross-examination.

Well, I have carefully gone through the Petitioner's Witness Statement on Oath and there's nowhere that the Petitioner has deposed to the facts submitted above in the address.

It is trite therefore that the address of Counsel no matter how brilliant cannot take the place of evidence.

When Respondent/Cross- Petitioner was cross-examined as to whether she unilaterally changed the school of their child without consulting the Petitioner, the Respondent/Cross- Petitioner stated thus:-

"The Petitioner and I jointly made the decision. He was aware of it."

Respondent/Cross- Petitioner was further asked how she arrived at the amount, she replied that, that was the amount they had historically paid per term.

Respondent further stated that the parties have receipts evidencing payment and the Petitioner is aware. Still under cross-examination on the issue, Respondent/Cross- Petitioner stated that when their son had to move to year 1 as the former school Bishop school only caters for ages 1 – 5, she gave the Petitioner a list of 10 schools and he picked the present one.

When asked by learned Counsel if she had anything to show that Petitioner had given his consent in that regard, the Respondent stated that there's nothing in the Petition in that regard for her to have responded.

Respondent further stated when asked about the Petitioner's occupation she replied:-

"He is a building Engineer/Construction Consultant. He is the owner of ONYIA Construction Ltd, Capital Electrics and Lightening Limited.

ONYIA GROUP OF COMPANIES as well as about four others. I can provide them later. He also recently added a lecturing job at University of Nigeria Nsukka."

Although Dw1 (the Respondent did admit that she earns more than the Petitioner as a lecturer). She did however add that as a person in totality, Petitioner's earnings are significantly and ridiculously higher than hers.

Well, I have considered all the above pieces of evidence and I am of the view that Respondent/Cross- Petitioner's evidence on this issue was unshaken during cross-examination. I'm also satisfied by her evidence that indeed the parties jointly agreed on the school and school fees of Master Zimife Uzo-Onyia the only child of the marriage.

Therefore, in the best interest of the child of the marriage Master Zimife Uzo-Onyia, I hereby make the following Interim Order pending when the status of the marriage is determined as follows:

(1). The Respondent shall have custody of the only child of the marriage Master Zimife Uzo-Onyia until the marriage is finally determined.

2. The Petitioner shall pay the sum of **₦50, 000.00** as monthly upkeep for the only child of the marriage Master Zimife Uzo-Onyia.

3. The Petitioner is ordered to pay the school fees of Master Zimife Uzo-Onyia, in the sum of **₦485, 000.00** only, as agreed by both parties.

These Orders are hereby made in the interim in the best interests of Master Zimife Uzo-Onyia.

Signed:

Hon. Justice S. U. Bature
6/6/2022.