

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI-ABUJA
BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN
SUIT NO: CV/2391/2020**

BETWEEN:

NKEMJIKA CHIOMA MBAH.....CLAIMANT

AND

KENECHUKWU OBINNA MBAH.....RESPONDENT

JUDGMENT

By this application, the applicant sought for the following orders.

1. An order of this Honourable Court directing the respondent to maintain the applicant, by paying directly to the applicant the sum of N120,000.00 (One Hundred and Twenty Thousand Naira) only monthly as her maintenance allowance from 1st January, 2019 until the applicant secures a job and receives salary.
2. An order of injunctive degree restraining the respondent from denying the applicant access to the children of the marriage and intimidating the applicant into returning to their matrimonial home.
3. An order directing the respondent to give the applicant unrestricted access to the children of the marriage Mbah Chimbusonma Sophie, female, 6 years, Mbah Munachi Ureel, female, 3 years, Mbah Kenechukwu Ivan, male, 1 year 11 months, and allowing the applicant to communicate with her children through the respondent's telephone when the children are in custody of the respondent.
4. An order granting the applicant equal/divided part custody of the children of the marriage with the respondent and allowing the applicant to stay with

the children of the marriage during holidays and school period.

5. An order directing the respondent to grant the applicant access to their residence at Umuabaka village, Ukehe, Igbo-Etiti Local Government Area of Enugu State to take the following personal properties: Haier Thermocool fridge plus freezer, Haier Thermocool Deep Freezer, Haier Thermocool twin tub washing machine, Ignis Gas Cooker (5 burners), Eurostar grilling oven, LG Home Theatre, Master Chef Mini oven, Deep Fryers, 1 No. Dressing table with mirror and stool, baby car seat and a baby trolley.
6. An order directing the respondent to disclose any change of telephone number or residential address to the applicant within 48 hours of such change.
7. And for such further order or orders the court may deem just and proper in the circumstances.

The application is supported by sixty-six paragraphed affidavit, and attached to the affidavits are EXH. "NCM 1" – "NCM 6", and it is also accompanied by a written address of counsel.

The respondent filed a counter affidavit in opposition to the application of forty-seven paragraphs, and is accompanied by a written address of counsel.

The applicant stated in the affidavit in support that the respondent beat the applicant, being the wife to the respondent, on the 12th January, 2019, and when the family members of the applicant intervened by coming to the matrimonial home broker peace, the respondent indeed confirmed to the family members of the applicant that he really beat the applicant, and they took the applicant along with them for fear of her life, however, the respondent pleaded with her to return to the matrimonial home and she did that and they continued co-habitation. One of the

conditions, it is stated, of her coming back to the matrimonial home was that the respondent should pay to the applicant the sum of ₦20,000.00 (Twenty Thousand Naira) monthly upkeep, and subsequently the respondent gave her for three months from March to May, 2019 in violation of the agreement.

It is stated that in 2018, when the applicant fell sick, the respondent refused to take her to hospital but took her to Dr. Innocent Nwoga who had earlier treated wrongly, and that upon refusal to go Dr. Innocent Nwoga, the respondent dumped her on the road and asked her parents to take her to the hospital, and for the fact that she did not have money, she called her mother who took her to hospital.

It is stated that the applicant made effort to start doing something, but the respondent frustrated that effort, and in January, 2016 she had an offer to go for ultrasound training, but the respondent did not agree for her to undergo that ultrasound training. It is stated that in 2017, when she applied to work with Annunciation Hospital Emene, Enugu, the respondent stopped her, and with the approval and consent of the respondent, she applied for MIC programme at University of Nigeria, and the respondent failed to pay, but she paid with her money from her parents. The deponent stated that the respondent failed to pay for her fees inspite of the fact that the respondent was receiving rent from their property in the sum of N5,500,000.00 (Five Million, Five Hundred Thousand Naira), yearly, and she later dropped out from MIC Programme.

The deponent stated that she came with fish farming idea and the respondent discouraged her, but later got funds from her parents and obtained the required training, and the respondent stopped her.

She stated that in May, 2018 she made attempt to start learning sewing and was stopped by the respondent, and in

the same year she got free training offer at Eze Ndi Eze Diagnostic Centre, and the respondent frustrated it.

She stated further that in 2019 she got someone that agreed to pay for her to attend a mammography course, but the respondent again refused to allow her to attend the course. The respondent also refused her to attend to a free workshop for radiographers in Nigeria held in Abuja, and the respondent still refused to allow her to attend. She stated that she made attempt to visit her parents at home, and the respondent refused to allow her, and stated further that she become increasingly frightened of living with the respondent because of the threats and similar behaviour.

It is stated that the respondent removes the electricity fuse so that when he is not at home she could not watch DSTV, and also disconnected the air conditioner in her room.

It is stated that the respondent threatened that if she ever get job abroad, he would ensure that the applicant run mad, and that she lives in fear and captivity as a results of these threats, and that prompted her to report to the police and he was invited.

The deponent stated that the respondent filed a petition against her father to the police, and her father was arrested and detained on the ground that her father encouraged her to leave her matrimonial home. She stated that she too filed a petition with No. PET/057/2019 against the respondent for judicial separation at FCT High Court which was assigned to justice Okeke (of blessed memory), and that was settled and the petition was withdrawn.

The deponent stated that the respondent took away the children of the marriage from the applicant and refused her access to the children, until on 16th March, 2020 she visited the children's school and requested to see them, but she was informed that the respondent has instructed the school not to involve her in anything that has to do with the

children, but on the 17th March, 2020 she was allowed to visit, and on the 4th May, 2020, the children requested to visit the applicant and the respondent refused. That the respondent was poisoning their minds to go against the applicant, that on the 25th May, 2020 she attempted to visit the children and called the respondent severally but he kept on rejecting her calls, and the applicant called everyone in respondent's house severally and knocked on the respondent's gate but she was ignored.

It is stated that the applicant discovered that the respondent through chats on his face book accounts requesting young ladies to come to Enugu and visit him, and also she discovered same in his whatsapp chats, and the applicant confronted the respondent that if the respondent continues this way, she would be left with no option but to stop having conjugal relationship with him, and the respondent continued, and she seized having conjugal relationship with him, and having stopped having conjugal relationship with the respondent, he stopped giving her money for her maintenance or for purchases for the need of the family.

It is stated that the respondent earns money from his property in the sum of N5,500,000.00 (Five Million, Five hundred thousand Naira only, and also earns from other businesses as contract jobs, management fees and agency fees.

In his written address, the counsel to the applicant proposed lone issue for determination, thus:

Whether from the affidavit in support of this application, it is just and proper having regard to the means, earning, capacity and conduct of the parties to the marriage and all other relevant circumstances to grant this application?

The counsel submitted that by the combined reading of section 70(2) and 73(1) (a) & (b) of the Matrimonial Causes Act, 2004 to the effect that the court may in exercise of its powers do any or all of the following:

- (1) **“Order that a lump sum or weekly, monthly, yearly or other periodic sum be paid;**
- (2) **Order that a lump sum or weekly, monthly, yearly or other periodic sum be secured.”**

The counsel cited the case of **Nanna V. Nanna (2004) 3 NWLR (pt 966) 10** in giving credence to the provisions of section 70(1) of the Matrimonial Cause Act. He also cited the case of **Damullak V. Damulak (2004) 8 NWLR (pt 874) 155** as to the attitude of the court in considering the conduct of the parties to the marriage before ordering maintenances which should also take into consideration the following:

- a. If the wife's conduct borders on services depravity, this may result in the reduction or even total elimination of a proper maintenance;
- b. If the conduct of the husband is normal or perfidious, which conduct is object viable, the wife must be given full maintenance but must not be evicted by the reason of that condemnable conduct;
- c. Punitive damages in the form of maintenance on the ground of depravity of the husband should be awarded;
- d. Where the normal conduct of the husband or his marital behavior has adversely affected the financial status of the standard of living of the parties;
- e. Where the petitioner is adjudged guilty of misconduct, evidence may be given with a view to persuading the court to take a lenient view of the petitioner's misconduct.

The counsel submitted that all other relevant circumstances which the court may consider in ordering maintenance may include standard of living to which the parties are accustomed, the requirement of the applicant or even public interest demand. He opined that upon perusal of affidavit in paragraphs 41-44 and 52 that the conduct of the respondent in the circumstances of this application is reprehensible, immoral and perfidious. It is submitted that the applicant does not earn anywhere as at the time of filing this suit and the court is invited to look at paragraphs 15-27 of the affidavit in support; and he cited the case of **Obajimi V. Obajimi (2011) LPELR (CA)** to the effect that maintenance of wife may be claimed by her from the husband even if there is no suit for divorce or separation, that is to say, a wife is entitled under Matrimonial Causes Act to claim maintenance in the High Court, if her husband willfully neglected to maintain her without instituting a Matrimonial Case, and the case of **Ekisola V. Ekisola (1961) W.A.L.A. 137** and section 70(2), 73(17) and (22) of the Matrimonial Causes Act were referred to.

It is submitted that the mistreatment of the applicant began prior to the say conjugal right was ceased, and it is not for conjugal relationship that the respondent treated the applicant.

On the means of earnings, the counsel cited the case of **Damulak V. Damulak (supra)** to the effect that means of parties refer to the respective capital assets of the parties including contingent and respective assets, but the husband's earnings capacity is subject to severe fluctuations of the wife is unusually efficient and a keen business woman commanding substantial income yet may be unwilling to work, and the counsel submitted that the court would see that the applicant neither has means of earning capacity which is foisted on her by the respondent who has means

and earning capacity, and on weighing the scale of justice, it is clear that granting this applications outweighs that of the refusing the application.

The counsel asked these questions: **why would a husband if enarnuoured of the wife stop the wife from working or doing business? Why would a husband with means and earning capacity refuse to maintain his wife? Why would a husband with means of earning capacity follow his wife to grocery shops each time the need arose just to make payment?**

The counsel answered the above questions that the respondent wants curtail the potential in the applicant to excel and not to be financially independent, and he submitted that the respondent has the burden to contend or justify his willful refusal to support his wife's efforts. The counsel urged the court to look at the affidavit in support of this application and the exhibits attached and he cited the case of **Mueller V Mueller (2006) 6 NWLR (pt 977)** to the effect that a man has a common law duty to maintain his wife and such a wife has the right to be maintained.

The counsel submitted that EXH. NCM 6 shows clearly who the respondent is, and proper evaluation of EXH. NCM 2 and NCM 5 will reveal that the conduct of the respondent is utterly perfidious, this is because upon being served with EXH NCM 2 which is the petition for judicial separation and instead of to file any answer, the respondent deceitfully planned and executed a pretentious reconciliation agenda for the withdrawal of the petition upon terms and conditions in EXH. NCM 3, and the perfidy is clearly established by the depositions in paragraph 44 of the affidavit in support.

The counsel referred to Black's Law Dictionary, tenth edition which defines divided custody as an

arrangement by which each parent has exclusive physical custody and full control of and responsibility for the child's part of the time, with visitation rights in other parents, and he opined that the applicant only wants to have access to the children at any given time in her residence with the respondent retaining the right to visit the children while in her custody and have them to his custody at any given time as the circumstances may permits, and it is not the intention of the applicant to have exclusive custody of the children of marriage but a divided custody so that parties can have unrestricted access to the children.

The respondent in his counter affidavit completely denied all the averments as contained in the affidavit in support of this application, and therefore put the applicant to strictest proof, having denied specifically paragraphs 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 64.

In his written address, the counsel to the respondent formulated two issues for determination, thus:

- 1. Whether the applicant has placed enough material before this court to warrant the grant of this application?**
- 2. Whether the conduct of the applicant warrants the grant of this application?**

On the issue No. 1, the counsel to the respondent submitted that in an application of this nature, it behooves upon the applicant to place enough material that will warrant the court to exercise its discretion in his favour, and this discretion has to be exercised judicially and judiciously, and he cited the case of **Remana V. NACB Consultancy & Finance Co. Ltd & Anor (2006) LPELR – 7606 (CA)**. The counsel

further submitted that under the Matrimonial Causes proceedings and application for maintenance, the applicant has to establish the income and the earnings of the respondent, and he cited Order XIV Rule 4(4) of the Matrimonial Causes Rules and he set out the materials to be provided by the applicant in convincing the court that the applicant merit the relief sought, and he referred to the case of **Omonzane V. Omonzane (2020) LPELR – 52220 (CA)** to the effect that failure to prove and place material before the court, will amount to the refusal of the application.

The counsel submitted that the factors to be proved cannot be presumed or taken for granted by the court, and he cited **Olu-Ibukun V. Olu-Ibukun (1974) 9 N.S.C.C. 91**, and he submitted that the applicant in paragraphs 20, 61, 62 and 63 alluded to the earnings of the respondent and that those averments are empty and without particulars, and the respondent denied all those facts, and the onus to prove those facts are that the applicant which she failed to discharge, the counsel submitted.

The counsel submitted that the applicant in relief 5 prays to the court to for an order granting her access to collect some items which she referred to as her personal items, and the counsel submitted that there is no evidence before this court showing that such items are in the location under reference and that the applicant did not lead any evidence to show that even if such property exist, they belong to the applicant, and he urged the court to refuse to grant the application.

On the issue No. 2, the counsel to the respondent answered in the negative, to the counsel, this is because the counsel to the applicant cited the case of **Damulak V. Damulak (supra)** wherein the counsel enumerated the conditions in relation to the parties before a maintenance would be awarded, and the counsel also submitted that the

respondent has personally deposed to a counter affidavit denying all the averments in the affidavit in support, and urged the court to discountenance the application and refuse to grant the reliefs.

Thus, the court raised these issues su motu and asked the counsel to both parties to address the court:

- 1. Whether it is appropriate for this court to entertain this application against the background of the provisions of sections 54 and 114 of the Matrimonial Causes Act, and Order III part I Rules 1 (1) (2) & (3) of the Matrimonial Causes Rules?**
- 2. Whether it is proper to maintain this application without predicating it on any law, rules of court or Matrimonial Causes Rules?**

On the 25th day of October, 2023, the counsel to the applicant appeared, while the counsel to the respondent did not appear. The counsel to the applicant adopted his written argument proffered in these two issues.

The counsel to the applicant quoted the provisions of section 54(3) of the Matrimonial Causes Act to the effect that the Act provides an exception to proceedings can only be commenced by filing a petition before this court, in that a proceedings can be commenced by filing an application of the rules permit or that leave is granted by the court to bring such an application, and he submitted that by that provisions, the applicant can bring up an application of this nature without necessarily filing a petition before the court.

The counsel also quoted the provisions of Order III Rule 1(3) of the Matrimonial Causes Rules and submitted that an application of this nature can be filed for enforcement of the Matrimonial reliefs under the Act, and the Rules clearly provides for it. The counsel also referred to section 70(1) of

the Matrimonial Causes Act to the effect that it makes provision for an applicant to bring an application for maintenance whether or not there is a pending petition for decree of dissolution of marriage or judicial separation, and he cited the case of **Mr. Romanus Asimonye V. Mrs. Adora Asimonye (2009) LCN/3263 (CA)** to the effect that the respondent in that case after the determination of the petition for divorce brought an application for maintenance via originating summons and the appellant contended that such procedure is unknown to Matrimonial proceedings, and the judge discountenanced such argument and being dissatisfied with the judgment appealed to the Court of Appeal, and the Court of Appeal dismissed the appeal and held that a party to a marriage can bring an application for maintenance and custody of children whether or not there is petition for divorce or judicial separation, and the counsel cited the cases of **Obajimi V. Obajimi (2011) LPELR – 4665 (CA)** and **K.P.LAH V. Ugwu (2018) LPELR – 45395(CA)**, and the provision of Order XIV Rule (1) (c) of the Matrimonial Causes Rules and section 9 (2) & (3) of the Matrimonial Causes Act were referred to the effect that the applicant came before this court through this application to have divided/shared custody which enables both parents to take care of the children of the marriage. The counsel quoted section 114 of the Matrimonial Causes Act and submitted that it lends credence to the fact that proceedings for maintenance and custody as sought by the applicant is one which can be entertained by this court, and urged the court to hold that the application is meritorious, competent and in line with the Rules of this court and to grant the reliefs of the applicant.

Let me first deal with the issues raised by this court as to whether it is proper for this court to entertain this application against the background of sections 54 and 114 of the Matrimonial Causes Act and Order III Part I, Rule I (1) (2) &

(3) of the Matrimonial Causes Rules as it touches on the competence of the application of the jurisdiction of this court to entertain same. See the case of **Owners of the MV" Arabella" V. N.A.I.C. (2008) All FWLR (pt 443) p. 1211 at 1233, paras. A-C** where the Supreme Court held that the issue of jurisdiction which can be raised at any stage by either of the parties or the court is decided when the point is taken whenever an issue of jurisdiction is raised, and court should deal with it first or promptly or expeditiously, as it has jurisdiction to decide whether or not it has jurisdiction.

Now, it is the contention of the counsel to the applicant that by section 54(3) of the Matrimonial Causes Act, it provides an exception to the general rule that a Matrimonial proceeding can only be commenced by a petition, and that therefore that a proceeding for claim of maintenance and custody of children of the marriage can be commenced by an application if the Matrimonial Causes Rules permit.

The counsel therefore relied on Order III Rule I (3) of the Matrimonial Causes Rules to the effect that it provides that an application of this nature can be filed for enforcement of Matrimonial reliefs.

The counsel also relied on section 70(1) of the Matrimonial Causes Act and some judicial authorities to the effect that it is proper for an applicant to bring an application of this nature for maintenance of custody of children of the marriage whether or not there is a pending petition for dissolution of the marriage or judicial separation.

It is incumbent to state here that the court raised these issues *su motu* and asked parties to address it having regard to the fact that there is a pending petition before court 54 of this court sitting at Gwagwalada for the dissolution of the marriage between the same parties with No. PET/82/2022, but however, that petition was dismissed by that court.

Thus, section 54 of the Matrimonial Causes Act provides:

“(1) Subject to the next succeeding subsection, a matrimonial cause of a kind referred to in paragraph (a) or (b) of the definition of “Matrimonial Cause” in section 114(1) of this act shall be instituted by petition.

(2) A respondent may, in the answer to the petition, seek any decree or declaration that the respondent could have sought in a petition.

(3) Proceedings of a kind referred to in paragraph (c) of the definition of “Matrimonial Cause” in section 114 (1) of this Act that are in relation to proceedings under this Act for a decree or declaration of a kind referred to in paragraph (a) or (b) of that definition:

(a) May be instituted by the same petition as that by which the proceedings for the decree or declaration are instituted; and

(b) Accept as permitted by the rules or by leave of the court, shall not be instituted in any other manner”.

By the above quoted provision of section 54(1) (2) and (3) of the Matrimonial Causes Act, and the provision of subsection (1) of section 54, it can be inferred that it is made subject to the succeeding subsection, which means, the succeeding subsection (2) & (3) of section 54 subsume the provision of subsection (1) of section 54 of the Matrimonial Act, which also means proceedings referred to in paragraph (a) & (b) of the Act as to the definition of Matrimonial Cause shall be instituted by petition, however, this subsection is subject to subsection (2) (3) (4) of section 54 of the same Act, that is to say no other means have been provided through which proceedings can be commenced, with respect to matrimonial cause, only through petition.

By the provision of subsection (2) of section 54 of the Act, it can be inferred that whatever the respondent may seek for any decree or declaration can be sought through that petition.

And by the provision of subsection (3) of section 54 of the Act, a proceeding of a kind referred to paragraph (c) of the definition of Matrimonial Cause in section 114 of the Act for any decree or declaration referred to in paragraph (a) or (b) of that definition may be instituted by the same petition or where the Matrimonial Cause Rules permit or by the leave of the court.

The area of concern is section 54 of the Matrimonial Causes Act is subsection (3) (6) which provides:

“except as permitted by the rules or by leave of the court, shall not be instituted in any other manner”

The word used in the above quoted paragraph (b) of subsection (3) of section 54 of the Act is “shall” means that a thing must be done. It is a form of command or mandates. It is not permissive, it is mandatory. See the case of **Animashaun V. Ogundimu (2016) All FWLR (pt 832) p. 1786 at 1798, paras. B-C.**

It is therefore incumbent upon this court to look at the provisions of Matrimonial Causes Rules with a view to see whether it is permitted to commenced an application of this nature. It is pertinent at this juncture, before looking at the Rules, to look at the provision of section 114(1) (c) of the Matrimonial Causes Act as referred to by the counsel to the applicant which provides:

“(1) In this Act, unless the contrary intention appears:

(c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody of guardianship of infant children, of the marriage or the

maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a) or (b) of this subsection, including proceedings of such a kind pending at, or completed before, the commencement of this stet”.

It is worthy of note that the proceedings for the dissolution of the marriage between the two parties in this application that was before court 54 of this court has been completed, and therefore, the proceedings before this court is for maintenance and custody of infant children of the marriage. By the above quoted provision of section 114 (1) (c) of the Matrimonial Causes Act, it can be inferred to mean that the proceedings before this court is what that section 114(1) (c) of the Act is referring as part of the definition of Matrimonial Cause.

Now, Order III part 1 Rule 1 (3) of the Matrimonial Causes Rules as referred by the counsel to the applicant provides:

“Subject to sub-rule (1) and (2) of this Rule, proceeding in a Matrimonial Cause shall, except as otherwise provided in these Rules, be instituted by filing an application to a court having jurisdiction under the Act in the proper office of that court.”

By the above quoted provision, it can be seen that it is made subject to sub-rule (1) and (2) of the same Rule, which means sub-rule (3) has been subsumed by sub-rule (1) and (2). Sub-rule (1) provides that proceedings required by section 54(1) of the Act to be instituted by petition shall be instituted by filing a petition, and sub-rule (2) provides in essence that where leave has been granted under section 54(3) of the Act for the institution of the proceedings of a kind to which that subsection (3) applies otherwise than in

the relevant petition or answer, the proceedings shall be instituted by filing an application to the court.

It is noteworthy also that the provision of sub-rule (3) which permits filing an application to commence a suit is subject to sub-rule (1) and (2) which also provides that where leave has been granted under section 54(3) of the Act. By this, it can also be inferred that the provisions of Rule 3 of Order III Rule I of the Matrimonial Causes Rules does not take away what has been provided in section 54 (3) of the Act as to the requirement of obtaining the leave of this court before filing this application, and to this I so hold.

I have painstakingly gone through the record of this court, and have not seen where the applicant applied and obtained the leave of this court before filing this application, and the implication is that the application is incompetent, and I therefore, so hold. See the case of **Ape V. Asekomhe (2020) All FWLR (pt 1060) p. 197 at 226, para. A.**

As the application is incompetent and so it robs this court of the jurisdiction to entertain the application, I so hold. See the case of **Ademetan V. I.T.R.C.C.G. (2016) All FWLR (pt 821) p. 1506 at 1520, paras. D-E** where the Court of Appeal, Lagos Division held that competence process is one of the pre-conditions that will give a court jurisdiction to entertain a suit. In the instant application, and having held that the application is incompetent, this court has no jurisdiction to entertain this suit, and it is hereby struck out.

Hon. Judge

Signed

24/1/2024

Appearances:

C.S. Onuchebe Esq holding the brief of G.C. Ugwunweze Esq for the applicant.