

IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

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

ON FRIDAY THE

2ND DAY OF AUGUST, 2024.

BETWEEN:

SUIT NO. B/996^D/2023

MR. GODWIN OSARO IYEKEKPOLOR -----PETITIONER

AND

MRS. ROSELINE OSAZEE IYEKEKPOLOR -----RESPONDENT

JUDGMENT

This Judgment is in respect of a Petition for the dissolution of marriage dated and filed on the 17th day of November, 2023. The Petitioner is seeking the following reliefs:

- 1) Decree for the dissolution of the marriage between the Petitioner and Respondent on the ground that the marriage has broken down irretrievably as the Respondent has behaved in a way and manner that the***

Petitioner cannot be expected to live with her due to irrational behaviour and irreconcilable differences;

- 2) A decree granting custody of the children of the union to the Petitioner, being the biological father and sponsor of the children, who have been living with the Petitioner in his residence;*
- 3) A decree that the Respondent may have visiting right to the children within reasonable time; and*
- 4) For such order or further order(s) as this honourable court may deem fit to make in the circumstances of this suit.*

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

He adopted his statement on oath dated and filed on the 17th day of November, 2023 as his evidence in this suit and tendered the

The Petitioner's case as can be gleaned from his deposition is that he married the Respondent who was then a spinster at the Marriage Registry, Benin City, Oredo Local Government Area, Edo State. A Certified True Copy of the Marriage Certificate was tendered and admitted in evidence as Exhibit 'A' at the hearing.

Immediately after the wedding, the Petitioner and the Respondent cohabited at No. 5 Enabulele Street, Off Osakpamwan Street, Uselu, Benin City and then moved to 2213 Grant Road, Regina, SK, Canada, S4S5C9.

He informed the Court that their marriage is blessed with two children, as follows:

- a) Perkins Osakpamwan Iyekekpolor (Male) -----Born on 5th day of May, 2003; and*

b) Collins Ikponmwosa Iyekekpolor (Male)-----Born on 21st day of June, 2004.

He alleged that since they became married, there has been no previous proceedings in a court between the Respondent and himself.

The Petitioner alleged that when they started to live together, the Respondent started to behave in an irrational manner that no reasonable person can live with her.

He alleged that their marriage has broken down irretrievably and they have not had any conjugal relationship as couple for over three years before the filing of this Petition.

Furthermore, the Petitioner alleged that due to the Respondent's irrational behavior, living with her portends great risk to him and the young children whose future is bright.

He maintained that the Respondent behaves in such a weird manner towards him, thereby affecting his emotions and marital affections without restraint. He said that no reasonable person can live peaceably with the Respondent. He described the Respondent as being hot tempered, vindictive, violent, unruly, unreasonable and rash to him. He alleged that the Respondent will not be prejudiced in any way whatsoever if this marriage is dissolved as it has broken down irretrievably.

The Respondent on her part though she was served with the originating processes by substituted means vide an order of the Court, she did not respond or furnish any answer to the petition.

After the Petitioner testified, he closed his case and the Petition was adjourned for final address.

In his Final Written Address, the learned counsel for the Petitioner, *Edwin Atohengbe Esq.* formulated two issues for determination as follows:

- (i) Whether the marriage of the parties has broken down irretrievably? and*
- (ii) Whether the Petitioner is entitled to be granted custody of the children of the marriage based on evidence led before this honourable court?*

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE ONE:

Whether the marriage of the parties has broken down irretrievably?

Arguing issue one, counsel submitted that the law is settled that the court shall hold that a marriage has broken down irretrievably when either of the parties behaved in a way that the other party cannot be expected to live with him/her. He said that in the instant case, from the facts presented before this court by the Petitioner, the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her.

He said that the Respondent's despicable acts of cruelty against the Petitioner as revealed in the facts contained in paragraphs 13, 14, 16 & 17 of the Petitioner's statement on oath has caused the Petitioner distress and affected the Petitioner's psychological well-being and this has necessitated his craving for the intervention of this honourable court.

He said that the Petitioner in his uncontroverted evidence before this honourable court stated amongst others, that due to the Respondent's irrational and/or unrepentant behaviour, living with the Respondent portends great risk to the Petitioner's life.

He maintained that with the intolerable behaviour of the Respondent, the Petitioner cannot be expected to continue to live with her and he relied on the provisions of *Section 15(1) the Matrimonial Causes Act, Cap M7 LFN, 2004 (as amended)*.

He urged the Court to resolve issue one in favour of the Petitioner.

ISSUE TWO:

Whether the Petitioner is entitled to be granted custody of the children of the marriage based on evidence led before this honourable court?

Arguing this issue, learned counsel posited that the Respondent is not challenging the grant of custody to the Petitioner. He said that facts not challenged are deemed admitted and facts admitted are not required to be proved and he relied on the case of *Theodore Emmanuel Charles Owoo & Ors. Vs. Mrs. Umo Asuquo Edet (2012) All FWLR part 642 page 1791*.

Counsel submitted that the prime consideration in granting custody is the interest and over-all welfare of the children, the conduct of the father and the mother, their respective resources, their comportment and the total bio-data by the court. He referred the Court to the case of *Mr. Oladipo Obajimi Vs Mrs. Olufumilayo A. Obajimi (2012) All FWLR part 649 page 1168 particularly at page 1187, para. A*

He said that in the instant case, the Petitioner testified that he is a responsible gentleman and gainfully employed as a Nurse in Canada, where he is currently based. He pointed out that from the evidence before the court, it can be deduced that the 'weird' behaviour of the Respondent does not only portend great risk to the Petitioner's life, but will be a bad influence on the children of the union.

In conclusion, he urged the Court to hold that the Petitioner has proved his case on the balance of probability and is entitled to the reliefs sought in this Petition. He therefore urged the Court to resolve issue two in favour of the Petitioner.

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, all through the case, the Respondent virtually abandoned the trial and never responded to all the Hearing Notices served on her.

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 the unchallenged and uncontroverted evidence of the Petitioner 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 two issues for determination in this Petition are as follows:

- 1. Whether the Petitioner has proved that the marriage has broken down irretrievably; and*
- 2. Whether the Petitioner is entitled to the custody of the two children of the marriage.*

I will now resolve the two issues for determination seriatim.

ISSUE 1:

Whether the Petitioner has proved that the marriage has broken down irretrievably?

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 ground that the marriage has broken down irretrievably as the Respondent has behaved in a way that the Petitioner cannot be expected to live with her due to her irrational behaviour and irreconcilable differences.

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 Petitioner led uncontroverted evidence that since they got married, the Respondent started to behave in an irrational manner that no reasonable person can live with her. He alleged that their marriage has broken down irretrievably and they have not had any conjugal relationship as a couple for over three years before the filing of this Petition.

Furthermore, the Petitioner alleged that due to the Respondent's irrational behavior, living with her portends great risk to him and the young children whose future is bright. He maintained that the Respondent behaves in such a weird manner towards him, thereby affecting his emotions and marital affections without restraint. He said that no reasonable person can live peaceably with the Respondent who he described as being hot tempered, vindictive, violent, unruly, unreasonable and rash.

From the evidence adduced by the Petitioner, I am of the view that he has established the fact that since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her. The evidence is sufficient to meet the requirements of *section 15(2) (c) of the Matrimonial Causes Act*, to prove that the marriage has broken down irretrievably.

In essence, the Petitioner has established one of the grounds 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*.

I therefore resolve Issue 1 in favour of the Petitioner.

ISSUE 2:

Whether the Petitioner is entitled to the custody of the two children of the marriage?

On Relief (2) which is on custody of the two children of the marriage, *Section 71(1) of the Matrimonial Causes Act 1990* provides as follows:

“In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the Court shall regard the interests of these children as the paramount consideration; and subject thereto, the Court may make such order in respect of those matters as it thinks proper”

When deciding the issue of custody, the trial Court exercises a judicial discretion and in exercising that discretion the Court should take the following factors into consideration: These are the ages of the children, education, welfare and general upbringing, the arrangements made for their accommodation and the conduct of

the parties to the marriage. Indeed the interest of the children at all times should be of paramount consideration. See the following cases: *Otiti v Otiti (supra)*; *Nana v Nana (2006) 3 NWLR (966)1*; *Williams v Williams (1987) 2 NWLR (54) 66*; *Odogwu v. Odogwu (1992) 2 NWLR (225) 539*.

In deciding what the welfare of a child is, factors which have been considered relevant by the Courts include:-

a) *degree of familiarity between the child and each of the parents respectively;*

b) *the amount of affection between the child and each of the parents;*

c) *the respective income and position in life of each of the parents;*

d) *the arrangements made by the parties for the education of the child;*

e) *the fact that one of the parents now lives as man and wife with a third party who may not welcome the presence of the child;*

f) *the fact that young children should as far as practicable, live and grow up together;*

g) *the fact that in cases of children of tender ages should, unless other facts and circumstances make it undesirable, be put under the care of the mother; and*

h) *the fact that one of the parents is still young and may wish to marry and the child may become an impediment.*

These are some of the factors only as each case is to be decided on the peculiar facts and circumstances placed before the Court in the proceedings. See *Lafun v Lafun (1967) NMLR, 401*; *Williams v Williams (supra)*; *Alabi v Alabi (2007) 9 NWLR [1039] 297*; *Afanja v Afanja (1971) 1 U.I.L.R. 105*; *Odogwu v Odowgu (supra)*.

Applying the foregoing principles to this case, I must observe that the Petitioner led satisfactory evidence of how he has been responsible for the upkeep of his children ever since he parted ways with the Respondent. He has also provided evidence of his means and his ability to cater for the two children. Incidentally from the ages of both children, I observed that none of them is below the age of twenty years. From the uncontroverted evidence of the Petitioner, I hold that he is entitled to the custody of the two children. Moreover, the Petitioner has expressed his willingness to grant access to the Respondent to see their children whenever she desires. I think that is enough for her.

From the foregoing, I hold that the Petitioner has substantially met the criteria outlined above and is entitled to the custody of the children of the marriage. I therefore resolve Issue 2 in favour of the Petitioner.

Having resolved the two issues for determination in favour of the Petitioner, I hold that the Petition succeeds and the Petitioner is granted the following reliefs:

- 1) A Decree for the dissolution of the marriage between the Petitioner and Respondent on the ground that the marriage has broken down irretrievably as the Respondent has behaved in a way and manner that the Petitioner cannot be expected to live with her due to her irrational behaviour and irreconcilable differences;***
- 2) A decree granting custody of the children of the union to the Petitioner, being the biological father and sponsor of the children, who have been living with the Petitioner in his residence; and***
- 3) A decree that the Respondent may have visiting right to the children within reasonable time.***

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

02/08/2024

COUNSEL:

- 1. Edwin Atohengbe Esq.Petitioner***
- 2. Unrepresented.....Respondent***