

IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIHIERO,

ON WEDNESDAY THE

13TH DAY OF JULY, 2022.

BETWEEN:

SUIT NO. B/233^D/2020

MRS. AMENAGHAWON ESOMASESO PETITIONER

-AND-

MR. CLEMENT ESOMASESO RESPONDENT

JUDGMENT

This Judgment is in respect of a Petition for the dissolution of marriage filed on behalf of the Petitioner on the 14th day of May, 2020. The Grounds for the Dissolution of the Marriage are *inter alia* as follows:

- 1. That the marriage has broken down irretrievably because the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live together with the Respondent;**
- 2. That the Respondent has deserted the marriage since 2014 (over 6 years ago); and**
- 3. The Respondent has ceased to consummate the marriage.**

The orders sought by the Petitioner in this Petition are as follows:

- 1. A Decree of dissolution of the marriage between the petitioner and the respondent;**
- 2. General damages of ₦5,000,000.00 (Five Million Naira);**

And for such further order or other orders as this honourable court may deem fit to make in the circumstance of this case.

The Petition was served on the Respondent but he refused to appear before this Court to defend the petition. The matter was eventually fixed for hearing and the Petitioner opened her case and testified on oath.

She testified that she got married to the Respondent on the 14th of April 2013. That she filed the Notice of marriage at the Oredo Marriage Registry and celebrated the marriage at the Believers Ministry Incorporated at Evbuotubu. She stated that after the wedding they cohabited at No. 2 First Lady Street, Off Ova Road, Egor quarters, Benin City.

She informed the Court that there is no child from the marriage. That after the wedding they lived together for some time in Benin City and later moved to Lagos. That while they were in Lagos, the Respondent started to keep late nights while keeping to himself. She alleged that for a whole month, the Respondent refused to speak to her in the house and he stopped consummating

the marriage for more than one year. She alleged that whenever she went close to him, he stayed away and kept telling her that he did not marry her because of sex.

She said that in 2016 she relocated back to Benin. She stated that she has not taken him to court before now on this issue and did not connive with any person to bring this Petition. She concluded that from 2016 till now the Respondent and she have lived apart. In the course of her evidence, the Petitioner informed the Court that she was abandoning her relief for the sum of N5, 000,000 (Five Million Naira) as general damages.

After the Petitioner testified, she closed her case and the petition was adjourned for final address.

At the hearing, a counsel, *O.Aigbovo Esq.* appeared for the Respondent but he informed the Court that they are not challenging the Petition.

In his Final Written Address, the learned counsel for the Petitioner, *Joe Aluyi Esq.* formulated a sole issue for determination as follows:

“Whether the Court can grant the divorce petition based on the facts of this case as provided in the Matrimonial Causes Act.”

Arguing the sole issue for determination, learned counsel submitted that ***Order 5 Rule 27(1) of the Matrimonial Causes Rules*** provides that a Marriage certificate is to be filed with petition unless the petitioner is unable to so do.

Furthermore, he posited that ***Order 5 Rules 27(6) of Matrimonial Causes Rules*** states thus:

“Where a petitioner is unable, for any reason, to comply with sub-rule (1) of this rule, the petitioner shall state in the affidavit verifying the petition the circumstances by reason of which he is unable so to comply”.

He informed the Court that the petitioner stated in paragraph 4 of her verifying affidavit, the circumstance why she was unable to attach the marriage certificate to her petition and she also stated it in her evidence in chief. He said that the petitioner even went ahead to obtain a court order to file this divorce petition without a certificate attached. He relied on the case of ***ANYAEBUNAM v. CATHERINE ANYAEBUNAM (supra)***.

Learned counsel submitted that the petitioner gave oral evidence where she repeated the facts in her petition. He urged the Court to grant this petition pursuant to ***Section 15(2)(a)(c)(d)(e)(f) of the Matrimonial Causes Act 1990 as amended*** to hold that the marriage has broken down irretrievably for the following reasons:

- a) That the Respondent has willfully and persistently refused to consummate the marriage;***
- b) That since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent;***
- c) That the Respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;***
- d) 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; and***
- e) 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.***

Learned counsel referred to the evidence adduced at the trial and posited that the Respondent deserted the marriage since 2014 (over 8 years now). He maintained that the marriage lasted for only a year and there is no child in the marriage.

He posited that all the Court processes, and hearing notices were pasted on the Respondent’s wall but he refused to file any process or appear in this court to defend the petition.

He referred to the case of *ZENITH BANK v. NACOIL INT'L LTD (2017) LPELR-49973 (CA)*, where the Supreme Court held that the burden of proof on a claimant when the claim is not contested is minimal. He also relied on the case of *CHAMI v. UBA PLC (2010) 6NWLR (PT 1191) 474 (SC)* and urged the Court to grant the Petitioner's reliefs.

I have carefully gone through the evidence adduced at the trial together with the address of the learned counsel for the Petitioner. From the records contained in the court's file in this petition, all through the case, the Respondent virtually abandoned the trial and never responded to all the Hearing Notices served on him. His lawyer who appeared occasionally, informed the Court that they are not contesting the Petition.

Thus, the evidence of the Petitioner remains unchallenged. The position of the law is that evidence that is neither challenged nor debunked remains good and credible evidence which should be relied upon by the trial court, which has a duty to ascribe probative value to it. See: *Monkom vs. Odili (2010) 2 NWLR (Pt.1179) 419 at 442; and Kopek Construction Ltd. vs. Ekisola (2010) 3 NWLR (Pt.1182) 618 at 663.*

Furthermore, where the Claimant has adduced admissible evidence which is satisfactory in the context of the case, and none is available from the Defendant, the burden on the Claimant is lighter as the case will be decided upon a minimum of proof. See: *Adeleke vs. Iyanda (2001) 13 NWLR (Pt.729) 1at 23-24.*

However, notwithstanding the fact that the suit is undefended, the Court would only be bound by unchallenged and uncontroverted evidence of the Claimant if it is cogent and credible. See: *Arewa Textiles Plc. vs. Finetex Ltd. (2003) 7 NWLR (Pt.819) 322 at 341.* Even where the evidence is unchallenged, the trial court has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim. See: *Gonzee (Nig.) Ltd. vs. Nigerian Educational Research and Development Council (2005) 13 NWLR (Pt.943) 634 at 650.*

Applying the foregoing principles, I will evaluate the evidence adduced by the Petitioner to ascertain whether they are credible and sufficient to sustain the Petition.

I am of the view that the sole issue for determination in this Petition is whether the Petitioner has proved that the marriage has broken down irretrievably.

I will now resolve the sole issue for determination.

In every civil action, including a matrimonial petition, the burden of proof is on the Claimant or Petitioner, as he who asserts must prove. Furthermore, the standard of proof required is on the preponderance of evidence or the balance of probabilities. See: *AGAGU V MIMIKO (2009) 7 NWLR (PT. 1140) 223.*

In the instant case, the Petitioner is seeking a Decree of Dissolution of Marriage on the grounds inter alia as follows:

- 1. That the marriage has broken down irretrievably because the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live together with the Respondent;***
- 2. That the Respondent has deserted the marriage since 2014 (over 6 years ago); and***
- 3. The Respondent has ceased to consummate the marriage.***

By virtue of *Section 15(2) of the Matrimonial Causes Act*, the Court upon hearing a petition for dissolution of a marriage shall hold that the marriage has broken down irretrievably if, but only if the petitioner satisfies the Court of one or more of the following facts namely:

- 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 3 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 the law; and*
- h) that the other party to the marriage has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.*

In effect there are eight grounds for divorce and proof of one of these grounds or facts is in the eyes of the law, conclusive proof of irretrievable breakdown of the marriage. See *Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383*.

A Court cannot dissolve a marriage or declare a marriage to have broken down though it appears the marriage has broken down irretrievably unless one of the listed facts is established by the petitioner. The law requires that the petitioner should state clearly the specific ground or grounds for divorce as listed in Section 15(2) above. See *Ibrahim v. Ibrahim (supra) and Damulak v. Damulak (2004) 8 NWLR (Pt. 874) 151*.

The law provides that in matrimonial causes, a matter or fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court. Thus in divorce suits, a decree shall be pronounced if the Court is satisfied on the evidence that a case for the petition has been proved.

In the instant case the evidence adduced at the trial is to the effect that from 2016 till now the Petitioner and the Respondent have been living apart. In other words, the parties have lived apart for a period of over three years before the filing of this Petition. Furthermore, the Respondent does not object to a decree being granted.

By virtue of *section 15(2) (e) & (f) of the Matrimonial Causes Act*, that is sufficient proof that the marriage has broken down irretrievably.

The section provides as follows:

“Section 15-

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 3 years immediately preceding the presentation of the petition.”

In essence, the Petitioner has established two of the conditions to prove the irretrievable breakdown of the marriage. As earlier stated, proof of one of these grounds or facts is in the eyes of the law, conclusive proof of irretrievable breakdown of the marriage. See *Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383*. It will be quite unnecessary to consider the ground that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

In the event *the sole issue for determination is resolved in favour of the Petitioner. The petition succeeds and the Petitioner is granted a decree of dissolution of marriage on the ground that the parties have lived apart for more than two years immediately preceding the presentation of this petition and the Respondent does not object to a decree being granted.*

I hereby Order a Decree Nisi which will be made a Decree Absolute after three months unless there is a cogent reason to vary same. I make no order as to costs.

P.A.AKHIHIERO
JUDGE
13/07/2022

COUNSEL:

1. **Joe Aluyi Esq.****Petitioner**
2. **O. Aigbovo Esq.**.....**Respondent**