

IN THE HIGH COURT OF JUSTICE EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP HON. JUSTICE E.O.AHAMIOJE ó JUDGE
ON FRIDAY THE 30TH DAY OF MARCH, 2012.

BETWEEN

SUIT NO: B/7D/2005

MR. JACOB EDORISIAGBON NEHIKHARE..... PETITIONER

AND

1. MRS. CILICIA NEHIKHARE í í RESPONDENT

2. MR. ADEBAYO í í í í í .. CO-RESPONDENT

JUDGEMENT

This is a petition for the dissolution of marriage brought by the Petitioner on the ground that the marriage has broken down irretrievably on grounds of adultery and desertion.

The 1st Respondent apart from filing an Answer to the petition also cross-petitioned wherein she sought the following order:

- (a) An Order dismissing the petition.
- (b) A decree of dissolution of marriage between the Cross-petitioner and the Petitioner on grounds herein before stated.

In his testimony, the Petitioner stated that he knew the Respondent who is his wife. That she has three children for him who are now adults, and working in

various places. That the Respondent was a Senior Nursing Officer in Nigeria but now a Senior Nursing Officer in London. He stated that the Respondent left his house in 1973, which is period of 32 years. That she committed adultery before she left, and had a baby girl through adultery called, Miss Joy Adebayo who was born in 1981.

He said that sometime in 1973, he attended a friend's party and returned at about 5-6p.m to find that the toilet in the house was not kept clean. That the Respondent attacked and challenged him when he questioned her about the unclean nature of the toilet. The Respondent inflicted a wound on his eye. He took his late father, who was present to show him the toilet. The father reprimanded the Respondent, and Itohan the sister went and cleaned the toilet. The following morning at about 6.00a.m, the sister Itohan told him the Respondent has packed her property away from the house and left which was on 18/3/73. He asked the children, he was told that they were sleeping. He took care of them before taking them to school. After this, he went and informed his father. The father told him that the Respondent did not come to his house. The mother of the Respondent also told him that she did not come to her house. After searching for her in vain, he came to the house and single handedly took care of the children from primary school to the university level. That it was later

he learnt that the Respondent was living with one Mr. Adebayo. He stated that he never brought into the matrimonial home another woman while they were in Lagos and Benin City where they lived in a two bed room flat. He stated that their custom do not permit a man to bring into their matrimonial home another female friend. That he never married another woman till date, and do not intend to do so. He said that the Respondent joined him in London in 1963. That he trained her as a Nurse at Walson Hospital on a full time Nursing course. He stated that in 1966, after he successfully completed his accounting studies in Birmingham, they decided that he return to Nigeria. The Respondent returned to Nigeria in 1967, and joined him in Lagos. That he secured a job for her at the Federal Ministry of Health. That she did not contributed to the upkeep of the children.

He stated that in 1972, the Respondent was transferred to Epe, and they agreed to relocate to Benin City. He was employed as a Chief Accountant to the University of Benin. After this, he secured a job for the Respondent at the University Teaching Hospital, Benin City as a Nursing Officer. That the Respondent built houses without his knowledge. That he later knew that the Respondent built a second house at Imafidon Street, Benin City. He said that through the period he co-habited with the Respondent in Benin City, she was

never at home even when she was off-duty. That she did not collude with the Respondent to bring the petition. He urged the Court to grant the reliefs because the Respondent left the matrimonial home since 1973, and also ground of adultery. He said that the marriage was contracted in London in 1963, and they were issued a marriage certificate, Exhibit A0

Under cross examination, he stated that the Respondent never paid his school fees while studying in London. He stated that he knew one Miss Philomena Omorodion who is his girlfriend whom he met in Benin City in 1973. That he got to involved with her in 1972 because the Respondent was not always at home. He denied the fact that he was always bringing women into her matrimonial home. He stated that one Mrs. Dudu was her girl friend, and has a son for him called EfosaNehikhare who is about 16 years. He stated that one Mrs. Ogholo was also his girlfriend and has a son for him called OsahonNehikhare born in June 1981. He stated that one Philomena Omorodion lives with him in the house till date, but has no child for him. That she packed into his house since 1981. He denied threatening the Respondent at night with cutlass and dangerous weapons to move out of the matrimonial home. That he did not accompany the physical threats with a letter to the family of the Respondent to move out of the home. He denied threatening the Respondent when she moved out of the matrimonial home that she will never get pregnant.

That he never told the Respondent to have sexual relationships with a man. He denied the fact that while in Lagos, Miss Philomena Omorodion was always writing letter to him. That he did not file the petition to spite the Respondent and her children.

At the close of the Petitioner's case, the Respondent testified that the Petitioner is her husband. That he went to London, and she later joined him. That while in London as a student nurse, she was paid monthly salary and she supported the Petitioner financially. That she was responsible for the upkeep of the house while the Petitioner was in school. She said that the Petitioner qualified as an Accountant and returned to Nigeria in 1967, and left her and the son, Charles in London. That she returned to join him in Nigeria in January 1968. That trouble started between him and the Petitioner in late 1968 because of Miss Philomena Omorodion who was the girlfriend of the Petitioner. That Philomena Omorodion took over her matrimonial bed when she was on night duty. She said that in between 1972 early 1973, the Petitioner asked her and the children to come down to Benin City because he got a job at the University of Benin. She obeyed in order to preserve her marriage. Later, the Petitioner joined them. Before he came, she got a job with UBTH, Benin City as a London trained Nurse. At this point, Miss Philomena Omorodion started to write him series of letters. That on one occasion, she searched and found a letter written

by Miss Philomena Omorodion. She reprimanded the Petitioner about the letter. The Petitioner asked her what was wrong with Philomena Omorodion writing love letters to him, and that he had already asked her to pack out of the matrimonial home. That before they move down to Benin City, the Petitioner went to her family twice to threaten her. She stated that the Petitioner started his love affairs with Miss Philomena Omorodion from Lagos and not in Benin City. That he often threatened to kill her with, cutlass on several occasions. That the sister-in-law often report the matter to her father-in-law. That because of the constant threats from the Petitioner, she called a carpenter to help close the door leading from her room to that of the Petitioner. That her sister, Esther lived with them during this period.

She stated that in the month of August 1973, a driver from the University of Benin delivered a letter, Exhibit -Bø from the Petitioner to her asking her to pack out of the matrimonial home before his arrival, and failure to do so, will be met with blood shed. The Petitioner sent copies of the letter to her uncle, Solomon and his father. When she received Exhibit -Bø, she reported to the Police at Esigie Police Station, Benin City. She was given a Policeman to arrest him but she refused. She went to her father-in-law who told her that he has already received his copy. He promised to call a family meeting but advised her to stay away from matrimonial home. She told him that she would stay with

him but he told her that he has no vacant room in his house. The Petitioner further went to her family and his own family to ask her to pack out of their matrimonial home. Before she got home, the Petitioner had already thrown away her property from the house. She eventually packed out of their home, and rented an apartment. That during this period, the Petitioner sometimes come to her house to threaten her saying that she will never get pregnant in the presence of her sister. He told her that she has his permission to have sex with another man to see if she can get pregnant. She said that this time, the Petitioner had already had a son from another woman in 1975. That it was in 1981, she met Mr. Adebayo and she became pregnant. After that, she refused to see him again. That she took care of herself before and after delivery. That the child, joy lived with the Petitioner and her other children. That she gave birth to joy to prove to the Petitioner that he is not God. That they got married in London at St Theresa Catholic Church, Birmingham, and we issued marriage certificate, Exhibit A. She stated that the Petitioner had a child in 1975 from one Mrs. Dudu and in 1981 had another child from Mrs. Ogholo called Osahon. That in 1986, had another son from one Mrs. Caroline Nehikhare whom he married under native law and custom. That he married Mrs. Philomena Omorodion immediately she packed out of the matrimonial home. That she co-habited with the Petitioner in London, lagos and Benin City. that she did not collude with him to bring this

petition. She urged the Court to dissolve the marriage on the cross-petition and dismiss the Petitioner's petition. She urged the court to grant her relief on grounds of adultery by the Petitioner, and that the Petitioner is married to Mrs. Philomena Omorodion and Caroline. That he lives with Philomena Omorodion.

Under cross examination, she stated that they lived in two bed room flat while in Lagos, and three bed rooms flat in Benin City. That the Petitioner always bring women into the matrimonial home when she is on shift duty. She denied the fact that the Petitioner had problems with her as a result of her bad manner.

That the problem they had was his relationship with Miss Philomena Omorodion. That she was pushed out of the house by the Petitioner after the expiration of the date on Exhibit -Bö. That she met Mr. Adebayo in 19981, during one of her visits to Lagos with her children, and gave birth to joy in 1981.

Next to testify is DW1, Mrs. Agnes Ojo. She stated that when the parties were living in Lagos, she visited them in the house. During her visit, she observed that there was quarrel between them.

She stated that in 1972, the Respondent called her to say that the Petitioner was in their family house. She went there and saw him. She wanted to grip him but the people around prevented her from doing so. That on a certain day, their

mother sent for her and showed her a letter written by the Petitioner. The Respondent was invited and shown the letter. The Respondent insisted that she will not pack out in compliance with the Petitioner's letter. The Respondent then agreed to move out of the house based on Exhibit -Bö.

Under cross examination, DW1 stated that the Respondent is hot-tempered. That the Respondent packed out of the matrimonial home in 1973. That her family members tried to settle the matter but the Petitioner refused to allow the Respondent return to the matrimonial home. That the Respondent had a child for another man.

DW2 is Esther Ibizugbe. She stated that she lived with the parties in Lagos. That not too long she went to Lagos to live with them, they started to have misunderstanding, but did not know the cause of it. That the Respondent is a Nurse who normally go to night duty. After she had gone for night duty, the Petitioner will bring a woman to the matrimonial home. That when the woman comes, the Petitioner will ask her and the children to move to their room including the late ItohanNehikhare. The Petitioner will then call them out of the room when he wants to drop the woman. Later, the parties were transferred to Benin City and the misunderstanding continued. That when ever the Petitioner is beating the Respondent, the children and the Respondent will be crying. That the Petitioner often say to the Respondent that he will kill her if she refuse to

pack out of the house. That the Petitioner told her that he will kill her and the Respondent and nobody will give evidence of how he killed them. That the Respondent will always tell the Petitioner not to kill her because of Philomena. She said that the Petitioner later drove the Respondent away from the common room they shared together and she joined them in their room. That the Respondent normally block the room with the bed in the night to prevent the Petitioner gaining access to continue with the beating. That because of the constant threat from the Petitioner, she ran away from the house to live with her mother.

At the close of the Respondent's case, Tony .I. Enaboifo Esq, of Learned Counsel for the Respondent, submitted that the cross-Petitioner has proved her case on the preponderance of evidence to warrant the Court giving judgment in her favour.

He submitted that the Respondent has led evidence in proof of the 1st plank of her ground for the dissolution of the marriage between the parties in line with the requirement of Section 15 (2) (c) of the Matrimonial Causes Act.

He submitted that since the marriage between the parties, the Petitioner has lived an adulterous life outside the vows of the matrimonial union thereby causing great trauma to the Cross-petitioner, and a demonstration of cruelty on the Cross-petitioner. That the Petitioner admitted that he knew and got involved

with the one Miss Philomena Omorodion in 1973, who eventually moved into his house in 1981, as a wife with full rights of co-habitation. He submitted that the Petitioner also admitted that he had children, EfosaNehikhare, OsahonNehikhare outside wedlock during the subsistence of his marriage with the Cross-petitioner. He urged the court to hold that the Cross-petitioner had proved the catalogue of adulterous and promiscuous escapades of the Petitioner, and cited *ALABI V ALABI (2008) ALL FWLR (PT. 418) 245 AT 251, RATIO 1.*

He submitted that the Petitioner subjected the Cross-petitioner to such a brazen threat to life in the home such that the Cross-Petitioner could not reasonably be expected to continue in the marriage with the Petitioner, and referred to Exhibit B.

He submitted that in the absence of any uncontroverted evidence of the Cross-petitioner in relation to the issue of threat in Exhibit B, he urged the Court to hold that the 1st plank of the Cross-petitioner has been proved by the Cross-petitioner. In respect of intolerable behaviour, he cited the cases of *DAMULAK V DAMULAK (2004) 3 NWLR (PT.874) 151 AT 155; RATIO 4 AND NANA V. NANA (2006) 3 NWLR (966) 1 AT 7-8; RATIOS 2 AND 3.*

He submitted that the parties have lived apart for a period of 31 years before the presentation of the petition in compliance with Section 15 (2) (f) of the

Matrimonial Causes Act. He submitted that the Petitioner pushed and forced out the Cross-petitioner from the matrimonial home through gave misconduct of his and brazen intimidation of the Cross-petitioner. That the acts of the Petitioner smacks of outright cruelty against the Cross-petitioner, and urged the court to do so hold. He submitted that the Petitioner is in constructive desertion of the Cross-petitioner in the relationship, and referred to **DAMULAK V DAMULAK (SUPRA) RATIOS 1, 2, & 3; NANA V NANA (SUPRA) RATIOS 5 & 6.**

He submitted that the Petitioner connived with and condoned the so-called adulterous act of the Cross-petitioner and referred to her evidence. He submitted that the Petitioner stated that the child (Joy) lived with the Petitioner and her other children in the Matrimonial home which was admitted by the Petitioner. He finally urged the Court to dismiss the Petitioner's petition, and uphold the Cross-petition.

On her part, B.O. Molokwu (Miss) of Learned Counsel for the Petitioner, formulated two issues for determination to wit:

1. Whether the marriage between the Petitioner and the Respondent has broken down irretrievably? and
2. Whether the Respondent/Cross-petitioner by her evidence has proved her case against the Petitioner?

On issue 1, she submitted that it is obvious, given the evidence provided by the parties that they have lived apart for a continuous period of at least 31years, and both parties do not object to the dissolution of the marriage; and referred to Section 15 (2) (f) of the Matrimonial Causes Act, 2004.

She submitted that the Respondent deserted the Petitioner since 1973, thereby renouncing her responsibilities and evading her duties as a spouse which is a period of 31 years preceding the presentation of the petition, and cited Section 15 (2) (d) of the Matrimonial Causes Act.

She submitted that adultery can be regarded as a ground only when the Petitioners find it intolerable to live with the Respondent. That the Petitioner stated that the Respondent left their matrimonial home to co-habit with the Co-Respondent. That she willingly abandoned the Petitioner to co-habit with the Co-Respondent and had a child for him. That the adulterous act can not be blamed on the Petitioner. That the Petitioner found it intolerable to live with her as a wife because of the adulterous act; and cited *ALABI V ALABI (2007) 9 NWLR (PT. 1039) 297 AT 303, RATIOS 2, 3, 4 AND 5.*

She submitted that another condition upon which the Court shall hold a marriage has broken down irretrievably is provided for in Section 15 (2) (c) of the matrimonial Causes Act 2004. That examples of intolerable behaviour stated in Section 16 (1) are neither exhaustive or exclusive. That such averment must be

coupled with an allegation that the Petitioner find it intolerable to put up with it, and cited *OTTI V OTTI (1992) 7 NWLR (PT. 252) 187 AT 192, RATIOS 1 and 2; DAMULAK V DAMULAK (SUPRA) RATIO 4.*

She submitted that the Petitioner can no longer put up with such show of ingratitude, insecurity and secrecy of the Respondent. She urged the Court to hold that the marriage has broken down irretrievably.

On issue 2, she submitted that the Respondent has not proved the allegation of threat. That she failed to show any report made to the Police nor call the Police to corroborate her evidence. She submitted that the evidence given by the Respondent and her witness are contradictory and urged the Court to dismiss the Cross-petition, and dissolve the marriage in favour of the Petitioner.

It is pertinent to state that in every civil action, including a petition, the burden of proof falls squarely upon the Plaintiff or Petitioner alleging it, as he who asserts must prove. 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 vide paragraph 9 (1) of the Petition sought an order of dissolution of the marriage between himself and the Respondent on the grounds stated therein in paragraph 9 (t), (a) ó (d). The Respondent in her Amended answer and Cross-petition vide paragraph 50 (b) also sought an order of

dissolution of the marriage between the parties on the grounds stated in paragraph 49.

In the instant Petition, and Cross-petition, the parties sought an order of dissolution of the marriage on ground of desertion. What then is desertion?

Desertion had been defined thus:

“The Separation of one spouse from the other with an intention on the part of the deserting spouse to bring cohabitation permanently to an end and without reasonable cause and without the consent of the other spouse.”

See Rayden’s Practice and Law of Divorce (Edited by Jackson J and Turner C.P.) 9th Edition (Butter Worth, London (1970) P. 165.

In the case of **NANA V NANA (2003) 3 NWLR (PT. 966) 1 AT 32** it was defined thus:

“Desertion within the meaning of Section 15 (2) (c) of the Matrimonial Causes Act must be one where any of the parties abandons and forsakes without justification, thus renouncing his or her responsibilities and evading its duties.”

In order to constitute desertion, four elements must be present at the same time. They are as follows:

- (1) Defacto separation of the parties
- (2) Animus Deserendi
- (3) Lack of cause for the withdrawal from cohabitation, and
- (4) The absent of consent of the deserting spouse.

It is worthy of note that Defacto separate implies the bringing to an end of cohabitation by severing all marital obligations. The most obvious of this occurs when one spouse physically departs from the matrimonial home. See ***RASANWO VS. RASANWO (1961) W.N.L.R. 297.***

In proof of act of desertion on the part of the Respondent the Petitioner stated that sometime in 1973, he attended a friend's party and returned at about 5-6 p.m. to find the toilet in the house unclean. That the Respondent attacked and challenged him when he questioned her about the unclean nature of the toilet. That the Respondent inflicted a wound on his eye. He took his late father, who was present in the house to show him the toilet. The father reprimanded the Respondent, and Itohan, the sister went and cleaned the toilet. The following morning at about 6.00 a.m, Itohan told him, that the Respondent packed her property away from the house and left which was on the 18/3/73. He went to inform her parents who told him that she did not come to them. After searching for her in vain, he single handedly took care of the children up to University level.

The Respondent in rebuttal of the evidence of the Petitioner in proof of her Cross-petition, stated that in the month of August 1973, a driver from the University of Benin delivered a letter, **Exhibit 'B'** from the Petitioner to her asking her to pack out of the matrimonial home before his arrival, and failure to do so will be met with bloodshed. That the Petitioner send copies of the letter to her uncle and father. That when she received **Exhibit 'B'** she went to her father-in-law who told her that he got his copy, and promised to call a family meeting. He advised her to stay with him but he told her that he had no vacant room in his house. That before she got home, the Petitioner had already threw away her property from the house. She eventually moves out of the matrimonial home and rented an apartment.

I have carefully considered the evidence adduced by the parties in proof of the acts of desertion including **Exhibit 'B'**. After weighing the evidence of the Petitioner and place side by side with the evidence of the Respondent.

Cross-Petitioner, I say unhesitatingly that I prefer the evidence of the Respondent/Cross-Petitioner to that of the Petitioner. It is manifest from the evidence of the Cross-Petitioner, that she did not pack out of the matrimonial home unjustifiably. In other words, the Cross-Petitioner was forced out of the matrimonial home by the Petitioner based on the letter, **Exhibit 'B'** written to her

by the Petitioner. It is at this stage, pertinent to reproduce the relevant portion of the said **Exhibit 'B'** which reads thus:

öDear Mrs. C.O. Nehikhare,

It is with utmost regret that I have to take this measure; after discussing with your mother and sister this morning. I came to the conclusion that to avoid blood being shed, the daily quarrel and fighting. I hereby order you, with my full consent, to quit my house and leave apart at least for a time.ö

In the instant case, the evidence of the Cross-Petitioner and **Exhibit 'B'** showed clearly that it was the conduct of the Petitioner that compelled the Cross-Petitioner to abandon the parties matrimonial home.

It is, my view, that the Petitioner having sent the Cross-Petitioner packing out of the matrimonial home can not rely on desertion as a ground for the dissolution of the marriage. I hold that the Petitioner has failed to prove that the Respondent was in desertion.

On the other hand, it is, my view, that the Cross-Petitioner leaving the matrimonial home based on the letter, **Exhibit 'B'**, written to her by the Petitioner can only be best described as constructive desertion. It is, constructive desertion in the sense that, it was the conduct of the Petitioner that compelled her to abandon

the matrimonial home. And section 18 of the Matrimonial Causes Act defines constructive desertion as:

“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 the marriage 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 also **NANA V NANA (SUPRA) AT 46.**

It is, my view, from the evidence of the Cross-Petitioner and **Exhibit ‘B’** that it was the Petitioner who willfully deserted the Cross-Petitioner without just cause or excuse, and therefore was in desertion. I therefore hold that the Cross-Petitioner has successfully established that the Petitioner constructively deserted the Cross-petitioner under Section 15 (2) (d) of the Matrimonial Causes Act.

Aside from this, the Cross-Petitioner further testified that she has lived separate and apart from the Respondent for a period of 31 years immediately preceding the presentation of the Cross-petition when the Petitioner compelled her to abandon the matrimonial home without her consent. This was also pleaded in paragraph 49(b) of the Amended Answer and Cross-petition. This, in my view,

comes clearly within the purview of the provision of Section 15(2) (f) of the Matrimonial Causes Act which provides thus:

“The Court hearing a petition for decree of dissolution of a marriage should 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:

(f) That the parties in the marriage has lived apart for a continued period of at least three years immediately preceding the presentation of the petition”

On the issue of adultery, it is, in my view that the least said about it, the better. Moreover, Section 15(2) (a) & (h) requires the Petitioner or Cross-Petitioner to prove one of the facts contained therein, and not all the facts before he or she can succeed. It is my opinion, that the Cross-Petitioner has proved two of facts contained therein, and this is sufficient.

On the whole, I hold that the Petitioner has failed to prove his petition as required by law. Accordingly, same is dismissed as lacking in merit.

I further hold that the Cross-petitioner has successfully proved that the marriage celebrated between her and the Petitioner at St. Theresa's Church Willington Road, Birmingham, U.K. on the 29/3/1963 has broken down irretrievably under Section 15 (2) (d) (f) of the Matrimonial Causes Act, 1970.

