IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT 20, GUDU-ABUJA
ON WEDNESDAY THE 26TH DAY OF APRIL 2023
BEFORE HIS LORDSHIP: HON. JUSTICE MODUPE R. OSHO- ADEBIYI

PETITION NO: PET/395/2020

BETWEEN:
JENNIFERCLARE NNENNA EZEKWEM ========PETITIONER
AND
LAWRENCE AFAMEFUNA EZEKWEM=========RESPONDENT

JUDGMENT

By a notice of Petition dated and filed on the 11th of August 2020, the Petitioner prayed this Court for the following reliefs;

a. A decree of dissolution of marriage between the petitioner and the respondent on the ground of cruelty and living apart for a courteous period of two years immediately preceding the presentation of this petition.

b. An ORDER of this Honourable Court granting custody of the only child of the marriage to the Petitioner who has moral integrity, the ability to cater for her physical, mental, emotional, psychological, and social where withal to train the child to become useful in life and to the large society.

c. An ORDER of this Honourable Court restraining the Respondent from harassing, threatening, inflicting wounds, or other bodily harm and pains on the Petitioner, by himself, assigns, Privies in any manner or form whatsoever and howsoever.

d. An ORDER of this Honourable Court mandating and directing the Respondent to provide the child's School Fees timely and make a monthly payment of N50,000.00 into a designated Bank Account to be managed and accessed by the Petitioner as her upkeep excluding hospital bills and other educational needs of the only child of the marriage as may be necessarily required.

e. An OTHER OR FURTHER ORDERS as the Honourable Court may deem fit to make in the circumstances.

The facts that gave rise to this suit is that on the 27th of January 2018, Respondent told the Petitioner's Mother who was due to leave their house that she should go with the Petitioner and their new-born. That due to the actions of the Respondent on that day, the Petitioner and her mother were rescued by their brother-in-law and policemen. That the Petitioner, her mother, and her new-born were in great trauma and shock and the Respondent did not show any remorse. That all efforts at reconciliation failed and the Petitioner's Parents returned the traditional bride price to the Father of the Respondent in accordance with the Native Law and Custom. That there is no reasonable probability of reconciliation between the Petitioner and the Respondent, and the conduct of the Respondent is not what the Petitioner is reasonably expected to live with under the circumstances.

Upon being served with the Petition on the Respondent, the Respondent filed a notice of preliminary objection seeking for a declaration that the petitioners petition fails to contain the ground on which petition for decree of the solution of marriage may be presented to the court and as such, the petition is incomplete and ought to be struck out for lack of jurisdiction of the courts to entertain this matter.

The petitioner on her parts filed a counter affidavit in opposition to the preliminary objection contending that the petition met the requirement of law and the non-use of the phrase the marriage has broken down irretrievably or referring to the facts constituting the ground does not ipso facto rob the courts of jurisdiction to hear the petition.

This court had examined the preliminary objection and counter affidavit and reserved its ruling till conclusion of the substantive case. The ruling

will first be determined in this judgment prior to determining the issues in this petition.

The Respondent filed his answer to the Petitioner's petition as well as a notice of cross petition to which the Petitioner filed her answer/reply to the cross petition. However, on the 20th day of October 2022, the Respondent withdrew his cross petition and the court dismissed same parties having joined issues in the cross petition.

The matter thereafter proceeded to trial with the petitioner opening her case on the 21st of June 2022. Petitioner testifying as the sole witness, adopted her witness statement on oath as evidence in support of the Petition and tendered the following as exhibit in proof of her case: -

1. Certificate of marriage with no. 278 dates 16/2/2017 as Exhibit A.
2. Marriage certificate with no. 539 issued at Catholic Archdiocese of Abuja as Exhibit B.

Under cross examination, Petitioner maintained that she is the wife of the Respondent and that the name on the exhibits is her maiden name. That she has nothing before the Court to show that her parents lodged a complaint to the Police against the Respondent. That although it wasn't stated in her petition, the marriage between her and the Respondent has broken down irretrievably.

Having closed her case, the Respondent opened his defence with the Respondent testifying as the sole witness and adopting his statement on oath as his evidence in this case. Under cross examination, he admitted that he asked Petitioner, together with the baby and her mother to leave their home as there were issues.

The Respondent thereafter closed his case and the court adjourned for parties to file their final written address.

Parties adopted their respective written address as argument in support of their case. The respondent from the address filed, raised a sole issue for

determination, which is "whether this Hon. Court has jurisdiction to hear and determine this suit when the petition (originating process) is incompetent, and her proper parties are not before the Court. Counsel arguing this issue contended that the process before this Court is incompetent for petitioner's failure to add that "the marriage has broken down irretrievably ". Counsel contended further that the parties before this Court are not proper parties as the Petitioner's name as contained in the relevant certificates/exhibits is not her name in this suit and in the absence of any change of name, as admitted by petitioner under cross examination, the petitioner in this petition is not known and this she is not a proper party.

Counsel submitted finally that as a result of the incompetent process and lack of proper party before this court, the court lacks jurisdiction to hear this case and urge the court to strike out same.

Counsel relied on the following cases:-

1. Adeparusi V. Adeparusi (2014) LPELR-41111 (CA)
2. Akinolu V. Akinolu (2019) LPELR-47416 (CA)
3. Pius V. Olorunfemi (2020) LPELR-49579 (CA)
4. Shamang V. Shamang (2018) LPELR-44365 (CA)
5. Abiri V. Unilever Nig PLC (2019) LPELR-47305 (CA)
6. Ikene V. Anakwe (2000) 8 NWLR (pt.669)484
7. Titlley Gyado & Co. Nig. Ltd. & Anor V. MACON (2014) LPELR-22518 (CA)
8. The Admin & Exec of the Estate of Abacha V. Eke Spiff & Ors (2009) LPELR-3152 (SC)
9. SPDC & Anor V. PESSU (2014) LPELR-23325 (CA)
10. Oyewole & Ors V. Adedeji (2014) LPELR-22554

The Petitioner's Counsel on their part, raised two issues for determination thus;

1. Whether the marriage between the Petitioner and Respondent has broken down Irretrievably having lived apart for a continuous period of two years immediately Preceding the Presentation of this Petition.

2. Whether the Petitioner is entitled to be granted the custody of the only Child of the marriage Miss. Stephanie Chizaram Ezekwem.

Arguing the first issue, Counsel submitted that from the evidence of the Petitioner which was admitted by the Respondent that it was the act of the Respondent that led to the parties living apart from the 28th of January 2018 till date, thus the Petitioner has satisfied the requirement of Section 15 (2) (c) and (2) (e) and urged the Court to grant the first prayer sought in favour of the Petitioner.

Counsel further submitted that the Petitioner has successfully established the facts stated in Section 15(2) by credible evidence, hence, the sole ground that the marriage has broken down irretrievably has been established and the fact the phrase was omitted in the pleadings will not rob the Court of its jurisdiction. Submitted that holding otherwise will amount to technical justice.

With respect to the issue of proper parties raised by the Respondent's Counsel. Petitioner's Counsel urged the Court to take judicial notice of the fact that parties bear their names on the marriage certificate and Petitioner automatically adopted the name of the Respondent upon the marriage and urged the Court to discountenance the submission of the Respondent's Counsel as same is misconceived.

Arguing the second issue raised by Petitioner's Counsel, Counsel submitted that the only child of the marriage had been with the Petitioner, and she had solely been responsible for the education, welfare and upbringing of the child and urged the Court to grant custody of the child to the Petitioner.

Counsel relied on the following authorities:

1. Odusote V. Odusote (2012) 3 NWLR (pt.225) 539
2. Tabansi V. Tabansi (2009) 12 NWLR (pt.1155) 415
3. Odogwu V. Odogwu (2006) 5 NWLR (Pt.972)

I have considered the entirety of the Petitioner's case, the Respondent's case as well as the arguments proffered by respective counsel in their respective case. I have also re-read and refreshed my memory on the issues and arguments raised in the preliminary objection and two issues call for determination in this case as follows;

1. Whether this Court has the jurisdiction to entertain this Petition
2. Whether the Petitioner has proved her case to be entitled to the reliefs as claimed.

Dealing with issue one which is "whether this Court has jurisdiction to entertain this Petition". In this case, it is Respondent's contention that the Petitioner's petition is fundamentally flawed and not in compliance with the provision of Section 15 of the Matrimonial Causes Act for failure to insert the sole ground which is "that the marriage has broken down irretrievably" thereby making the petition incompetent. The Petitioner on her part contended that the Petition is in compliance with the requirement of the law and the mere fact the phrase "broken down irretrievably" was omitted in the petition cannot rob the Court of its jurisdiction to entertain this case. As rightly submitted by Counsel to the Respondent, jurisdiction is a fundamental issue and the importance of jurisdiction in adjudication cannot be over emphasized being the authority or power of the Court conferred by law to decide disputes brought before it. The law is well settled that a Court of law is competent to adjudicate over a matter only when all the conditions precedent for exercise of its jurisdiction are duly fulfilled. See OLAGBERO V. OLAYIWOLA (2014) LPELR 22597 (CA). In this

instant application, the Applicant is urging on this Court to strike out the petition for being incompetent for failing to comply with the provision of the Matrimonial Causes Act and Matrimonial Causes Rule as it particularly failed to include the ground "**that the marriage has broken down irretrievably**".

Rightfully, the principle is well settled that an incompetent originating process which an action such as this instant petition is based robs the Court of its competence to entertain the matter before it. The question therefore that begs to be answered is can it be said that the petition presented by the petitioner is defective? The position of the law is clear that proceedings under the Matrimonial Causes Act are sui generis and has its set of rules being the Matrimonial Causes Rules which regulates the filings and proceedings relating to Matrimonial Causes.

Order V of the Matrimonial Causes Rule provides for the required content of a petition. Order V Rule 3 (g) provides that petition shall state;

"*The facts, but not the evidence by which the facts are to be proved, relied on as constituting the ground, or each ground specified in the petition, stating if more than one ground is so specified, the facts relating to each ground as far as practicable, separately".*

Going by this provision the Petitioner complied with this rule by stating the facts as constituting the grounds to be;

I. Cruelty

ii. Living apart for a continuous period of two years immediately preceding the presentation of the petition.

The Applicant is also contending that the instant petition is not in compliance with section 15 of the Matrimonial Causes Act.

From the provision of Section 15 of the MCA, it gives a party the power to present petition upon the ground that the marriage has broken downirretreivably. The said provision provides thus;

"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" and the Court upon hearing the petition will hold the marriage to have broken down if the Petitioner satisfies one of the grounds as stated in section 15(2). The provision does not make it imperative to state that marriage has broken down irretrievably as it uses the word "MAY". It is for the Court hearing the Petition to hold that the marriage has broken down upon the facts stated therein. Hence the Matrimonial Causes Act gives the court the power to consider the facts as presented by the Petitioner in order to determine whether the facts as contained in the petition are sufficient to declare that the marriage has broken down irretrievably. Consequently, from the provision of the Matrimonial Causes Act and Matrimonial Causes Rules, it is my view that the petition of the Petitioner is competent and the absence of the word "irretrievably broken down" does not qualify the petition as incompetent and I so hold.

The Respondent's Counsel is also contending that this Court lacks jurisdiction to hear this case as the Petitioner is not a proper party. it is Counsel's argument that under cross examination, the Petitioner when asked if she was the woman Respondent contracted marriage with at the AMAC Registry, the Petitioner answered in the affirmative and the subsequent question asked which is if petitioner had changed her name, to which Petitioner responded in the negative. Submittedthat from the exhibits before this Court, the name of the Petitioner on the petition is different from the name of the Petitioner and urged the Court to strike out the case of the Petitioner as she is not a proper party before this Court.

The Court in U.O.O. NIG. PLC v. OKAFOR & ORS (2020) LPELR-49570(SC) held thus

"The Respondents are right; the question of proper Parties is a very important issue, which would affect the jurisdiction of the Court since it goes to the foundation of the Suit in limine. In effect, where the proper Parties are not before the Court then the Court lacks jurisdiction to entertain or hear the Suit - See Cotecna Int. Ltd. V. Churchgate (Nig.) Ltd. & Anor (2010) 18 NWLR (pt. 1225) 346 SC. See also Utih V. Onoyivwe (1991) 1 NWLR (pt. 166) 166 SC, wherein this Court per Karibi-Whyte, JSC, explained as follows - It is a well settled principle for the administration of justice in our judicial system that a matter cannot be heard on its merits unless there is a cause of action, and the Plaintiff has the right to bring the action... The Court in which the action has been brought can only validly exercise jurisdiction to hear and determine the matter in such circumstances. So, before an action can succeed, the Parties must be shown to be the proper Parties to whom rights and obligations arising from the cause of action can attach.

Proper party has been defined by the Black's law dictionary 6th Edition as one who has an interest in the subject matter of the litigation which may be settled therein. In this instant case, can it therefore be said that the Petitioner is not a proper party? I think not. From evidence before the cpourt, the Petitioner and Respondent have not denied being married, Respondent has taken steps in this matter by filing processes wherein he stated that himself and Petitioner were married and have since been separated. He has also given evidence about actions/inactions of the Petitioner during the pendency of their marriage. In essence it is unchallenged and uncontroverted that both parties are married. The argument of Petitioner being a wrong party cannot avail the Respondent after Respondent has acknowledged during trial that indeed both are married, it is too late in the day for such unfounded and absurd argument from Respondent as it is inequitable to participate in a dissolution of marriage petition, take vital steps in filing necessary processes, admit that

indeed parties were married and worse of all rely on the marriage certificate then turn around to raise issue of improper name of Petitioner. The Respondent knows whom he married; Respondent knows he married the Petitioner hence the wrong description of the Petitioner has not in any way jeopardized the Respondent nor can it be said to affect the competence of this suit. Gone are the days where the Courts place reliance on technicalities as it leads to injustice. Adhering strictly to technicalities, is tantamount to sacrificing justice on the altar of technicalities.

In my view, the Petitioner's identity at all times was never in doubt by the Respondent. The fact that the name on the certificate before this Court is different from the Petitioner on record is of no moment as the Respondent was not at any point misled as to the identity of the Petitioner. I agree with the Petitioner that it is common knowledge in this part of the world that it is mostly the culture that women, upon marriage, adopt the name of their husband. In fact, all through cross-examination of the Respondent, he referred to the Petitioner as "my wife". Hence, the identity of the Petitioner was never in doubt, and I hold that from the entirety of the petition before this Court, the Petitioner is a proper party and the objection of the Respondent is hereby overruled.

The next issue to be determined is "whether the petitioner has proved her case to be entitled to the reliefs sought". The Petitioner is seeking for the relief sought in this Petition on the ground of cruelty and parties living apart. The law is trite that a Court hearing a petition for the dissolution of a marriage shall grant the relief if the court is satisfied that the marriage has broken down irretrievably. See Section 15 (1) of the Matrimonial Causes Act. Subsection 2 of Section 15 sets out facts upon which the Court could hold that a marriage has broken down irretrievably. It states thus: -

"The court hearing a petition for a decree of dissolution of 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 provide reasonable grounds for presuming that he or she is dead.

Thus, upon proof of any of the factors stated in Section 15(2) (a-h) of the Matrimonial Causes Act, to persuade the Court that the marriage has broken down irretrievably, the Act provides that the Court shall grant a decree of dissolution of the marriage if it is satisfied on all the evidence

adduced as held in UZOCHUKWU V. UZOCHUKWU (2014) LPELR-24139 (CA).

In this case, the Petitioner stated facts to prove cruelty from paragraphs 8 to 17 of Petitioner's witness statement on oath. Although cruelty is not one of the facts stated under Section 15 (2), it however falls under Section 15 (2) (c), that is "since the marriage, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. The list of the behaviours is listed in Section 16 and the behaviours are not exhaustive as cruelty can be classified as intolerable behaviour under Section 15 (2) (c).

The Court in the case of Nanna V. Nanna (2006) 3 NWLR (Pt.966) at P.43 defined cruelty to mean the intentional and malicious infliction of physical and mental suffering upon living creatures, particularly, human beings, or as applied to the latter, the wanton malicious and unnecessary infliction of pain upon the body or the feelings and emotions, abusive treatment in humanity and outrage. The Court held further as follows,

"Cruelty is therefore regarded as a conduct which is grave and weighty as to make cohabitation virtually impossible coupled with the injury or a reasonable apprehension of injury, physical or mental to health. The accumulation of minor acts of ill-treatment causing or likely to cause the suffering spouse to breakdown under strain, constitutes the offence of cruelty"

In this case, the act which the Petitioner is relying on to constitute cruelty is that the Respondent suddenly asked both the Petitioner together with their baby and her mother to leave their matrimonial home abruptly. This fact was undisputed and even admitted by the Respondent. Now the question to be answered is can the action of the Respondent asking the Petitioner to leave the house abruptly and without notice amount to cruelty?

The Respondent asking the Petitioner to leave their matrimonial home with a new-born to an unknown destination is enough to cause serious mental/emotional instability to the Petitioner who was a new mother at the time. In my view, the act of the Respondent is a departure from the normal standard of conjugal kindness more so, as she was a new mum going through different emotions, the act of the Respondent towards the Petitioner can only be described as cruelty which can culminate into a mental breakdown and thus amounts to cruelty and I so hold.

The petitioner is also relying on Section 15 (2) (e) in that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of this petition and the Respondent does not object to a decree being granted.

The fact before this Court is undisputed that the Petitioner and Respondent have been living apart since 28th of January 2018 till date and I therefore hold that the Petitioner has succeeded to proving the facts for this Court to hold that the marriage between the parties has broken down irretrievably and I so hold. Relief one is hereby granted.

The Petitioner is asking for this Court to grant custody of the only child of the marriage to her. By Section 71 (1) of the Matrimonial Causes Act and Section 1 of the Child's Right Act 2003, the Court is bound to consider the interest and welfare of the child as the paramount consideration in the grant of custody and maintenance. The Respondent having not opposed to the grant of custody to the Petitioner, it therefore implies that Respondent is not averse to the Court granting this relief. From the evidence before this Court, the child is still a minor and have always been with the Petitioner. There is no evidence before this Court that the Petitioner has been an unfit parent towards the child. It will therefore be in the best interest of the child to continue to remain in the custody of the petitioner and I so hold.

The Petitioner in relief three is praying for a restraining order against the Respondent. The Petitioner whose burden lies in proving her entitlement to this relief has failed to prove the aggressive and violent behaviour of the Respondent towards her to be entitled to this relief. Mere allegation without more is not enough to grant this relief. The petitioner ought to have called her mother to give evidence to buttress the facts as well as attached a copy of the complaint lodged at the police station against the Respondent, which Petitioner failed to do. Consequently, this relief therefore fails.

With respect to the upkeep and maintenance of the child, by Section 70 (1) of the Matrimonial Causes Act Cap 220 Laws of the Federation of Nigeria, 1999, the Court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. In this case, there is nothing before me to show the means and earning capacity of the Respondent. Be that as it may the provision of Section 70 of the MCA is what should guide the Court in granting an order for maintenance and is not automatic. The education and welfare of a child are serious and sensitive matters that is guaranteed under the Child Rights Act of 2003 and should not be hampered with by technicalities. What is best for the child should take precedence over all other considerations in the Court. Both the Petitioner and Respondent admit to being employed, and the child had been solely catered for by the Petitioner, it is only fair that the Respondent shall pay to the Petitioner the sum of ₦50,000.00 every month for the upkeep and maintenance of the children. Both parties shall be jointly responsible for the education and medical expenses of the child on a 70/30 basis with the Respondent bearing 70% as the Petitioner who shall have

custody of the child shall be burdened with clothing and sheltering of the child. Consequently, I hereby order as follows;

1. I hereby pronounce a Decree Nisi dissolving the marriage celebrated between the Petitioner, **JENNIFERCLARE NNENNA EZEKWEM** and the Respondent, **LAWRENCE AFAMEFUNA EZEKWEM** at the AMAC Marriage Registry, ABUJA on 16th February 2017.
2. I hereby pronounce that the decree nisi shall become absolute upon the expiration of three months from the date of this order unless sufficient cause is shown to the court why the decree nisi should not be made absolute.
3. I hereby grant custody of the child to the Petitioner until she attains the age of maturity at 18 years old, however, the Respondent shall be granted access to visit the child at a neutral place after due consultation with the Petitioner if Respondent so wishes.
4. I hereby Order that both parties shall be responsible for the education and healthcare of the child of the marriage on a 70/30 basis. Respondent to pay 70% of the school fees and medical care while Petitioner to shoulder 30%.
5. Respondent is hereby ordered to pay to the Petitioner the sum of N50,000.00 monthly for the maintenance and upkeep of the child of the marriage. The Respondent payment of N50,000.00 monthly is subject to inflation rate bearing in mind that the child is about 5years old. The N50,000.00 shall be reviewed upwards on a scale of 50% every 3years.

PARTIES: Absent

APPEARANCES: D. I. Nwachukwu appearing for the Petitioner. F. I. Adariku appearing for the Respondent.

HON. JUSTICE MODUPE R. OSHO-ADEBIYI

JUDGE

26TH APRIL 2023