

**IN THE HIGH COURT OF THE FEDERAL
CAPITAL TERRITORY, ABUJA
HOLDEN AT ABUJA**

ON WEDNESDAY, 6TH DAY OF JULY, 2022

BEFORE HON. JUSTICE SYLVANUS C. ORIJ

SUIT NO. FCT/HC/PET/317/2021

BETWEEN

TOLULOPE REBECCA ADELEKE --- PETITIONER

AND

SUNDAY PETER ADELEKE --- RESPONDENT

JUDGMENT

The petitioner filed her Notice of Petition for dissolution of marriage on 27/8/2021. In paragraph 11 of her petition, the petitioner seeks the following reliefs:

- a) A decree of dissolution of the marriage between the petitioner and the respondent on the grounds that the marriage has broken down irretrievably in that the respondent has constructively deserted the petitioner for a period of one year immediately preceding the presentation of the petition.

- b) An order of Court granting the petitioner custody of the only child of the marriage.

In proof of the petition, petitioner testified as PW1. She adopted herevidence in her statement on oath filed on 27/8/2021 and tendered Exhibits 1, 2 & 3. The respondent did not file any process and did not attend Court in spite of hearing notices served on him.

Evidence of the Petitioner:

The evidence of the petitioner is that after her marriage to the respondent, they cohabited peacefully until about two weeks after the marriage when there was a little misunderstanding between them. Before she could explain her side of the story, he gave her a slap and tried to strangle her. The respondent is very aggressive, temperamental and becomes aggressive at slightest provocation. During the pregnancy of their daughter, they had a little misunderstanding and the respondent slapped her and wanted to beat her. In order to save her life and that of the baby, she left the matrimonial home to her parents' house and stayed there until her labour started. Her father was the one that took her to the hospital. She went back to the matrimonial home after she gave birth.

After her delivery, she found out that the respondent had a child outside wedlock. She saw messages in his phone between him and the woman with whom he had the child. She saw messages showing that he has been sending money to the woman for the child and constantly visiting her in Lagos. In paragraphs 7-12 of her statement on oath, PW1 narrated that the respondent slapped her by the side of her head on 25/3/2020 and she became unconscious

and fell on the bed. The respondent rushed her on the bed and used a pillow to try to suffocate her. She struggled for her life and pulled herself from under the pillow and fell on the tiles. He rushed to the kitchen and she, not knowing what he was going to pick/carry, rushed out of the house bleeding. The vigilantes in the area pleaded with him to open the door and to allow her in. When she went in, he started beating her again and strangled her to the wall.

In paragraphs 14-22 of her statement on oath, the petitioner stated that as the torture was too much, she decided to end the suffering with her hands. She drank the sniper insecticide around the house to take her life and that was all she could remember. When she became conscious, she found herself at the General Hospital Nyanya from where she was referred to National Hospital. Within the 5 days that she was at the emergency unit of the National Hospital, the respondent never slept at the hospital. When she was discharged from the hospital, respondent insisted that she will not follow him home. She *"forcefully followed him home"* and cooked for him that day but he did not eat her food. She kept cooking for him but he refused to eat her food. The respondent's attitude changed since that incident. He goes out and comes home very late.

The further evidence of the petitioner is that during the lockdown for the Covid pandemic in March 2020, the respondent left her and the child without food or support. She was starving because she was not working. She picked

some of her things and moved to her parents' house in April for help. Throughout the lockdown, the respondent neither called nor came around to find out how she was fairing with his daughter. After the lockdown, she went back home and found that he had changed all the locks in the house. She called him to inquire why he changed all the locks. The respondent told her that he did not want her in the house again. In May 2020 when their daughter was sick and was on admission, she called him on phone but he did not pick or call back. She took pictures of the child on admission and sent them to him through Whatsapp. He read the messages but did not reply and did not go to see the child.

She went back the second time in July, 2020 to get some few clothes for her daughter and discovered that the locks were still changed. She called him and he asked her to wait. She waited there for close to 3 hours before he came. When he eventually came and after much persuasion from neighbours, he opened the front door and she saw all her belongings arranged in boxes at the entrance. That was when she knew that the respondent no longer wanted her. She was in tears. He dragged her bags out shouting that she should leave his house and she left. Since July 2020 when he forced her out, he has never called her to find out how she was fairing or to check up on his daughter.

The petitioner further testified that she made several attempts to get his attention by calling him but he did not pick her calls or return her calls. She is tired of the marriage and she is afraid for her life. She has been through

emotional, physical and psychological trauma in the hands of the respondent. She has been responsible for the upkeep and maintenance of the child since March 2020 till date. She is employed with Nigeria Airspace Management Agency, Abuja and she is capable of taking care of her daughter.

PW1 tendered the following documents:

- a) Marriage Certificate dated 4/11/2017: Exhibit 1.
- b) Certificate of Birth of Ayooluwa Adeleke: Exhibit 2.
- c) Document from National Hospital in the name of the petitioner: Exhibit 3.

Issues for Determination:

Fredrick C. Ogbuagu Esq. filed the petitioner's final address on 23/3/2022, which was served on the respondent on 30/3/2022. The respondent did not file his final address. On 27/4/2022, learned counsel for the petitioner adopted the petitioner's final address.

Fredrick C. Ogbuagu Esq. formulated one issue for determination, which the Court adopts, to wit:

Whether or not from the totality of evidence adduced, the petitioner has sufficiently proved her case in the circumstances of this case to entitled her to the grant of the reliefs sought.

Fredrick C. Ogbuagu Esq. stated that proof in civil cases is on preponderance of evidence and he who asserts must prove. He cited the case of **Ayorinde v.**

Segun [2012] All FWLR [Pt. 636] 403. He referred to section 15[1] & [2] of the Matrimonial Causes Act, which make provisions for grounds for dissolution of marriage. It was submitted that a party to the marriage does not need to prove all the grounds in subsection [2] of section 15 of the Act to establish that the marriage has broken down irretrievably; proof of one or more grounds is sufficient. The petitioner has proved that since the marriage the respondent has behaved in such a way that she is not reasonably expected to live with him as required by section 15[2][c] of the Act.

The petitioner's counsel posited that it is the court that determines whether an act or conduct can be described as intolerable behaviour and the test is objective. The case of Bibilari v. Bibilari [2011] 13 NWLR [Pt. 1264] 228 was relied upon. He relied on the evidence of the petitioner and argued that the respondent has subjected her to physical torture and mental anguish through his conducts thereby affecting her physical health. Counsel further argued that the respondent is guilty of "*constructive desertion having deserted the petitioner and refused to return since then.*" He noted that both parties have lived apart since 2020.

On custody of the child of the marriage, counsel referred to section 71[1] of the Matrimonial Causes Act and section 1 of the Child's Rights Act, 2003 to support the submission that in proceedings with respect to the custody of a child of a marriage, the court shall regard the interest of the child as the paramount or primary consideration. PW1 has led evidence to show that in

the interest of the child, *Mitchel Ayooluwa Adeleke* [aged 3 years], custody should be granted to the petitioner who has been responsible for the child's feeding, hospital bills, accommodation, school fees, moral upbringing and welfare. The case of **Buwanhot v. Buwanhot [2009] 16 NWLR [Pt. 1166] 36** was cited in support.

Decision by the Court:

Section 15[1] & [2] of the Matrimonial Causes Act provide:

[1] *A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.*

[2] *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:*

The facts upon which the Court hearing a petition for a decree of dissolution of a marriage shall hold that the marriage has broken down irretrievably are set out in section 15[2][a]-[h] of the Matrimonial Causes Act, which include:

[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.

As rightly stated by the petitioner's counsel, since the respondent did not file an answer to the petition and did not adduce any evidence, the evidence of the petitioner is taken as proved, not having been controverted by respondent. The petitioner has adduced evidence of cruelty by the respondent; abandonment of, and lack of care for, the petitioner and the child of the marriage by the respondent; attempt by the respondent to strangle her; etc. The Court holds that the petitioner has proved that since the marriage, respondent has behaved in such a way that she cannot reasonably be expected to live with him. Thus, the petitioner has satisfied the Court that her marriage with the respondent has broken down irretrievably having proved the ground in section 15[2][c] of the Matrimonial Causes Act.

Also, the unchallenged evidence of the petitioner is that since July 2020 when the respondent forced her out of their home, he has never called her to find out how she was fairing or to check up on his daughter. To my mind, this is a clear act of desertion of the petitioner by the respondent. The petitioner filed the petition on 27/8/2021. The Court holds that petitioner has satisfied it that the marriage has broken down irretrievably in that the respondent has deserted her for a continuous period of at least one year immediately

preceding the presentation of the petition as provided by section 15[2][d] of the Matrimonial Causes Act.

From all that I have said, the Court holds that the petitioner is entitled to an order of dissolution of her marriage with the respondent as the marriage has broken down irretrievably. Relief [a] is granted.

In relief [b], the petitioner seeks an order granting her custody of the only child of the marriage. Section 71[1] of the Matrimonial Causes Act provides:

In proceedings with respect to 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.

The position of the law is that in deciding which of the parties to the marriage is to have custody of the child or children of the marriage, the interest of the child or children is the paramount consideration. In the case of **Alabi v. Alabi** [2007] LPELR-8203 [CA], it was held that one of the considerations or factors in determining the custody of a child of the marriage is the degree of familiarity of the child with each of the parents.

The unchallenged evidence of the petitioner is that she has been with the child and has been responsible for her upkeep and maintenance since March,

2020 till date. This evidence supports the grant of this relief. The relief is granted.

In granting the order for custody of the child of the marriage in favour of the petitioner, the Court has taken into consideration the fact that the child is entitled to stay where she chooses upon attaining the age of 18 years.

The Court has also considered the provision of section 71[4] of the Matrimonial Causes Act, which reads:

Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

From the unchallenged evidence of the petitioner, it is clear that the respondent has no interest in the affairs or welfare of the child of the marriage. For instance, PW1 testified that during the lockdown for the Covid pandemic in March 2020, the respondent left her and the child without food or support. In May 2020 when their daughter was sick and was on admission, she informed him via phone and sent pictures of the child on admission but he did not pick and did not go to see the child. The Court is of the view that it will serve no useful purpose to grant an order for respondent to have access to the child while she is in custody of the petitioner. Besides, the respondent

did not take any step to pray the Court to make an order granting him access to the child.

Conclusion:

The Court grants the following orders:

1. A decree *nisi* for the dissolution of the marriage between the petitioner and the respondent celebrated at AMAC Marriage Registry, Abuja on 4/11/2017. The decree *nisi* shall become absolute after three [3] months from today.
2. The petitioner shall have custody of the child of the marriage namely: *Mitchel Ayooluwa Adeleke* until she attains the age of 18 years. For the avoidance of doubt, *Mitchel Ayooluwa Adeleke* shall be at liberty to decide where to stay when she attains the age of 18 years.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel:

Fredrick C. Ogbuagu Esq. for the petitioner.

