

IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

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

ON MONDAY THE 28TH DAY OF SEPTEMBER 2026

BETWEEN:

SUIT NO. B/502D/2024

MRS ITOHAN MERCY ERIOGHAYE ----- PETITIONER

AND

MR UYI CHESTERSON ERIOGHAYE ----- RESPONDENT

JUDGMENT

This Judgment is in respect of a Petition for the dissolution of marriage. The Petitioner's extant pleading is her Further Amended Petition filed on the 23rd of September, 2025. In the Further Amended Petition, the Petitioner is seeking the following reliefs:

- a) The decree of dissolution of the marriage between the Petitioner and the Respondent.*
- b) An order of this Honourable Court giving the custody of the only surviving child of the marriage to the Petitioner who has single handedly shown capacity to train him up and give him a good life.*

The Petition was served on the Respondent who initially appeared in court in person and was represented by counsel, but he did not file any response to the Petition. Later, the Respondent abandoned the proceedings, and his counsel withdrew his appearance from the suit. In essence, the Petition was undefended.

At the hearing, the Petitioner testified in proof of her Petition.

In her evidence, the Petitioner testified that she is a registered nurse and a student, currently residing in the United States of America. She said that she got married to the Respondent in April, 2018 in a traditional marriage ceremony and a Registry wedding.

She stated that they had the Registry wedding at the Oredo Marriage Registry at Kings Square, Benin City on the 18th of April, 2018, and a copy of the marriage certificate was admitted in evidence as Exhibit “A”.

The Petitioner further testified that after the wedding, she and the Respondent lived at No. 42 Ohenhen Street, Isihor and at Ojo Street in Benin City.

She said that the marriage is blessed with three children named and aged as follows:

1. Iwinosa Erioghaye – deceased
2. Nicholas Igbinosa Erioghaye (M) – 6 years
3. Baby girl – deceased.

She testified that after they got married, the Respondent lost his job eight months after the wedding and refused to get another job. She said that he abandoned his family responsibilities, and she was the only person taking care of the family.

The Petitioner testified that after the delivery of her second son, the family responsibilities increased, yet the Respondent refused to assist her until she became pregnant and delivered their third child.

She testified that the problem started with the delivery of the third child. She said that the Respondent took her to the University of Benin Teaching Hospital (UBTH), where she was working at that time, and left her there while she was in labour.

She said that at 12.00 midnight the doctor called the Respondent to inform him that they needed to do a caesarean operation which required him to sign some papers and to donate blood, but the Respondent refused to come, so she signed the consent form herself.

She said that due to the delay, the baby was asphyxiated and was taken to the central baby care unit for resuscitation, and the baby was there for 21 days.

The Petitioner alleged that in March, 2021, the Respondent left them and never came back. She stated that her child is currently living with her elder sister, and she communicates with him every day. She said that she sends money to her sister for her

son's upkeep every two weeks through First Bank. Twenty copies of the First Bank transfer receipts were admitted in evidence as Exhibits "B1" to "B20". The Certificate of Compliance in respect of the documents was also admitted as Exhibit "C".

She testified that she paid school fees for her child. Four copies of the receipts for school fees were admitted in evidence as Exhibits "D1", "D2", "D3" and "D4".

The Petitioner further testified that she has made some arrangements to take her child out of the country, but she needs a document to show that she has custody of the child to obtain a visa for him. A copy of two pages of the international passport of Erioghaye Nicholas Igbiosa was admitted as Exhibit "E".

The Petitioner stated that she wants the court to grant her a divorce and custody of her child, who is six years old.

After her evidence-in-chief, the Petition was adjourned for cross-examination, and a hearing notice was issued and served on the Respondent, who failed to appear in court to cross-examine the Petitioner. The Petitioner was discharged from the witness box, she closed her case, and the Petition was adjourned for defence or final address. A hearing notice was again issued and served on the Respondent.

In his Final Address, the learned counsel for the Petitioner, *J.O. Odi Esq.*, formulated two issues for determination as follows:

- i. Whether the evidence of the Petitioner has fulfilled the requirements of the law to warrant the grant of the order sought?*
- ii. Whether on the unchallenged evidence before this Honourable Court, the Petitioner has proved that the marriage has broken down irretrievably?*

Arguing the first issue for determination, the learned counsel submitted that the evidence of the Petitioner has met the requirements of the law to warrant the grant of the reliefs she seeks in this suit.

He argued that under *Section 15(1) of the Matrimonial Causes Act* (sic), one of the requirements for the grant of the orders sought is that the Petitioner must prove that the

Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.

Learned counsel posited that the Petitioner did not only prove that the Respondent has deserted her for a continuous period of at least one year preceding the filing or presentation of her petition as required by ***Section 15(1)(d) of the Act (sic)***, but she also fulfilled the requirements of paragraphs (e) and (f) of the same Act.

Learned counsel posited that the Petitioner in her evidence stated that the Respondent deserted her and their only son in March, 2021 and has not returned since then. He maintained that from the month of March, 2021 to the 15th of January, 2026, is over 5 years that the Respondent has deserted the Petitioner.

Learned counsel posited that not only has the Respondent deserted the Petitioner, but they have also lived apart for over 2 years before the Petitioner presented this Petition. He stated that from simple calculation between March, 2021 when the Respondent deserted the Petitioner and the 22nd day of May, 2024, when this petition was presented, it has been over 3 years and by implication the requirements of paragraphs (d), (e) and (f) of the Act have been established in this Petition. He maintained that this is particularly so, since the Respondent has by his conduct so far shown that he is not opposed to the granting of the reliefs sought in this Petition as required by ***Section 15(1)(e) of the Matrimonial Causes Act (sic)***.

On the first issue for determination, learned counsel therefore submitted that the circumstances anticipated under ***Section 15(1)(d), (e) and (f) of the Matrimonial Causes Act (sic)*** exist in this suit, and he urged the Court to grant the reliefs sought.

On the second issue for determination, learned counsel submitted that in view of the unchallenged and uncontroverted evidence of the Petitioner, she has established that the marriage has broken down irretrievably.

Learned counsel argued that from the evidence of the Petitioner so far, it is clear that the Respondent is no longer interested in the marriage and that the marriage between them has broken down irretrievably, as both parties have lived apart since March, 2021 when the Respondent left.

He reiterated that at the end of the evidence of the Petitioner, the Respondent was served with a hearing notice and given the opportunity to challenge the Petitioner's evidence through cross-examination, but the Respondent stayed away from the Court, thereby leaving the evidence of the Petitioner in this matter unchallenged and uncontroverted.

He urged the Court to believe the Petitioner and grant her reliefs. He relied on the cases of *Olohunde v. Adeyoju* (2000) 79 LRCN 2297; (2000) 10 NWLR (Pt.676) 562 and *Nzeribe v. Dave Engineering Co. Ltd.* (1994) 8 NWLR (Pt.361) 124 at 139.

In conclusion, he urged the Court to give judgment in favour of the Petitioner and grant the reliefs sought in this Petition.

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, the Respondent virtually abandoned this trial and failed to respond to all the hearing notices served on him.

This suit is therefore undefended and 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 the cases of: *Monkom v. Odili* (2010) 2 NWLR (Pt.1179) 419 at 442; and *Kopek Construction Ltd. v. Ekisola* (2010) 3 NWLR (Pt.1182) 618 at 663.

Furthermore, where a party has adduced admissible evidence which is satisfactory in the context of the case, and none is available from the other side, the burden on that party is lighter as the case will be decided upon a minimum of proof. See: *Adeleke v. Iyanda* (2001) 13 NWLR (Pt.729) 1 at 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. v. 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. v. 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 it is 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 is entitled to the reliefs sought in this Petition?

In every civil action, including a matrimonial petition, the burden of proof is on the 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 matrimonial causes, ***Section 82(1) of the Matrimonial Causes Act, Cap. M7, Laws of the Federation of Nigeria, 2004*** (hereinafter referred to as “the Act”) specifically provides that a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.

By virtue of ***Section 15(1) of the Act***, the sole ground upon which a petition for the dissolution of a marriage may be presented is that the marriage has broken down irretrievably. ***Section 15(2) of the Act*** provides that the Court hearing such a petition 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 wilfully 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; and*
- 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.*

In effect, there are eight facts upon which the Court may hold that a marriage has broken down irretrievably, and proof of any one of them is, in the eyes of the law, conclusive proof of the irretrievable breakdown of the marriage. See: *Ibrahim v. Ibrahim (2007) 1 NWLR (Pt.1015) 383*.

Before proceeding, I must observe that learned counsel for the Petitioner anchored his submissions on *paragraphs (d), (e) and (f) of Section 15(1) of the Act*. With respect, *Section 15(1)* merely prescribes the sole ground for dissolution, namely, that the marriage has broken down irretrievably; the facts from which the Court may so hold are set out in *Section 15(2)*. I shall therefore treat counsel's submissions as relating to *Section 15(2)(d), (e) and (f) of the Act*. I must also observe that the period between March, 2021 and January, 2026 is about four years and ten months, and not over five years as counsel submitted. Nothing, however, turns on this, since what the Act requires is proof of the relevant period immediately preceding the presentation of the Petition.

In the instant case, the uncontroverted evidence of the Petitioner is that the Respondent left the matrimonial home in March, 2021 and has never returned. By virtue of *Section 114(4) of the Act*, the date of a petition is the date on which it was filed. This Petition was first filed on the 22nd day of May, 2024.

Desertion, within the meaning of **Section 15(2)(d) of the Act**, is not merely the physical separation of the parties. It connotes the withdrawal of one spouse from cohabitation with the intention of bringing it permanently to an end, without the consent of the other spouse and without just cause. From the unchallenged evidence before the Court, the Respondent, who had for long failed to support the family, refused to attend to the Petitioner when she was in labour and required his consent and a donation of blood for a caesarean operation. Thereafter, in March, 2021, he left the Petitioner and the child and has neither returned nor made any provision for them. There is no evidence that the Petitioner consented to his departure or gave him any cause for it. His continuous absence for over three years before the presentation of this Petition, and his abandonment of these proceedings, leave no doubt that he intended to bring cohabitation permanently to an end. I therefore find that the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the Petition, within the meaning of **Section 15(2)(d) of the Act**.

Furthermore, by **Section 15(3) of the Act**, the parties to a marriage shall be treated as living apart unless they are living with each other in the same household. From March, 2021 to the 22nd of May, 2024, a period of over three years, the parties did not live together in the same household. I therefore also find that the parties have lived apart for a continuous period of at least three years immediately preceding the presentation of the Petition, within the meaning of **Section 15(2)(f) of the Act**. This fact does not depend upon the consent or non-objection of the Respondent.

Having so found, it is unnecessary to rest this decision on **Section 15(2)(e) of the Act**. I will only observe that the parties have also lived apart for more than two years before the presentation of the Petition, and the Respondent, who was duly served, has raised no objection to a decree being granted. His failure to defend this suit can be seen as evidence of non-objection. See: **Aderinwale v. Aderinwale (1976) 4 CCHCJ 1201**.

I have also considered the possibility of a reconciliation of the parties as required by **Section 11 of the Act**. There is nothing before the Court to suggest any reasonable possibility of reconciliation, the Respondent having abandoned both the marriage and these proceedings.

As earlier stated, proof of any one of the facts listed in **Section 15(2) of the Act** is conclusive proof of the irretrievable breakdown of the marriage. See: ***Ibrahim v. Ibrahim (supra)***. Having found that the Petitioner has established the facts in **Section 15(2)(d) and (f) of the Act**, I hold that the marriage between the Petitioner and the Respondent has broken down irretrievably.

On the issue of custody, the Petitioner is seeking custody of the only surviving child of the marriage, Nicholas Igbinsa Erioghaye. Regarding custody of the children of a marriage, **Section 71(1) and (4) of the Act** provides as follows:

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

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.”

In determining the question of custody, the interest of the child is the paramount consideration. The unchallenged evidence is that the Respondent abandoned the Petitioner and the child in March, 2021 and has made no provision for the child since then. The Petitioner, on the other hand, has single-handedly maintained the child. Exhibits “B1” to “B20” show regular remittances for his upkeep, and Exhibits “D1” to “D4” show that she has paid his school fees. Although the Petitioner currently resides in the United States of America, the child lives in the care of her elder sister, with whom she has made arrangements for his upkeep, and she communicates with him daily. She has obtained an international passport for the child (Exhibit “E”) and has made arrangements for him to join her abroad.

I have considered whether the Petitioner's residence outside Nigeria, and her intention to take the child to join her there, should weigh against her application. In my view, they do not. The child is of tender age; the Petitioner is his mother and the only parent who has shown any concern for his welfare, and his reunion with her is plainly in his interest. There is nothing before the Court to suggest that the Respondent is able or willing to care for the child. I am therefore satisfied that it is in the best interest of the child that his custody be granted to the Petitioner.

By **Section 71(4) of the Act**, the Court may make provision for access to the child by the other party to the marriage. The Respondent has shown no interest in the child since March, 2021 and did not seek access in these proceedings. I shall therefore make no order as to access, but the Respondent is at liberty to apply to the Court for access should he so desire.

Furthermore, by **Section 57(1) of the Act**, where there are children of the marriage who are under the age of sixteen years at the date of the decree nisi, the decree nisi shall not become absolute unless the Court, by order, has declared that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children, or that there are special circumstances that the decree nisi should become absolute notwithstanding. Nicholas Igbinosa Erioghaye is about six years old. On the evidence already reviewed, the child is housed and cared for by the Petitioner's elder sister, maintained by regular remittances from the Petitioner, and enrolled in school with his fees paid by the Petitioner. I am satisfied that proper arrangements in all the circumstances have been made for his welfare, advancement and education, and I shall make the requisite declaration.

The sole issue for determination is therefore resolved in favour of the Petitioner.

On the question of costs, costs follow the event, and by **Section 110 of the Act**, the Court may make such order as to costs as it thinks just. The Petitioner, having succeeded, is entitled to her costs.

Having resolved the sole issue for determination in favour of the Petitioner, I hold that this Petition succeeds and I hereby make the following orders:

- 1. A Decree Nisi is hereby granted dissolving the marriage celebrated between the Petitioner, Mrs Itohan Mercy Erioghaye, and the Respondent, Mr Uyi Chesterson Erioghaye, at the Oredo Marriage Registry, Benin City on the 18th day of April, 2018, on the ground that the marriage has broken down irretrievably.*
- 2. Custody of Nicholas Igbinosa Erioghaye, the only surviving child of the marriage, is hereby granted to the Petitioner.*
- 3. Pursuant to Section 57(1)(a) of the Matrimonial Causes Act, the Court hereby declares that it is satisfied that proper arrangements in all the circumstances have been made for the welfare, advancement and education of the said child.*
- 4. By virtue of Section 58(1)(a) of the Matrimonial Causes Act, the Decree Nisi shall become absolute upon the expiration of three months from the date of this Judgment, unless it is rescinded or an appeal is instituted in the meantime.*
- 5. The Respondent shall pay to the Petitioner the sum of ₦200,000.00 (Two Hundred Thousand Naira) as costs of this Petition.*

P.A. AKHIHIERO
JUDGE
28/09/2026

COUNSEL:

- 1. J.O. Odii Esq. -----Petitioner*
- 2. Unrepresented -----Respondent*