IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON THURSDAY THE 20TH DAYOF APRIL 2023.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO -ADEBIYI

SUIT NO. PET/513/2020

BETWEEN

MRS. REBECCA YORCHI AGWAI ------------------------PETITIONER
AND
MR. OLUTOSIN ABIMBOLA ROTIMI ------------- RESPONDENT

JUDGMENT

The Petitioner by a Petition filed 20/10/2020against the Respondent claims the following:

1. A DECREE OF DISSOLUTION of the marriage on the ground that since the marriage the Respondent has behaved in such a way that the petitioner cannot be reasonably expected to live with the Respondent.
   i. The Respondent has deserted the marriage between him and petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.
   ii. The parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.
2. AN ORDER of Court granting full legal custody of the only child of the marriage Folasade Eden Rotimi to the Petitioner subject to the Respondent's visitation right subject to such visitation taking place at any date, time and place the petitioner and her family or anybody nominated by the Petitioner may determine and supervise.
3. AND for such other reliefs as the Honourable Court may think just and necessary to make.

In support of the Petition, the Petitioner filed verifying affidavit and certificate relating to reconciliation. The Petitioner opened her case on 14/01/2021 and gave evidence as a sole witness from the witness box stating as follows;

> "My name is Rebecca Yorchi Agwai I live at Maitama Abuja. I'm the Petitioner. Respondent is my husband. We met in 2002

while I was a student at University of Hull in the United Kingdom(U.K.) and during the time we were courting. He had cause to apply for an indefinite leave to remain in the United Kingdom as he had been resident there and was qualified to apply.During that time his parents also applied for him for residency in the U.S.A. On 4/12/2010 the Respondent and myself had a marriage blessing in the U.K. at that time neither of us were U.K. Citizens hence no marriage certificate was issued. We co-habited together at 183 CrammbilleStreet, Stifford Clay in Essex. From December, 2010 up till November, 2012 we resided and co-habited at that address. The marriage certificate was issued on 30th July, 2014 at New York City. Marriage is blessed with a child born on 17/1/2013 (female.) The name of the child is Folashade Eden Rotimi. In October, 2014 both parties and our daughter decided to relocate and live here in Abuja. We arrived at my parent's home in Maitama in Abuja. Thereafter he said he was returning to the U.K. to go and pursue his U.K. Citizenship with a promise to be back either at the end of 2014 or early 2015, he left October, 2014. Thereafter relationship between us became strained while my daughter and I continued to reside at my parent's residence in Maitama, Abuja. In November, 2016, he came to Abuja for 3 days to visit us.He stayed with a friend and at that time we discussed about the way forward in our marriage. He had no plans for us but said he was returning to the U.K. to conclude his citizenship and would be back soon. Till date he has not provided a matrimonial home for my daughter and myself as we still reside with my parents since 2014. The last time I saw him was 2016. We have lived apart from 2014 till date as we did not live together when he came home in 2016. Myself and my family have been maintaining my daughter including payment of school fees and medical requirement. I want the marriage dissolved, full custody of my daughter as I'm the only parent that she knows.

In evidence the Petitioner tendered one (1) document which was admitted in evidence and marked as follows; marriage certificate dated 30th day of July, 2014 issued at New York City, County of New York between parties as Exhibit A.

The Respondent was served with the petition via substituted means by pastingbut did not file an answer to the Petition or cross petition. The Respondent's counsel Florence F. Aremuthen cross examined the

Petitioner on 7/10/2021. Under cross examination Petitioner reiterated that Respondent and herself have been living apart since 2014. That at the earlier stage of their marriage Respondent was involved on the life of their only child but has not been responsible for the upkeep and maintenance of the child since they started living apart.

There was no re-examination and the Petitioner closed her case. At the end of her case, the Respondent counsel submitted that the Respondent rests his case on the Petitioner's case and case was adjourned for adoption of final written addresses. The Petitioner's counsel adopted his final written address dated 31/1/2023 wherein he raised a sole issue for determination to wit;

> "Whether upon a calm appraisal of the evidence adduced by the Petitioner, it can be said that the Petitioner has satisfied the provisions of Section 15(1) of the Matrimonial Causes Act so as to be entitled to the reliefs sought".

Summarily Learned counsel submitted that by the unchallenged evidence of PWl, the Petitioner has discharged on a balance of probability her burden of proof in line with **Section 15(1) and (2) (c, d and f) of the Matrimonial Causes Act** that the marriage between her and the Respondent has broken down irretrievably due to the Respondent's intolerable behavior as captured in her testimony.Counsel submitted that the law is now trite and settled that for a petitioner to succeed in a petition for dissolution of marriage, he/she must establish that facts upon which his petition is founded which must fall within one or more of the items contained in**Section 15(2) (a) to (h) of the Matrimonial Causes Act 1970** and cited **EKEREBE v. EKEREBE (1999) 3 NWLR (PT. 596) 514.**Counsel submitted that the Petitioner has discharged the burden as nothing was placed on the opposite side of the scale to counter all the facts and evidence led by the Petitioner. It is trite law that when evidence on a particular fact is not challenged or controverted, the court ought to deem the said fact as proved, he relied on**UBN v. OGBOH (1995) 2 NWLR (PT. 380) 647 at 654; FOLORUNSHO & ANOR v. SHALOUB (1994) 3 NWLR (PT. 333) P. 413 PARA. B-H.**Counsel submitted that the Petitioner has proved that she has lived apart with the Respondent since 2014,a cumulative period of over 8 years as at date and on the authority of **OMOTUNDE v. OMOTUNDE (2001) 9 NWLR (PT. 718) 252 at 284, para D-E,**is entitled to have the marriage dissolved. Counsel submitted that Custody of a child of a marriage dissolved by a court is governed by **Section 77 of the**

Matrimonial Causes Act,which vests the court with the discretion in every proceeding relating to custody to determine same on the basis of the consideration of the best interest of the child. See **ALABI v. ALABI (2009) 9 NWLR (PT.1039) 305, ODOGWU v ODOGWU (1992) 2 NWLR (PT. 225) 529**. Counsel then urged the court to hold that the best interest of Folasade Eden Rotimi is that she remains in the full primary custody of the Petitioner and that Petitioner is always willing to concede to Respondent's right of visitation in the terms set out in the petition. Counsel urgedthe court to grant the reliefs as sought.

By the Respondent's final written address, learned counsel also raised a sole issue for determination to wit:

> "Whether in the circumstances and evidence adduced before this Court, the Petitioner has proved her case and entitled to the orders sought?

Learned counsel submitted that the Petition was brought upon a faulty celebration of marriage not in line with **Section 49 and 50 of the Matrimonial Act** and same is not expected to stand as the draftsman of the Rules made provision for the celebration of marriages, non-compliance of same can vitiate whatever proceeding emanates therefrom he cited**BUHARI V. YUSUF (2003) 6 S.C (Pt. 11) 156.** Counsel submitted that the standard of proof under the Matrimonial Causes Act is as stated in **Section 82 of the Act.** Counsel further submitted that assuming without conceding that there exists a valid Marriage worthy of being adjudicated upon, that the Petitioner made several assertions which are fundamental to the character and reputation of the Respondent in her Notice of Petition; however, that she failed to prove same as alleged. He relied on the case of **ACCESS BANK PLC v. TRILO NIG. LTD & ORS (2013) LPELR-22945 (Pp 49-50) paras F-B**. That facts pleaded must be supported by evidence or they would be deemed abandoned. Cited**JATAU & ANOR. v. SANTIVI (2020) LPELR-49603 (Pp 26-26) paras c-D.** Counsel submitted that in determining the Custody of a child in the circumstances at hand, the best interest of the child shall be of paramount consideration relying on **Oduche v. Oduche (2005) LPELR-5976 (CA) and Sanni v. Mabinuori (2014) LPELR-22537 (CA)**. In conclusion counsel urgedthe court to dismiss the petition in its entirety or refuse the petitioner's reliefs for sole custody of the child of the marriage as the petition is lacking in evidence and failing to comply with the Rules guiding the celebration and dissolution of valid statutory Marriages under the Nigerian statutes.

Having carefully considered the petitionand the address of respective counsel, the issue for determination is;

> **"Whether Petitioner has proved that she has established the legal requirements for the grant of this petition".**

First and foremost, the Counsel to the Respondent in his written address adduced a lot of facts, law and evidence. Counsel had gone ahead to give evidence in his written address and also relied on some issues of law. It is trite that no matter how beautiful a written address may be, it cannot take the place of oral evidence. Also, counsel raising the issue of validity or non-validity of the marriage of the parties is akin to relitigating a decided issue. this court had earlier ruled on the validity of the marriage and the court is functus officio on the issue.

I had at the beginning of this judgment stated that the Respondent rests his case on that of the Petitioner.The law is that where a Respondent rests his case on that of the Plaintiff or Petitioner, as the case may be, the Respondent would in effect be contending that: (a) The Plaintiff or petitioner has not made out a case for the Respondent to answer; or (b) The Respondent admits the facts of the case as stated by the petitioner; or (c) The Respondent has a complete answer in law to the Petitioner's case as held in **BUSARI & ANOR V. ADEPOJU & ORS(2015) LPELR-41704(CA)**. In a situation where such evidence is unchallenged and uncontradicted, minimum proof will be accepted. The bottom line is that, whether a Defendant adduces or does not adduce any evidence at the trial, it remains the fundamental and primary duty cast on a Plaintiff or Petitioner, to prove his case by credible evidence.I find in support of this the case of **Nnamdi Azikiwe University v. Nwafor (1999) 1 NWLR (Pt.585) 116 at 140-141** where the Court of Appeal **per Salami J.C.A.** expounded the point thus:

> *"The plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence... the mere fact that a case is not defended does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establishes or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant..."*

Therefore, from the above the point appears sufficiently made that the burden of proof lies on the plaintiff or petitioner in this case to establish her case on a balance of probability by providing credible evidence to sustain her claim irrespective of the unchallenged evidence.

The law is now settled that, there is only one ground upon which the Court could be called upon to decree for dissolution of marriage, i.e., that the marriage has broken down irretrievably; and the Court on hearing the petition can hold that the marriage has broken down irretrievably if the Petitioner can satisfy the Court of one or more of certain facts contained in **Section 15 (1) and 15 (2) (a) – (h) of the Matrimonial Causes Act, 2004.** In the case of **IBRAHIM V. IBRAHIM (2006) LPELR-7670(CA) Per ARIWOOLA, J.C.A in Pp. 16-17, paras. E-F held**

> "*The law also provides for the facts, one or more of which a petitioner must establish before a Court shall hold that a marriage has broken down irretrievably. It reads thus - Section 15(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-- (a) that the Respondent has willfully 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*"

Therefore, 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 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).**

Having examined the evidence of the Petitioner, it is my view that the grounds upon which the Petitioner's petition would fall under is stated in **Section 15(2)(c) (e) & (f) of the Matrimonial Causes Act**, which provides that since the marriage the Respondent has behaved in such a way that the petitioner cannot be reasonably expected to live with the Respondent, that the Respondent has deserted the marriage for a continuous period ofat least two years immediately preceding the presentation ofthe petition and that the parties to the marriage have lived apartfor a continuous period of at least three years immediately preceding the presentation ofthe petition.There must be physical separation and the intention to remain separated for a party to rely on this provision of desertion. In the case of **ANIOKE V. ANIOKE (2011) LPELR-3774 (CA)** Per Oredola JCA held,

> "*Thus to establish the allegation of desertion, a petitioner must establish: (a) Physical separation. (b) avowed or manifest intention to remain separated on a permanent basis. Absence of consent from the other spouse. Absence of any good, just cause or justification..........*"

In the instant case, the facts in support of the evidence adduced, which is unchallenged and as such deemed admitted, is that the Respondent deserted the marriage between him and the Petitioner since October 2014(6years as at the date of filing this Petition), as stated by the Petitionerin her testimony before this court. Also, the Petitioner averred that when the Respondent visited in November 2016, he came to Abuja for 3days and stayed with a friend rather than stay with the Petitioner and the child of the marriage. This also interprets that the Respondent has shown a manifest intention to remain separated.I am therefore satisfied that the Petitioner has adduced credible evidence in support of the fact that the Respondent deserted their marriage for a continuous period of at least two years immediately preceding the presentation of this petition andthat the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the

petition. The Evidence wasnot challenged nor controverted by the Respondent.The law is trite that arguments in the written address of Counsel however brilliant cannot dislodge the evidence on record, substitute, or constitute evidence upon which the Court can act as held in **MUAZU V. STATE(2018) LPELR-46768(CA)**, hence the arguments in the written address of Counsel do not constitute evidence upon which a Court can act. Therefore, the marriage in my view has irretrievably broken down by virtue of the provisions of **Section 15(2)(c), (e) and (f) of the Matrimonial Causes Act 2004** and I so hold, therefore the marriage celebrated between the Petitioner and the Respondent is hereby dissolved.

With respect to the relief on legal custody of the child of the marriage sought by the Petitioner, from the provisions of**Section 71(1) of the Matrimonial Causes Act, Cap 220 Laws of the Federation of Nigeria, 1990 and Section 1 of the Child's Right Act 2003,** the Court is bound to have regard to the interest and welfare of the children as the paramount consideration in the grant of custody of children.The Respondent having not filed any process or led evidence in challenge of the reliefs sought by the Petitioner implies he is not averse to the Court granting the reliefs. The child from the evidence adduced by the Petitioner is still a minor and have always been with the Petitioner. In my view, the child is of tender age and have remained in custody of her mother from birth up till now. The child who is still in her formative years will be better cared for by her mother. The Petitioner in her proposed arrangement for the child of the marriage has stated that she concedes to supervised visitation rights to the Respondent for the purpose of seeing the child of the marriage if granted full custody. In the circumstances, I will grant custody of the child to the Petitioner until she attains the age of maturity of18years when she would decide whom she would reside with and I hereby award supervised visitation right to the Respondent.

With respect to the relief relating to the maintenance of the child, by **Section 70 (1) of the Matrimonial Causes Act Cap 220 Laws of the Federation of Nigeria, 1990,**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, The Petitioner in her proposed arrangement for the child of the marriage stated that if granted full custody of the child of the marriage she undertakes to continue to cater for the general welfare, moral, physical, educational and social wellbeing of Folasade Eden Rotimi with or without any support from the Respondent. Be that as it may 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 be paramount over all other considerations in the Court and the court shall order accordingly. However, taking into consideration all relevant circumstances surrounding the Respondent,I am of the opinion that Respondent must contribute to the welfare of the child and I so hold.

The Petitioner, having discharged the burden placed on her to prove the petition and the marriage so dissolved between the Petitioner and the Respondent, consequently it is hereby ordered as follows.

1. I hereby pronounce a Decree Nisi dissolving the marriage celebrated between the Petitioner, **MRS REBECCA YORCHI AGWAI** and the Respondent, **MR. OLUTOSIN ABIMBOLA ROTIMI** at New York City, County of New York, USA on 30th of July, 2014.
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. That the Petitioner shall haveCustody of the Child of the marriage **Folasade Eden Rotimi**and the Respondent shall have supervised visitation rights to the child of the marriage at a reasonable time and place.
4. That the Petitioner shall be responsible for the general welfare, moral, physical, educational and social wellbeing of Folasade Eden Rotimi with any support from the Respondent.
5. That the Respondent shall pay the sum of N50,000.00 (FiftyThousand Naira) only, monthly to the Petitioner for the welfare and maintenance of the child.

Parties: Absent
Appearances: C. E. Odum appearing for the Petitioner. Florence Aremuappearing for the Respondent.

HON. JUSTICE M. OSHO-ADEBIYI
JUDGE
20TH APRIL, 2023