**IN THE HIGH COURT OF JUSTICE OF THE F.C.T.**
**IN THE ABUJA JUDICIAL DIVISION**
**HOLDEN AT APO, ABUJA**
**ON THURSDAY, THE 13TH DAY OF JULY, 2023**
**BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA**
**JUDGE**

**SUIT NO.: FCT/HC/PET/112/2022**

**BETWEEN:**

**MR BABATOPE OLALEKAN AWE** **PETITITONER**

**AND**

**MRS BOSEDE TITILAYO AWE** **RESPONDENT**

# JUDGMENT

By a Petition for the Decree of Dissolution of Marriage dated and filed on the 28th of February, 2022, the Petitioner instituted this action seeking for the following reliefs:-

1. *A Decree of Dissolution of Marriage between the Petitioner and the Respondent celebrated at the Idi-Ayunre, Oluyole Local Government Marriage Registry on the 14th day of August, 1991, under the Marriage Act on the ground that the marriage has broken down irretrievably because:-*
   a. *The Respondent committed adultery resulting in illegitimate pregnancy and willfully deserted the Petitioner and the Respondent*

*and the Petitioner have lived apart for a continuous period of over 16 (sixteen) years preceding the presentation of this petition.*

2. *Respondent has behaved in such a way that he has no intention of continuing in marriage with the Petitioner.*

The Petition was accompanied with all the statutorily required processes including the verifying affidavit and the Witness Statement on Oath of the Petitioner which elaborated the facts upon which the Petition was founded.

On the 12th of April, 2022, this Petition came up for the first time. Counsel for the Petitioner informed the Court that the Petitioner was unable to serve the Respondent with the originating processes and the hearing notice. He therefore brought an application *vide* a Motion *Ex Parte*with Motion Number M/2973/2022 dated and filed on the 16th of March, 2022 for an Order of this Court for substituted service. This Court heard the application on the 21st of June, 2022 and granted the main relief sought while also making other consequential orders.

On the 27th of September, 2022, the Court, satisfied that the Respondent had been served as ordered by the Court, allowed the Petitioner to open his case. He adopted his Witness Statement on Oath after he had been sworn. In his Witness Statement on Oath, the Petitioner, testifying as PW1, narrated how he got married to the Respondent at the Marriage Registry at Idi-Ayunre,

Oluyole Local Government Area of Oyo State. He tendered, and the Court admitted in evidence, the certificate of marriage between the Petitioner and the Respondent. This document was marked as **Exhibit A1**.

The Petitioner swore that he and the Respondent co-habited at Fodacis Area, Adeoyo, off Ring Road, Ibadan, Oyo State from the date of the marriage till the 13th day of October, 2005.The Petitioner averred that co-habitation between him and the Respondent ceased on the 13th of October, 2005 when the Respondent deserted their matrimonial home when the Petitioner found out that she was pregnant for another man. He further averred that when she deserted the matrimonial home upon his discovery of her infidelity, she lived within Ibadan metropolis before transferring her service to the Federal Capital Territory, Abuja. It was his case that the Respondent kept changing her residential address each time he found out her residential address. He also added that there had been no communication between the parties. It was the case of the Petitioner that the marriage has broken down irretrievably. He therefore sought for the reliefs as contained in the Petition for the Dissolution of the Marriage.

The Court adjourned to the 13th of October, 2022 for cross-examination of the PW1. On that date, the Respondent was neither in Court nor represented by Counsel. Learned Counsel for the Petitioner therefore applied that the

Respondent be foreclosed from cross-examining the PW1. The Court granted the application and adjourned the Petition to the 10th of November, 2022 for the Respondent to open her defence. The Court could not proceed on that date because the Respondent was not served with hearing notice against that date. The Court therefore adjourned the matter to the 6th of December, 2022 for the Respondent to open her case. Again, the case could not go on because there was no service of the hearing notice against that date on the Respondent. The Court had to adjourn the suit to the 26th of January, 2023 for defence. On the 26th of January, 2023, the Respondent was absent. On the application of learned Counsel for the Petitioner to that effect, the Court foreclosed the Respondent from defending the petition. The Court further adjourned the suit to the 20th of April, 2023 for adoption of final written addresses.

On the 20th of April, 2023, Counsel for the Petitioner adopted the Final Written Address of the Petitioner. The Respondent did not file her Final Written Address. as usual, she was neither in Court nor represented by Counsel. Upon the adoption of the Petitioner's Final Written Address, the Court adjourned for Judgment.

The Petitioner's Final Written Address was dated the 14th of February, 2023 and filed on the 15th of February, 2023. In the said Final Written Address, the

Petitioner through his Counsel formulated a sole issue for determination, to wit, '*Whether the Petitioner has proved his case, whereof this Honourable Court can validly decree the marriage between the Petitioner and Respondent dissolved?*'

In his submissions on the sole issue he formulated, learned Counsel contended that the marriage between the Petitioner and the Respondent was valid and subsisting at the time of filing the Petition for Dissolution of Marriage. He called in aid **Exhibit A1**, that is, the certificate of marriage between the Petitioner and the Respondent, adding that the Petitioner had discharged the evidential burden placed on him by the law. He relied and cited the cases of ***Lawrence v. Olugbemi & Others (2018) LPELR-45966(CA) at 37–38, paras C-F per Tsammani, JCA and Union Bank v. Ravih Abdul & Co. Ltd (2018) LPELR-46333(SC) at 13-16, paras D-E***. He also cited sections 32 and 34 of the Marriage Act CAP M6, Laws of the Federation of Nigeria, 2004 as well as sections 121(a), 131(1) and 132 of the Evidence Act, 2011.

Arguing further, learned Counsel referred to the Witness Statement on Oath of the PW1 and submitted that the Petitioner has established desertion by the Respondent to entitle him to an order of this Honourable Court dissolving the marriage between the Petitioner and the Respondent. He quoted section

15(d), (e), and (f) of the Matrimonial Causes Act and the cases of ***Oghenevbede v. Oghenevbede (1975) 3 U.I.L.R. 104, Towoeni v. Towoeni (2001) 12 NWLR (Pt. 727) 445, Omotunde v. Omotunde (2001) 9 NWLR (Pt. 718) 252 and Ajidahun v. Ajidahun (2000) 4 NWLR (Pt. 654) 605, Eziaku v. Eziaku (2018) LPELR-46373(CA) at 28-34, paras D-E and Uzochukwu v. Uzochukwu (2014) LPELR-24139(CA)*** wherein the Courts expounded the above statutory provisions of the Matrimonial Causes Act relating to the grounds for dissolution of marriage.

In concluding his submissions, learned Counsel pointed out that the case of the Petitioner was unchallenged. Relying on the case of ***Zubairu v. State (2015) LPELR-40835(SC)*** and some other cases to that effect, he urged the Court to hold that the Petitioner has established his case on the basis of his unchallenged evidence.

In determining this case, I will adopt the sole issue the Petitioner formulated in his Final Written Address and reframe same as follows: "***Whether the Petitioner has not established on the basis of his unchallenged evidence his entitlement to the reliefs sought in the Petition for the Dissolution of Marriage between him and the Respondent.***"

It is settled law that where the evidence of a party is unchallenged, the Court is bound to act on that unchallenged evidence. See ***Incorporated Trustees***

***of Ladies of Saint Mulumba, Nigeria v. Ekhator (2022) 15 NWLR (Pt. 1852) 35 S.C. at 61, paras B – C*** and***Mohammed v. State (2023) 3 NWLR (Pt. 1870) 157 S.C. at 199, paras. B-G; 217-218, paras. F-G***. The only qualification is that such unchallenged evidence must be compelling, cogent and credible. In other words, the Court can only act on an unchallenged evidence if it is not ridiculous or if it will not lead to a state of absurdity. Once the unchallenged evidence satisfies this requirement, and does not put the law on its head, the Court is bound to act on it. See ***First Bank of Nigeria Plc v. Standard Polyplastic Ind. Ltd. (2022) 15 NWLR (Pt. 1854) 517 S.C. at 550, paras. G-H, Onwuta v. State of Lagos (2022) 18 NWLR (Pt. 1863) 701 S.C. at 721, paras. E-H and Haruna v. State (2022) 15 NWLR (Pt. 1855) 1 S.C. at 23, para B***.

The Petitioner, testifying as PW1, laid evidence before the Court to justify the presentation of the Petition for the Dissolution of Marriage. In paragraphs 3, 4 and 5 of his Witness Statement on Oath, the Petitioner laid evidence to establish the fact of a valid and subsisting marriage between him and the Respondent. He tendered the certificate of marriage as evidence of the marriage. This certificate of marriage was admitted by this Court in evidence as **Exhibit A1**. He proceeded in paragraphs 5, 6, 8, 9,10 and 11 to place before the Court facts supporting the ground for dissolution of marriage. According to him, the Respondent committed adultery and became pregnant

as a result of the adultery. He also swore that the Respondent, unable to bear the shame of her action, left the matrimonial home on the 13th of October, 2005. Since then, the Petitioner averred, he has not seen the Respondent.

The Matrimonial Causes Act stipulates that an order for the dissolution of a marriage may be made if the marriage has broken down irretrievably. Section 15(1) and (2) provides the facts that will convince the Court that a marriage has broken down irretrievably.

> "***(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 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 respondenthas 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 of 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.***"

Of these eight factual circumstances that the Court could hold onto to dissolve a marriage, the Petitioner relied on adultery and desertion by the Respondent to claim that the marriage has broken down irretrievably. What, then, is required of a party who relies on adultery and desertion as the facts which support the ground that the marriage has broken down irretrievably? The Courts have provided the answer.

In the case of adultery, the Court of Appeal (Enugu Division) in the case of ***Megwalu v. Megwalu (1994) N.W.L.R. (Pt. 359) 718 at 730, paras E-G*** per Akintan, JCA (as he then was, later, JSC)held,to wit: ***"one of the grounds for the dissolution of a marriage under section 15(2) of the Matrimonial Causes Act, Cap 220 Laws of Federation of Nigeria 1990 is that the marriage has broken down irretrievably, that is, in this case, if the petitioner or cross-petitioner satisfies the court that since the marriage, the respondent or cross-respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. Therefore, it is definitely necessary to plead and lead evidence of the name of the other woman or man, as the case may be, if a case for divorce on the ground of adultery is to be made out."***

By virtue of this decision, a party who is relying on the fact of adultery must lead satisfactory evidence to the effect that (i) the other party has committed

adultery; (ii) they find it intolerable to live with the other party; (iii) plead and lead evidence of the name of the person with whom the adultery is said to have been committed; (iv) the circumstances that point inexorably to the fact of the adultery; and (v) the inclusion of the person with whom the adultery is said to have been committed as a co-respondent in the petition.

I note that the Petitioner did not include as a co-respondent the person with whom he alleged the Respondent committed adultery. He did not provide the name of the person. In other words, he did not plead and lead evidence as to the name of the person with whom the adultery was said to have been committed. He did not lead evidence to show that he found it intolerable living with the Respondent after the act of adultery.He only claimed that the Respondent became pregnant as a result of the adultery and left the matrimonial home out of shame and embarrassment when her adultery was uncovered. The Petitioner did not place before this Court evidence that (i) the Respondent was pregnant, and (ii) he was not responsible for the pregnancy.

The standard of proof in matrimonial matters is in a class of its own. While the standard of proof in criminal cases is proof beyond reasonable doubt, the standard of proof in civil proceedings is proof on a preponderance of evidence, or balance of probabilities. See sections 134 and 135 (1), (2) and (3) of the Evidence Act, 2011. In matrimonial matters, however, the standard

of proof is proof to the reasonable satisfaction of the Court. Section 82(1) and (2) of the Matrimonial Causes Act provides that ***"(1) for the purpose of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court. (2) Where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter."***

Proof to the reasonable satisfaction of the court is lower than the standard of proof in criminal proceedings, that is proof beyond reasonable doubt, but higher than the standard of proof in civil proceedings, that is, proof on a balance of probabilities or proof on the preponderance of evidence. The Court explained this evidential quagmire in the case of ***Erhahon v. Erhahon (1997) 6 N.W.L.R. (Pt. 510) 667 at 681, paras C-H.*** in this case, the Court of Appeal (Benin Division) **per Akpabio, J.C.A**. held that ***"While it is true that the standard of proof of adultery in a divorce case is not as high as that of rape or defilement in a criminal case, which is "beyond reasonable doubt", S.82(1) of the Matrimonial Causes Act, nevertheless puts proof of adultery in divorce cases in a class of its own as follows:- "(1) for the purpose of this Decree, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court." From the***

***foregoing, it will be seen that whether adultery is proved or not in matrimonial causes depends entirely on what the trial court who saw and heard the witnesses thought about their evidence."***

Can the Petitioner be said to have established the fact of adultery in this petition? I hasten to answer this question in the negative. I have observed with a tinge of amusement that learned Counsel did not advance legal arguments in support of the Petitioner's fact of adultery. He, instead, had urged the Court to hold that the Petitioner has established his case on the preponderance of evidence, that is, the standard in civil cases. See paragraphs 3.5, 3.6, 3.7, and 3.8 of the Petitioner's Final Written Address. He had also invited this Court to take note that the evidence of the Petitioner was not challenged by the Respondent either by through cross-examination or by the presentation of contrary and superior evidence. See paragraph 3.13 of the Petitioner's Final Written Address.

That was a strategic advocacy move on his part. He knew it was a Herculean task proving adultery in matrimonial matters, considering that adultery is an act that takes place behind closed doors. He did not adduce evidence that the pregnancy, which could have been conclusive proof of the adultery, was not his. This Court cannot, therefore proceed on assumptions. This Court is of the firm conviction, and accordingly holds, that the Petitioner has not established

the fact of adultery pursuant to section 15(2)(b) of the Matrimonial Causes Act.

But, adultery is not the only fact the Petitioner is placing before this Court as the facts constituting the ground that the marriage between him and the Respondent has broken down irretrievably. In couching the reliefs he seeks from this Court in this Petition, the Petitioner states that the Respondent "*…willfully deserted the Petitioner and the Respondent and Petitioner have lived apart for a continuous period of over 16 (sixteen) years preceding the presentation of this Petition.*" Desertion and living apart for a period exceeding three years are recognized under section 15 (2)(d) and (f) of the Matrimonial Causes Act as veritable facts constituting the ground for the grant of a decree of dissolution of marriage. The paragraphs provide thus:

> "***(d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;***
>
> ***(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***;"

Section 15(3) provides an interpretational guide to paragraphs (e) and (f). the subsection provides that "***For the purpose of subsection (2) (e) and (f) of***

***this section the parties to a marriage shall be treated as living apart unless they are living with each other in the same household***." The Courts have adumbrated on these statutory provisions in a plethora of judicial pronouncements. For instance, in the Court of Appeal case of ***Mrs Helen Anioke v. Mr Ben Charles Anioke (2011) LPELR – CA/C/126/2008*** the Court per Oredola, J.C.A., amplified the legal requirements for desertion as follows:-

> "***By virtue of Section 15(2) (d) of the Matrimonial Causes Act, a Court is bound to hold that a marriage has broken down irretrievably if it is established that the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the Petition. So, what is desertion? Desertion is the withdrawal of support and cessation from cohabitation without the consent of the other spouse and with the avowed intention of abandoning allegiance, fidelity or responsibility and remaining separated in perpetuity. Put differently, desertion means abandonment or voluntary withdrawal from all marital obligations by a married person, without any just cause. 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; (c) Absence of consent from the other spouse; and (d) Absence of any good, just cause or justification.***

***It is to be noted also, that the law gives recognition to two types of desertion, namely, simple desertion and constructive desertion. In the former, it is the absentee spouse who has abandoned the matrimonial ship and abdicated responsibility for requisite duties, while in the latter, it is the spouse who remains aboard the matrimonial ship who is in desertion, in that the said spouse has by his or her conduct expelled the other.***"

Counsel for the Petitioner has cited the cases of ***Eziaku v. Eziaku (2018) LPELR-46373 at 28-34, paras D-E per Elechi, JCA, Omotunde v. Omotunde (2001) 9 NWLR (Pt. 718) 252 at 262-263, paras D-E and Uzochukwu v. Uzochukwu (2014) LPELR-24139(CA)*** and quoted copiously thencefrom. The reasonings therein luciferously explicated the statutory provisions of section 15(2)(d) and (f) of the Matrimonial Causes Act. To establish actual desertion, therefore, a party must show (a) Physical separation; (b) Avowed or manifest intention to remain separated on a permanent basis; (c) Absence of consent from the other spouse; and (d)

Absence of any good, just cause or justification. Similarly, to establish living apart under paragraph (f), a party must lead evidence to the fact that they and the other party have not been living in the same household for a period of not less than three years immediately preceding the presentation of the petition.

The question that remains to be asked is whether the Petitioner has proved desertion and living apart to the reasonable satisfaction of this Court. Again, this Court must have recourse to the Witness Statement on Oath of the Petitioner. In paragraphs 9, 10, 11, and 12 of the said Witness Statement on Oath, the Petitioner led evidence to the fact that the Respondent left the matrimonial home at Fodacis Area, Adeoyo, off Ring Road, Ibadan, Oyo State for an unknown destination on the 13th of October, 2005. He also claimed that she continued to change her address each time she knew that he had located her. He gave her last known address as No. 24 Gidado Idris Street, Wuye, Abuja. At the time of presenting this petition, the parties had been living apart for a period of more than sixteen years. It is my considered view, and I so hold, that the Petition has established both desertion and living apart for a period of not less than sixteen years immediately preceding the presentation of the petition for the dissolution of marriage.

In view of the foregoing, therefore, I hold that the Petitioner has established the ground for the dissolution of marriage as set out in section 15(1) (2) of the

Matrimonial Causes Act. The sole relief sought by the Petitioner in this Petition for a Decree of Dissolution of Marriage is hereby granted. Accordingly, an Order of Decree Nisi is hereby made dissolving the Marriage between the Petitioner and the Respondent celebrated on the 14th day of August,1991 at the Idi-Ayunre, Oluyole Local Government Marriage Registry. This Decree Order Nisi shall become absolute three months hence.

This is the Judgment of this Honourable Court delivered today, the 13thof July, 2023.

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**HON. JUSTICE A. H. MUSA**
**JUDGE**
**13/07/2023**

**APPEARANCE:**
**For the Petitioner:**
**Gilbert Agwu Enyam, Esq.**
**Peter Kposone, Esq.**
**Sandy Useni, Esq.**

**For the Respondent:**
**Respondent not in Court and not represented**