IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON THURSDAY, THE 21ST DAY OF SEPTEMBER, 2023
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO: FCT/HC/PET/564/2020

BETWEEN:

MRS PUNARIMAM FEHINTOLA **PETITIONER**

AND

MR BABATUNDE FEHINTOLA **RESPONDENT**

JUDGMENT

This Judgment is on the Petition for a Decree of Dissolution of the Marriage between the Petitioner and the Respondent and the Cross-Petition of the Respondent for a Decree of Judicial Separation of the Marriage.

By a Petition for a Decree of Dissolution of Marriage dated the 18th of November, 2020 but filed on the 19th of November, 2020, the Petitioner, MrsPunarimam Fehintola, brought this action seeking the following reliefs:-

1. *A Decree of Dissolution of Marriage between the Petitioner and the Respondent on the ground that the marriage has broken down irretrievably.*

2. *An Order directing the Respondent to be remitting the sum of ₦300,000 per month to the Petitioner being the total amount for the maintenance of the two children.*
3. *An Order directing the Respondent to grant custody of the children to the Petitioner immediately.*
4. *An Order of perpetual injunction restraining the Respondent from further harassing, intimidating, threatening and assaulting the Petitioner.*
5. *And such further Orders or other Orders as this Honourable Court may deem fit to make in the circumstance.*

The Respondent was served with the Notice of Petition, the Petition itself and other accompanying processes on the 21st of March, 2021 *via* personal service. on the 29th of June, 2021, the Respondent filed his Memorandum of Appearance as well as his Answer to Petition and Cross-Petition. The processes were dated the 11th of June, 2021.

I note that there was no application from the Respondent for leave to file his Answer to the Petition out of time, considering that twenty-eight (28) days allowed by Order VII Rule 1(4) of the Matrimonial Causes Rules had elapsed. There was, however, no record that the Court made an Order granting leave to the Respondent to file his Answer out of time. There was also no record that Petitioner objected or consented to the Answer the Respondent had filed; even though consent of the Petitioner to the filing of the Answer after the

expiration of the time limited for the filing of the Answer ought to be in writing and signed by the party or, where the party is represented by a legal practitioner, by the legal practitioner pursuant to the provisions of Order X Rule 1(1) and (2) of the Matrimonial Causes Rules.

This suit came up for the first time in this Court on the 23rd of March, 2021. After a series of adjournments occasioned by the parties to the Petition – delays that impelled the Court to award costs at different times against the parties – the Petitioner eventually opened her case on the 3rd of February, 2022.

Testifying as PW1, the Petitioner, a journalist who worked with Arise News Channel informed this Court that she wanted a divorce because she had been abused emotionally and physically. She narrated how the Respondent used abusive words on her, insulted her family and how he beat her.

She swore that she had been married to the Respondent for fifteen (15) years, adding that the marriage produced two children; the first child, a son, aged fourteen (14) at the time of her evidence and the second child, a daughter, aged twelve (12) at the time of her evidence. She testified that she no longer lived with the Respondent and that she had not visited the children because the Respondent threatened to report her to the police if she did. She added that she only came to the neighbourhood of the Respondent and the

children would meet her to take them home. She averred that she supported the children with groceries whenever they were returning to school.

She further testified that the family of the Respondent had not called her since 2019 when the marriage hit the rocks, thereby making effort at reconciliation impossible. She insisted that she had no intention of returning to the matrimonial home.

During cross-examination, the Petitioner stated that the Respondent had concubines; that she had seen certain things in his bag and that she had a witness to his infidelity. This Court notes that she did not tell the Court what she saw in the Respondent's bags. She also told the Court that the last time she saw the children was in December, 2021, adding that she did not have access to the children unless the Respondent allowed them to see her. She confirmed that the Respondent was responsible for the upkeep of the house and that he also paid the school fees of the children, adding, however, that she also contributed to the welfare of the children.

She further stated that the Respondent was in the habit of sending her away from the matrimonial home, adding that she always returned following interventions from family members. She swore that she left on her own volition in 2019 because the Respondent threatened to kill her.

When this Court reconvened on the 3rd of March, 2022 for cross-examination, the Petitioner confirmed that none of the family members made any attempt to reconcile her with the Respondent. She added that the Respondent had sent money to her parents only once.

There was no re-examination. The Court therefore adjourned to the 5th of May, 2022 for defence.

When this Court reconvened on the 7th of July, 2022, the Respondent testifying as DW 1 opened his defence. It must be stated that the Respondent had filed his Answer to the Petition of the Petitioner as well as a Cross-Petition. In the Cross-Petition, the Respondent sought the following reliefs:-

a. *A Decree of judicial separation of marriage on the ground that the marriage has broken down irretrievably in that the Cross-Respondent has willfully and persistently refused to consummate the marriage and on the ground that since the marriage the Cross-Respondent has behaved in such a way that the Cross-Petitioner cannot be reasonably expected to live with the Cross-Respondent.*
b. *The Cross-Petitioner who is in custody of the two children, seeks an order for status quo to be maintained as he is capable of taking care of the children just as he has been doing since the Cross-Respondent abandoned the marriage as the Cross-Respondent is always too busy with work and other activities. The Cross-Respondent will be given free*

access to the children at will as it has always been, including visits at her residence as is already the case.

c. *An Order of Court compelling the Cross-Respondent to commence contribution to the upkeep of the children, as the Cross-Respondent is gainfully employed and financially buoyant.*

d. *An Order mandating the Cross-Respondent to contribute a monthly maintenance allowance for the children in the sum of ₦400,000.00 (Four Hundred Thousand Naira only) for the feeding maintenance and school fees and extra-curricular activities of the two children of the marriage until university level.*

After he had been sworn, the Respondent, as DW1, confirmed that he was married to the Petitioner and that the marriage was blessed with two children as the Petitioner had averred during her examination in chief. He averred that he returned home one day only to meet the absence of the Petitioner. He added that the Petitioner left the children of the marriage with him. He also informed the Court that before the last desertion, the Petitioner had left the matrimonial home on three occasions in the past.

He swore that the relationship he had with his children was cordial and enjoyed all the trappings of paternal generosity, care and attention. He also informed the Court that he had been a good and liberal in-law to the family of

the Petitioner. He recounted how he took care of the Petitioner's father, her siblings' school fees and rents.

He stated that the Petitioner was given to intense anger and would always destroy things in the house whenever she was seized with fits of anger. He said he cultivated the habit of stepping out of the house or locking himself in his room each time he noticed she was angry. At this point, the Court adjourned for continuation of the Respondent's examination-in-chief.

After a series of adjournments occasioned by the ill-health of the Respondent's Counsel on the 26th of October, 2022, the absence of the Respondent in Court on the 3rd of November, 2022, and the absence of the substantive Counsel for the Respondent on the 10th of January, 2023, this Court continued with the examination-in-chief of the Respondent on the 21st of February, 2023. On that day, the Respondent tendered a number of documents as exhibits. The Petitioner's Counsel did not object to the admissibility of the documents. This Court admitted those documents and marked them as exhibits as follows: receipts of electronic transfer marked as **Exhibit A1-A5**; certificate of compliance with section 84 of the Evidence Act, 2011 marked as **Exhibit B1-B2**; receipts of payments for school fees with receipt numbers 00407 and 00910 marked as **Exhibit C1-C2**; medical reports dated 26/04/2021 for male and female marked as **Exhibit D1-D2**; WhatsApp

conversations marked as **Exhibit E1-E5** and a photograph marked as **Exhibit F1**.

Under cross-examination, the Respondent confirmed that his marriage with the Petitioner had broken down and that he was responsible for the maintenance of the children, adding that the task was not a burden for him. He also answered, when asked a question to that effect, that he did not know anything about the Petitioner's salary.

There was no re-examination. The Court adjourned to the 18th of April, 2023 for adoption of Final Written Addresses. On that day, Counsel for the Respondent applied to Court for a short adjournment to enable him file the Respondent's Final Written Address. The Court granted the application subject to the payment of a cost of ₦15,000.00 (Fifteen Thousand Naira only). On the 31st of May, 2023, the next adjourned date, the Court could not hear the Respondent's application for extension of time to file his Final Written Address out of time because the Motion on Notice had no Motion Number. The Court had to adjourn to the 11th of July, 2023. The Court did not sit on the 11th of July, 2023; but it sat on the 12th of July, 2023. The Respondent's Counsel moved his motion which sought to regularize the Respondent's Final Written Address. the Court granted the relief sought therein. Thereafter, Counsel for the parties adopted the parties' respective Final Written Addresses while the Petitioner's Counsel adopted the

Petitioner's Reply on Point of Law. The Court thereupon adjourned for Judgment.

In the Petitioner's Final Written Address, learned Counsel for the Petitioner formulated one issue for determination: "*Whether considering the evidence placed before this Honoruable Court, the Petitioner's marriage to the Respondent has broken down irretrievably*."

Arguing this sole issue, learned Counsel referred to section 15(1) and (2) of the Matrimonial Causes Act M17 Laws of the Federation of Nigeria, 2004. He referred to the facts as contained in paragraph 7(7) – (32) of the Petition as well as the *viva voce* evidence of the Petitioner testifying as PW1 and urge the Court to find that the marriage has broken down irretrievably. It was the case of the Petitioner that she had established inhuman and brutish conduct of the Respondent towards her, including insults, assaults and emotional abuse which she claimed constituted intolerable behavior. The Petitioner's Counsel also drew the attention of the Court to the fact that the parties have lived apart for a continuous period of one (1) year immediately preceding the presentation of the petition.

On the claim for custody, learned Counsel prayed this Court to grant the custody of the children of the marriage to the Petitioner, adding that the welfare of the children must be taken into consideration in the grant of custody. He maintained that the children of the marriage being of tender age,

could be taken care of only by their mother. In asking the Court to make an order of maintenance of the children and the Petitioner against the Respondent, Counsel referred this Court to the evidence which was extracted from the Respondent under cross-examination wherein he stated that taking care of the children was not a burden for him.

For all his submissions on the sole issue he formulated, learned Counsel cited and relied on the cases of ***Umoetuk v. Umoetuk (2015) LPELR-40309(CA)*** and ***Davidson v. Davidson & Anor (2021) LPELR-56109(CA)***.

In his Final Written Address, the Respondent, through his Counsel distilled five issues for determination. These are: "*(1) Considering the Notice of Petition filed by the Petitioner, whether the Petitioner has proved to the satisfaction of this Court that the marriage between the Petitioner and the Respondent has broken down irretrievably as required by the provisions of the Matrimonial Causes Rules.; (2) Whether the Petitioner without pleading in her Notice of Petition can seek for relief of custody of the children; (3) Whether the Respondent/Cross-Petitioner has made out a case to warrant the grant of decree of dissolution of the marriage between her and the Cross-Respondent; (4) Whether the Respondent/Cross-Petitioner herein is entitled to continuous custody of the children of the marriage; and, (5) Whether the Petitioner is entitled to the sum of ₦300,000.00 (Three Hundred Thousand Naira only) as monthly upkeep for the welfare of the children*."

In his argument on the first issue, which, by the way seemed to incorporate Issues 2, 3 and 5, learned Counsel submitted that the Petitioner has failed to discharge the burden of proof incumbent on her because the factual ground she relied on for presenting her petition for the dissolution of the marriage was that the marriage has broken down owing to irreconcilable differences between the Petitioner and the Respondent.Contending that matrimonial causes are *sui generis* proceedings, it was the argument of learned Counsel for the Respondent that the Petitioner had not established her case to the reasonable satisfaction of this Court, being the standard of proof in matrimonial causes as enshrined in section 82(1) and (2) of the Matrimonial Causes Act.

Quoting extensively the provisions of sections 15(1) and (2), 44(3), 55, and 82(1) and (2) of the Matrimonial Causes Act, sections 131(1) and (2), 132 and 133(1) of the Evidence Act, 2011, Order V Rules 3(g), 12(1) and (2) as well as the cases of ***Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383, Mohammed Damulak v. Patricia Damulak (2004) 8 NWLR (Pt. 874) 151 at 166; Anoke v. Anoke (2013) FWLR (Pt. 658) 975 at 992-993; Adeparusi v. Adeparusi v. Adeparusi (2014) LPELR-41111(CA), Okala v. Okala (1973) ECSLR 67, Omotunde v. Omotunde (2001) 9NWLR (Pt. 718) 252, Wilson & Anor v. Oshin&Ors (2000) LPELR-3497(SC), Bakare v. Bakare (2016) LPELR-41344(CA), Otti v. Otti (1992) 7 NWLR (Pt. 252) 187, Anagbado v.***

Anagbado (1992) 1 NWLR (Pt. 216) 207, Bibilari v. Bibilari (2011) 13 NWLR (Pt. 1264) 207 at 233 paras C-D, Union Bank of Nigeria Plc & Anor v. Ayodare& Sons (Nig.) Ltd & Anor (2007) LPELR-3391(SC) at 50, paras C-E, Olurunfemi v. Asho (2000) 2 NWLR (Pt. 643) Adegbite v. Oguntolu(1990) 4 NWLR (Pt 146) 578 and***Egbunike& Anor v. ACB Ltd (1995) 2 NWLR (Pt. 375) 34***, learned Counsel urged this Court to hold that the Petitioner has not been able to discharge the evidential burden incumbent on her by virtue of the statutory and judicial authorities afore-cited. It was the contention of the Respondent that the Petitioner having failed to situate her Petition within the specificity provided in section 15(1) and (2) of the Matrimonial Causes Act, the Petition must fail.

Arguing the fourth issue which he couched as 'Issue Two', Counsel submitted that the interest of the children was of paramount importance in determining issues of custody. He referred this Court to the cases of ***Williams v. Williams (1987) 2 NWLR (Pt. 54) 66 at 89*** where the Court enumerated the factors that must be considered in determining custody. Pointing this Court in the direction of ***Odogwu v. Odogwu (1992) 2 NWLR (Pt. 225) 539 SC***, Counsel maintained that what constituted 'interest of the child' was not capable of a precise definition. He insisted that though the interest of the child was of paramount importance in the award of custody, paramountcy did not translate to exclusiveness. He cited the cases of ***Odusote v. Odusote (2012) 3 NWLR***

(Pt. 1288) 478 at 504, Oladetolun v. Oladetolun [Suit Number HD/111/20 of 6/7/71 (Unreported)] (with incomplete and vague reference to Sagay)and***Tabansi v. Tabansi*** (with no citation)in support of his argument that it was not in all cases that custody of children of the marriage were awarded to the woman. He urged the Court to hold that the Petitioner has not established her entitlement to the custody of the children of the marriage. Quoting the dictum of Nimpar, JCA in ***Wokoma v. Wokoma (2020) LPELR-49882(CA)***, he urged the Court to dismiss the Petition.

Replying on points of law to the Final Written Address of the Respondent/Cross-Petitioner, learned Counsel for the Petitioner in the Petitioner's Reply on Point of Law, argued, on whether the Petitioner has proved that the marriage between the Petitioner and the Respondent has broken down irretrievably, that the facts contained in paragraph 7 (7) – (17) of the Petition satisfied the requirement of section 15(2)(c) and (d), to wit, that since the marriage the Respondent has behaved in such a way that the Petitioner could not be expected to live with the Respondent and also that the Respondent has deserted the Petitioner for a continuous period of at least one (1) year immediately preceding the presentation of the petition. He cited the cases of ***Arowolo v. Akapo&Ors (2002) LPELR-7063 (CA), Ugboto v. Ugbotor (2006) LPELR-7612(CA),Omogiate v. Omogiate (2021) LPELR-56018(CA)*** and ***Ikpea v. Ikpea (2022) LPELR-58748(CA)***where the Court

held that cruelty on the party of Respondent could be described as a behavior that the Petitioner could not be expected reasonably to live with the Respondent.

He further submitted that the Court was bound to act on the evidence presented to it by the Petitioner during examination-in-chief which evidence are consistent with the facts contained in her Petition, especially as the Respondent had agreed in his own evidence that the marriage between him and the Petitioner has broken down irretrievably. He relied on ***Okwueze& Anor v. Okwueze (2019) LPELR-48403(CA), Mmbula Traditional Council &Ors v. Estate of The Late Benjamin Nwazue& Anor (2022) LPELR-58220(CA) and OAN Overseas Agency (Nig.) Ltd v. Brownwen Energy Trading Ltd (2022) LPELR-57306(SC)*** as well as section 123 of the Evidence Act, 2011 in urging the Court to discountenance the submissions of the Respondent and to hold that the Respondent having admitted that the marriage has broken down irretrievably, could not be heard to submit that the Petitioner had not established her case in this Petition.

From the totality of the facts and the evidence in support of same adduced by the parties to this Petition, this Court is confronted with the following two issues for determination: "***(1) Whether the Petitioner and the Respondent have established that the marriage between them contracted at the Jos North Marriage Registry, Jos, Plateau State on the 3rd of December, 2005***

has broken down irretrievably to entitle the Petitioner or the Respondent to a Decree of Dissolution of Marriage or a Decree of Judicial Separation respectively; and, (2) Whether the Petitioner or the Respondent is entitled to the custody of the two children of the marriage."

The *terminus a quo* in resolving Issue One is section 15 of the Matrimonial Causes Act. I have taken the liberty to reproduce the entire provisions of that section so that this Court can juxtaposition the factual situation which the parties have presented before this Court with the position of the law on the subject and arrive at a determination of whether the marriage has broken down irretrievably. The said section provides thus:

Section 15:

(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:-

(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 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.

(3) 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 facts upon which the Petitioner relies upon in bringing this petition are contained in paragraph 7 (7) – (33) of the Petition. In a nutshell, the facts point to cruelty, adultery and desertion. Adumbrating on what constitutes a behavior from the Respondent that is capable of giving the Petitioner reasonable reason not to live with the Respondent under section 15(2)(c), section 16 (1) provides that:

"***Without prejudice to the generality of section 15(2)(c) of this Act, the Court hearing a petition for a decree of dissolution of marriage shall hold that 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 not 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,

(iii) 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 and willfully 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."

In the course of her testimony before this Court on the 3rd of February, 2022, the Petitioner laid evidence to support the facts pleaded in paragraph 7(7) – (33) of the Petition. Though, the Matrimonial Causes Act did not mention cruelty as a factual circumstance under the general ground that a marriage has broken down irretrievably, the attitude of the Court is to categorise

assault, causing grievous hurt and injuries as behavior which a Petitioner in a Petition for a Decree for Dissolution of Marriage or Judicial Separation cannot be reasonably expected to tolerate and endure. See ***Arowolo v. Akapo& Others (2002) LPELR-7063(CA), Ugbotor v. Ugbotor (2006) LPELR-7612(CA) and Omogiate v. Omogiate (2021) LPELR-56018 (CA)***.

In the present Petition, the Petitioner has sought for dissolution of the marriage between her and the Respondent on the ground that the marriage has broken down irretrievably, relying on cruelty, violence, emotional and physical abuse as well as adultery. Paragraph 8 of the Petition contains six factual circumstances the Petitioner believes constitute evidence that the marriage has broken down irretrievably. According to the Petitioner, since the marriage, the Respondent had behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent, the Respondent had committed adultery and the Petitioner found it intolerable to live with the Respondent, the Respondent had consistently and continuously denied the Petitioner her conjugal rights, the Respondent had been violent, consistently and continuously beaten up the Respondent, threating to kill her, the Respondent had visited cruelty on the Respondent and the marriage had broken down irretrievably.

According to the Petitioner, the actions of the Respondent made her to vacate the matrimonial home in 2019, thereby giving rise to constructive desertion.

These factual circumstances are covered under section 15(2) of the Matrimonial Causes Act. It is for this reason that this Court finds it difficult to agree with learned Counsel for the Respondent when he contended in paragraph 4.01.16 of the Respondent's Final Written Address that the Petitioner's ground that the marriage has broken down irretrievably owing to irreconcilable difference between the Petitioner and the Respondent was not a valid ground recognized under section 15 of the Matrimonial Causes Act. It is the considered view of this Court, and I so hold, that the facts of violence and threats of violence constitute sufficient behavior which the Petitioner cannot reasonably be expected to live with the Respondent.

Interestingly, the Respondent, in his Cross-Petition, also accused the Petitioner of behavior which he found difficult to tolerate. For instance, in paragraph 32 (a), he accused the Respondent of willful and consistent refusal to consummate the marriage – a fact the Petitioner mentioned in paragraph 8(c) as one of the factual grounds for her Petition. In paragraph 32(b) and (e) he accused the Petitioner of engaging in behavior which he could not reasonably be expected to tolerate while in paragraph 32(d) he accused the Petitioner of violence. He made mention of the Petitioner deserting the matrimonial home in the first week of December, 2019. In his examination-in-chief on the 7th of July, he led evidence in support of his pleadings.

The evidence from the Petitioner and the Respondent points inexorably to a marriage that is terminally ill. Can it be saidthat the parties have not adduce sufficient evidence to satisfy the Court that the marriage has broken down irretrievably? I must point out that the Matrimonial Causes Act provides the standard of proof which a Petitioner in a matrimonial cause is required to discharge. Section 82 provides as follows:

(1) "***for the purposes 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."

The Courts have explained what "reasonable satisfaction" means. In ***Omotunde v. Omotunde (2001) 9 NWLR (Pt. 718) 252 at p. 284 paras B – C*****,** the Court held that:

> **"*The standard of proof in matrimonial matters is as embodied in section 82(1) of the matrimonial causes Act which requires that for the purposes of the Act, a matter shall be taken to be proved if it is established to the reasonable satisfaction of the***

***Court. What is reasonable satisfaction of Court is difficult to define. There is no kind of blanket description of same either but it must depend on the exercise of judicial powers and discretion of an individual Judge. It however entails adducing all available evidence in support of an assertion before the trial Court*"**

The Courts have interpreted the requirements of section 15(2)(c) of the Matrimonial Causes Act and the evidentiary burden incumbent on a Petitioner who seeks to rely on the factual basis envisaged under the said paragraph. In ***Bibilari v. Bibilari (2011) 13 NWLR (Pt. 1264) 207 at 228 paras D –E***, the Court held thus:

"***By the wordings of the provisions of the Matrimonial Causes Act, the "behaviour" means more than a state of affairs or a state of mind. It imports action or conduct by one spouse which affects the other. The conduct or act must be such that a reasonable man cannot endure. In considering what is reasonable, the court must consider in totality the matrimonial history.***"

Speaking further, the Court expounded at ***Pp. 227, paras. E-F;228, paras. B-C*** thus:

"***One ground for dissolution of marriage is that the respondent must have behaved in a way that the petitioner cannot reasonably be expected to live with her. Though the Act does not define the phrase "behaved in such a way" but the respondent's behaviour must be negative. It must be such that a reasonable man cannot endure it. The conduct must be grave and weighty in nature as to make further cohabitation virtually impossible. The court must be satisfied that the petitioner established a conduct or act before proceeding to look at the effect of that conduct on the petitioner. It involves a consideration not only of the behaviour of the respondent but the character, personality and disposition of the petitioner. A party's disenchantment and boredom with a marriage will not entitle the court to dissolve a statutory marriage***."

Speaking on this requirement, the Court accorded section 16(1) of the Act its imprimatur when it put it beyond equivocation at ***p. 226, paras. A-D*** that

"***In addition to facts under section 15(2) of the Matrimonial Causes Act, section 16(1) thereof stipulates fourteen circumstances or facts, out of which if proved would constitute the fact that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the***

***respondent. These facts are the commission of rape, sodomy, or bestiality, habitual drunk, or drug addiction for two years, frequent convictions for crime coupled with habitually leaving the petitioner without reasonable means of support, attempting to murder the petitioner or inflicting grievous bodily harm or her refusal to comply with a maintenance order, and confinement in a mental institution for five years during the six years period immediately preceding the presentation of the petition. The law requires that every petition for dissolution of marriage must contain specific ground or grounds that will fall within the set out facts under sections15(2) and 16(1) of the Matrimonial Causes Act.*"

This principle has been established in a long line of cases such as ***Ibrahim v. Ibrahim (2007)1 NWLR (Pt. 1015) 383; Nanna v. Nanna (2006) 3 NWLR (Pt. 966) 1; Harriman v. Harriman (1989) 5 NWLR (Pt. 119) 6; and Megwalu v. Megwalu (1994) 7 NWLR (Pt. 359) 718***among others. In the case of ***Ibrahim v. Ibrahim* (2007) 1 NWLR (Pt. 1015) 383 at *pp. 403, paras. F-G; 405, paras. B-D***, the Court held that the test of what constitutes an intolerable behavior is an objective one and that it is the Court's ultimate duty to determine. It, however insisted that "***The conduct of a respondent that a petitioner will not be reasonably expected to put up with must be***

grave and weighty in nature as to make further cohabitation virtually impossible." In ***Nanna v. Nanna (2006) 3 NWLR (Pt. 966) 1 at pp. 30 – 31, paras. H-A***, the Court held that "***The test as to whether a petitioner for the dissolution of a marriage can or cannot be expected to live with the respondent is objective. Consequently, it is not sufficient for a petitioner to merely allege that he or she cannot live with the respondent because of the respondent's behaviour. The behaviour alleged must be such that a reasonable man cannot endure***."

In ***Damulak v. Damulak (2004) 8 NWLR (Pt. 874) 151p. 166, paras. A-B***, the Court laid down the conditions that must be fulfilled by a Petitioner alleging intolerable behavior as a ground that the marriage has broken down irretrievably. According to the Court,

> "***Two sets of facts call for proof under section 15(2)(c) of the Matrimonial Causes Act. They are:***
>
> ***(a)the sickening and detestable behaviour of the respondent; and***
>
> ***(b)that the petitioner finds it intolerable to live with the respondent.***
>
> ***These two facts which are deduced from section 15(2)(c) are severable and independent. The petitioner must prove the***

detestable act and he or she must then proceed to prove that he or she finds it intolerable to live with the respondent."

Have the Petitioner and the Respondent discharged this evidential burden of? It is my considered view, and I so hold that the parties have not discharged this evidential burden of establishing that the either party has behaved in such a way that the other party finds it intolerable to live with them. In other words, this Court finds it difficult to accord sufficient weight to the claims of the Petitioner that the Respondent had visited her with cruelty and physical and emotional abuse; and with the Respondent that the Petitioner had been violent towards him and had been in the habit of destroying household items in her fits of anger. This Court, however, finds that there is a concurrence of evidence from both parties that they have been living apart for a period of at least one year immediately preceding the presentation of this Petition.There is also evidence from both parties that the other party had willfully and persistently refused to consummate the marriage. This is deducible, logically, from the fact that the parties have been living apart since December, 2019. This evidence is consistent with the provisions of section 15(2)(a) and (d) of the Matrimonial Causes Act.

It is significant to note that though desertion involves a party to a marriage abandoning their responsibilities and abdicating from the matrimonial home, the Matrimonial Causes Act recognizes constructive desertion. Section 18

provides that "***A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have willfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.***" See ***Nanna v. Nanna (2006) supra at P. 46, paras. D-H***.

The Respondent having admitted the facts contained in paragraphs 4(a) of the Petition for the Decree of Dissolution of Marriage, the burden of proving desertion – actual and constructive – incumbent on the Petitioner is alleviated. Section 123 of the Evidence Act provides that "***No fact needs to be proved in any civil proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.***"

In ***C.B.N. v. Dinneh (2021) 15 NWLR (Pt. 1798) 91***, the Supreme Court, speaking through Okoro, JSC, held at ***pp. 121. para. D, 123, para. H*** that "***Facts admitted need not be proved or need no further proof. In this case, the facts pleaded by the respondent on when the appellant can***

dismiss him from employment under the terms and conditions of respondent's employment are deemed admitted by the appellant. In the circumstances, the facts admitted needed no further proof." This trite principle of law has been applied in a plethora of authorities such as ***Abimbola v. State (2021) 17 NWLR (Pt. 1806) 399 at 431 para A; Mekwunye v. Carnation Registrars Limited (2021) 15 NWLR (Pt. 1798) 1 at 33 paras F – G; Ori v. State (2022) 5 NWLR (1824) 441 at 464 paras D – E; U.N.I.C. Ltd. v. U.C.I.C. Ltd. (1999) 3 NWLR (Pt. 593) 17; Honica Sawmill v. Hoff (1994) 2 NWLR (Pt. 326) 252; Economides v. Thomopulos (1956) 1 FSC 7; Ejiogu v. NDIC (2001) 3 NWLR (Pt. 699) 1*** among others.

On the ground of adultery as claimed by the Petitioner, this Court does not find any evidence to that effect. The law is clear on what a person alleging adultery as a ground is required to do in order to establish that ground. The Court of Appeal (Enugu Division) **per Akintan, J.C.A. (as he then was)** in ***Megwalu v. Megwalu (1994) N.W.L.R. (Pt. 359) 718 at 730, paras E-G***lucidly laid down the law in these words: ***"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."

See generally, on this point the following cases: ***Ekrebe v. Ekrebe (1999) 3 NWLR (Pt. 596) 514 at 523-524, paras. H-B; 528, paras. D-E per Mohammed, JCA (as he then was); Erhahon v. Erhahon (1997) 6 NWLR (Pt. 510) 667 C.A. at 687, paras C-H; Alabi v. Alabi (2007) 9 NWLR (Pt. 1039) 297 C.A. at 340 - 341, paras. C-H, 356, paras G-H;Megwalu v. Megwalu (1994) 7 NWLR (Pt. 359) 719 C.A. at 730, paras. E-G;Adetule v. Adetule (2022) 10 NWLR (Pt. 1838) 201 S.C. at pages 231-233, paras. H-E per Garba, JSC***.I hold,therefore, in the illumination of the above cases, that there is no such evidence of adultery from the Petitioner against the Respondent to this end. The ground of adultery therefore fails.

In answer to Issue One, I find that the marriage has broken down irretrievably on the factual grounds that the parties have lived apart continuously for a period of at least one year immediately preceding the presentation of this Petition and that the parties have willfully and persistently refused to consummate the marriage.

Having found that the marriage has broken down irretrievably, I shall turn my mind to the Second Issue, which is,***Whether the Petitioner or the Respondent is entitled to the custody of the two children of the marriage***,I must of necessity refer to the Ruling of this Court delivered on the 7th of October, 2021. The Ruling was delivered pursuant to a Motion on Notice with Motion Number M/2847/2021, filed on the 19th of March 2021, the Petitioner/Applicant had prayed this Honorable Court for the following reliefs:*(1) An Order granting temporary custody of the two children to the Applicant pending the hearing and determination of the petition, and (2) An Order of perpetual injunction restraining the Respondent, his agents, privies, or whatever names called from further harassing intimidating, threatening and assaulting the Petitioner and the two children*.

The prayers sought in the Motion are similar to Reliefs Numbers (C) and (D) contained in paragraph 11 of the Petition. Similarly, the Respondent in his Cross-Petition has also sought the custody of the two children of the marriage in paragraph 34(b) of his Cross-Petition. He has also sought for Orders of this Court vide Reliefs Numbers 34(c) and (d) directing the Petitioner to also contribute to the maintenance of the children of the marriage.

In the considered Ruling referred to above, this Court has ordered as follows:***(1) An Order granting temporary custody of the two children to the Petitioner/Applicant pending the hearing and determination of the***

petition is hereby refused. All parties are hereby enjoined to maintain the status quo ante bellum pending the hearing and determination of the petition; and (2) An Order is hereby made restraining all the parties from coming within a contiguous proximity of each other's residences and places of work. Specifically, the Respondent is hereby restrained from stalking, harassing, threatening or in any way abusing the Petitioner/Applicant pending the hearing and determination of this petition. Similarly, the Petitioner/Applicant is hereby restrained from stalking or in any way visiting the Respondent either at his residence or place of work pending the determination of this petition except directed otherwise by the Court.

It is important to state that though the Court looked into the processes filed in the suit to arrive at its decision contained in the Ruling, the Motion was unchallenged, as the Respondent only filed his Counter-Affidavit after the Court had delivered its Ruling on the application. In this Judgment, however, the Court has the benefit of evidence from both sides of the divide. I note with interest that the Petitioner, at the point of leaving the matrimonial home in December, 2019, did not leave with the children of the marriage. There was no evidence, too, that she has ever contributed to the welfare of the children both when she was living with the Respondent and when she left the Respondent in 2019. Though in her *viva voce* evidence she mentioned that

she always received lists from the children whenever they were returning to school and that she always bought groceries for them, there was no documentary evidence to that effect. Her *viva voce* evidence, is tantamount to *ipse dixit* evidence. Though *ipse dixit* evidence *ipso facto*may be admissible, the Court has a duty to call for additional evidence in proof of such assertion where the circumstances demand for such. In such case, the Court will not act on the *ipse dixit* evidence. See ***A.C.B. Plc v. Nbisike (1995) 8 NWLR (Pt. 416) 725 C.A. at 748, paras B-E; Okunade v. Olawale (2014) 10 NWLR (Pt. 1415) 207 C.A. at 273, paras C-D; Ori v. State (2022) 5 NWLR (Pt. 1824) 441 S.C. at 464, paras D-E***.

The Respondent, on the other hand, tendered a number of exhibits in support of his *viva voce* evidence that he had been responsible for the upkeep and wellbeing of the children of the marriage. There is evidence that the Respondent has been responsible for the children's school fees. This is **Exhibit C1-C2**. Contrary to the claims of the Petitioner that the children were malnourished, **Exhibits D1-D2 and F1**point otherwise. Significantly, contrary to the testimony of the Petitioner that the Respondent was mean and violent towards the children, the WhatsApp conversations marked as **Exhibit E1-E5**depicts a different image that is radically different from the monster the Petitioner created in paragraph 7(14),(16), (19), (20) and (21) of the Petition. The tone of the conversation between the Respondent and David, the first

son, was warm, friendly and convivial. In fact, **Exhibits A1-A5** being receipts of electronic transfers the Respondent made to the Petitioner's father and other family members utterly repudiate the Petitioner's assertions in paragraph 7(14), (17), (18), (26), (30) and (33) of her Petition. How could the Petitioner claim that the Respondent never allowed her access to the children when **Exhibit F1** showed the Petitioner and the children celebrating the first son's thirteenth birthday? How Could the Petitioner claim that the Respondent always lock the children up in the house whenever she came visiting when in fact **Exhibits E1-E5** revealed that the children always spend part of their holidays in the house of the Petitioner? It is for this reason that the Court finds it difficult to believe the *ipse dixit* evidence of the Petitioner that she has been contributing to the wellbeing of the children.

The Petitioner has argued that custody should be given to her because she is a woman and that children ought to stay with their mothers in their formative years. I agree with her that the general attitude of the Courts towards custody of children is to award same to the mother except where evidence is adduced to the fact that such course would have deleterious effect on the children. But this is not a run-off-the-mill case that would warrant this Court beating that path. In ***Alabi v. Alabi (2007) 9 NWLR (Pt. 1039) 297 C.A. at 351, paras A-F***, the Court held *inter alia* that "***In according the child's interest paramountcy, there are a number of well-settled considerations. For***

instance, there is no rule that a child of tender age should remain in custody of the mother. There is also no rule that when a child is female, her custody should be granted the mother."

Generally, in ***Alabi v. Alabi (2007) supra at 347-348, paras D-A***, the Court laid down the following principles:

> "***Although misconduct on the part of a party to the suit is not the paramount consideration, where parties have made equally laudable arrangement for the welfare of the child and its upbringing, misconduct may tilt the balance in favour of the other party. Also, where there are persistent acts of misconduct and moral depravity by one of the parties this may be evidence of unsuitability of that party to be entrusted with the custody of the child. Thus, certain relevant criteria must be considered in the determination of the welfare of the child as in this case, and they include: (a) the degree of familiarity of the child with each of the parents (parties); (b) the amount of affection by the child for each of the parents and vice versa; (c) the respective incomes of the parties; (d) education of the child; (e) the fact that one of the parties now lives with a third party as either man or woman; and (f) the fact that in the case of children of tender***

ages custody should normally be awarded to the mother unless other considerations make it undesirable e.t.c."

The Court is particularly worried that the Petitioner has not explained satisfactorily how she left the matrimonial home in 2019 without the children. Of commensurate interest, too, is the fact that she always returned the children to the home of the Respondent after the children had spent their holidays with her at her residence. So, why the huff and puff about custody?It is for this reason that this Court will reiterate the same Order it gave in its Ruling of 7th of October, 2021 and clothe it with the habiliment of permanency

With regards to the Order for perpetual injunction, The Courts have laid down the principles guiding the grant of perpetual injunction. In ***F.C.D.A. v. Unique Future Leaders Int'l Ltd. (2014) 17 NWLR (Pt. 1436) 213***, the Court of Appeal held at ***P. 243, paras. E-G*** that,

"***Perpetual injunction is based on final determination of the rights of parties, and it is intended to prevent permanent infringement of those rights and obviate the necessity of bringing action after action in respect of every such infringement.***"

In ***Adekunjo v. Hussain (2021) 11 NWLR (Pt. 1788) 434***, the Supreme Court explained at ***p. 455, paras. A-D*** that,

"***A perpetual injunction is a post-trial relief meant to protect a right established at the trial. Because of its nature of finality, it can only be granted if the claimant has established his case on the balance of probability on the preponderance of evidence. Its aim is to protect established rights.***"

Having found that the marriage has broken down irretrievably only on the grounds of willful and persistent refusal to consummate the marriage and constructive desertion, and not on the ground of violence and cruelty amounting to intolerable conduct, the need for a perpetual injunction is spent.The circumstance does not warrant the grant of the Order of Perpetual injunction. I so, hold.

For the reasons stated above and the findings of this Honourable Court, I hold that the Petitioner and the Respondent have established to the reasonable satisfaction of this Honourable Court, from their Petition and Cross-Petition respectively and their *viva voce* evidence in proof of the pleadings therein, that the marriage between the Petitioner and the Respondent contracted on the 3rd of December, 2005 at the Marriage Registry ofJos North Local Government Area of Plateau State has broken irretrievably. Accordingly, this Court hereby makes the following orders:

1. **That a Decree *Nisi*for the dissolution of the marriage between the Petitioner and the Respondent contracted on the 03rd of December,**

2005 at the Marriage Registry of Jos North Local Government Area of Plateau State is hereby made.In view of the grant of the Decree*Nisi* for the Dissolution of the Marriage between the Petitioner and the Respondent, therefore, the Respondent's Relief No. (a), that is, a Decree of Judicial Separation is refused automatically. This Decree *Nisi*for the Dissolution of the Marriage between the Petitioner and the Respondent shall become absolute at the expiration of three (3) months pursuant to the provisions of section 58(1)(a) of the Matrimonial Causes Act.

2. **The Petitioner's Relief No. (D), that is, an Order of Perpetual Injunction restraining the Respondent from further harassing, intimidating, threatening and assaulting the Petitioner is hereby refused as the Petitioner has not led cogent evidence to justify her entitlement to the equitable relief of injunction.Moreover, the circumstances of this case does not warrant the grant of the relief. In its place, this Court hereby orders the Petitioner and the Respondent to maintain a respectable distance from each other's residence except for the purpose of access to the children of the marriage.**

3. **The Petitioner's Relief No. (C), that is, an Order directing the Respondent to grant custody of the children to the Petitioner**

immediately, and the Respondent's Relief No. (b), that is, an Order for custody of the children of the marriage, are hereby refused. In the place of those two reliefs, this Court hereby orders that both the Petitioner and the Respondent shall have joint custody of the children until they attain the age of eighteen when they can decide which of the parents to live with. In view of this therefore, since the two children of the marriage are in boarding schools, the children shall spend equal number of days with each of the parties to this Petition during every holidays. Similarly, both parties shall have access to the children when they are in school and when they are in the custody of either party.

4. **The Respondent's Relief No. (c) in the Cross-Petition, that is, an Order of Court compelling the Cross-Respondent to commence contribution to the upkeep of the children, as the Cross-Respondent is gainfully employed and financially buoyant is hereby granted.**

5. **The Petitioner's Relief No. (B), that is, an Order directing the Respondent to be remitting the sum of ₦300,000.00 (Three Hundred Thousand Naira only) per month and the Respondent's Relief No. (d) for an Order mandating the Cross-Respondent to contribute a monthly maintenance allowance for the children in the**

sum of ₦400,000.00 (Four Hundred Thousand Naira only) for the feeding maintenance and school fees and extra-curricular activities of the two children of the marriage until university level are hereby refused.In their place, and since there is evidence before this Court that both parties are gainfully employed, both the Petitioner and the Respondent are hereby ordered to contribute equal sums towards the education, welfare, wellbeing, health and all the needs of the children until they graduate from the university. This Court will not make any order as to specific amount considering the force of inflation and devaluation of the Naira; but the parties are required by virtue of this Order to contribute such sums that are reasonable to sustain the current standard of care, education, welfare, wellbeing, healthcare and other needs the children of the marriage currently enjoy. What is reasonable at any particular time shall be determine by the amount required to maintain the current standard of care, education welfare, wellbeing, healthcare and other needs of the children of the marriage and such improvements on the current standard as may be necessary in future.

This is the Judgment of this Court delivered today, the 21st day of September, 2023.

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HON. JUSTICE A. H. MUSA
JUDGE
21/09/2023

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