**IN THE HIGH COURT OF JUSTICE**

 **EDO STATE OF NIGERIA**

 **IN THE BENIN JUDICIAL DIVISION**

 **HOLDEN AT BENIN CITY**

**BEFORE HIS LORDSHIP THE HONOURABLE JUSTICE J. I. ACHA, JUDGE, ON WEDNESDAY THE 17TH DAY OF FEBRUARY, 2021**

B E T W E E N: SUIT NO. B/747D/2020:

CHIEF LEEMON IKPEA … … … … PETITIONER/APPLICANT

 A N D

MRS. AGNES IKPEA … … … … RESPONDENT/RESPONDENT

**RULING**

 The Petitioner in this action, on the 14th day of December, 2020 filed two applications simultaneously, one Ex-Parte for Interim Injunction, the other on Notice for Interlocutory Injunction. The Motion Ex Parte was heard by this Court and it was ordered that Respondent show cause by way of affidavit why the orders sought should not be granted.

 Processes were filed on behalf of Respondent in response to the applications which were eventually regularized.

 As parties have exchanged processes in respect of the two applications, the Court proceeded to hear the Motion on Notice as all processes filed by the parties in respect of the two applications having been collapsed into the said application.

 In the Motion on Notice filed on the 14th day of December, 2020, Petitioner as Applicant prayed the Court for the following:-

“. AN ORDER restraining the Respondent either by herself, her children, agents, servants and/or privies howsoever from confronting, molesting, harassing, intimidating and causing or threatening violence against the Petitioner, his domestic and business staff, relatives and friends or in any manner whatsoever interfering with the Petitioner’s business or domestic life pending the determination of the substantive Petition.

2. AN ORDER directing the Respondent to vacate the matrimonial house at No. 3, Abuja Street, Banana Island, Lagos pending the determination of the substantive Petition.”

The application is supported by a 24 paragraph affidavit deposed by Petitioner/Applicant himself and filed along is Counsel’s written address.

Upon service of the order earlier on referred to and this Motion on Respondent, an affidavit of 26 paragraphs and headed “RESPONDENT’S AFFIDAVIT IN ANSWER TO PETITIONER’S MOTION DATED 14 DECEMBER 2020” deposed by Promise Onyibe, a Legal Practitioner was filed on the 22nd day of January, 2021 together with Counsel’s written address in response to Petitioner’s Motion. And by an order of Court made on the 4th day of February, 2021, the said affidavit filed on behalf of Respondent was deemed properly filed. In the same vein, Respondent on the 28th day of January, 2021 filed an affidavit to show cause as ordered by Court. The said affidavit was deposed by Amanda Dirisu, a Legal Practitioner. The Petitioner as Applicant on the 27th day of January, 2021 filed a 20 paragraph Further and Better Affidavit in response to Respondent’s Counter Affidavit to which are attached 3 (three) Exhibits. Filed along is Counsel’s Reply on Point of Law.

In arguing this application, G. C. Igbokwe, Esq. (SAN), Learned Senior Counsel of Counsel for Applicant referred to and adopted all the processes filed on behalf of Petitioner/Applicant as his argument of the Motion.

As his further submission, Learned Senior Counsel maintained that the Court has powers to grant the reliefs sought in this application as he posited that Applicant’s life is at risk. He contended that the situation has become messy as shown by the insulting letter written by a lawyer to Petitioner at Respondent’s behest. He argued that the balance of convenience is in favour of granting this application. That the Petitioner has deposed to the fact that he is willing to relocate Respondent even though she has alternative places to relocate.

He urged on Court to grant this application.

In opposition, O. A. Uka, Esq. of Counsel for the Respondent/Respondent referred to the Counter Affidavit with Counsel’s written address deemed filed on the 4th day of February, 2021, as well as the affidavit to show cause and he adopted all the processes to oppose this application.

In highlighting, Learned Counsel maintained that Applicant has not satisfied the conditions for the grant of an application such as this.

Counsel maintained that Applicant should relocate from their home at No. 3, Abuja Street, Banana Island, Ikoyi, Lagos to any other place and that Respondent would not oppose that. He posited that it is the life of Respondent who has not been allowed to leave the house ever since that is in danger. He urged on Court to dismiss this application.

This application is simply for an injunctive order or orders pending the determination of the substantive action/Petition. However, in the various affidavits filed, parties unwittingly delved into issues that can only be resolved at the end of trial. I will endeavour therefore to restrict myself to the application and refrain from making pronouncement on or deciding issues that would come up at the trial. This is in line with the authorities some of which I here reproduce. In **Onyesoh V. Nnebedum (1992) 9 LRCN 736** Karibi-Whyte JSC had this to say at pages 753 and 755 of the report thus:

“The Court of Appeal was in error in the observation that there is any need at this stage to resolve conflicting depositions in the affidavits. This is a function reserved for the ultimate resolution of the issues between the parties……………………………………………………………………………….

 A Judge determining an application for interlocutory injunction must be careful not to decide the substantive issues between the parties.”

Similarly, in **Eregbowa & Ors. V. Obanor & Ors. (2010) 16 NWLR (Pt. 1218) 33** Omoleye JCA had this to say on the point at page 50 of the report thus:-

“Without much ado, it appears to me that, in the lower court, the learned Counsel for both parties delved so much into issues which are meant to be tackled in the substantive action which indeed, the lower court rightly refrained from doing in its ruling, the subject matter of this appeal. This is because the law is settled that parties as well as the courts are not permitted to delve into substantive issues raised as complaint to be dealt with in the main action at the interlocutory stage…..”

 However, the Court would not close its eyes to obvious untruth contained in an affidavit. In **Okafor V Okafor 2 Selected Matrimonial Cases (SMC) 416** Amaizu JCA in the lead judgment of the Court stated at page 425 of the report thus:-

“The practice is that when a court is called upon to hear an interlocutory application/appeal, the learned trial Judge is always very careful not to decide on substantive issues or make findings on issues that may be contested at the hearing of the substantive suit. This practice, in my view does not mean that a court should close its eyes to obvious false averment in an affidavit sworn to by a party in the suit.”

In this application, I will discountenance those averments in the affidavits of the parties that pertain to issues that would be resolved at the substantive case. I will endeavour to wade through the depositions dealing with this application.

This application essentially is to restrain Respondent from molesting or harassing Petitioner, his domestic and business staff pending the determination of the substantive suit and for Respondent to vacate the matrimonial house pending the determination of the substantive suit.

It is not in dispute between the parties that the parties were married in 1982 under Esan Native Laws and Custom and subsequently contract a statutory marriage in 2001. By the depositions contained in paragraphs 4, 5, 6, 7, 8, 10, 11 and 13 of the affidavit in support of this application deposed by the Petitioner on the 14th day of December, 2020, paragraphs 5, 6, 8, 9, 10, 11 and 15 of Respondent’s counter affidavit deposed by one Promise Onyibe on the 22nd day of January 2021, it is clear and not in doubt that there are issues in the marriage between Petitioner/Applicant and Respondent/Respondent. However, it is left to be seen if these issues are capable of supporting the relief/prayer for the dissolution of the marriage between the parties at the conclusion of the substantive case.

An order of Interlocutory Injunction would be granted for the preservation of the “***res***” the subject matter of the action pending the determination of the substantive suit. In doing this, the Court would consider where the balance of convenience swings.

The factors to be considered in an application for interlocutory injunction are set out in a plethora of decided cases. See **Adesina V. Arowola & Ors. (2004) 6 NWLR (Pt. 870) 601 at 615 – 616**.

In **Intercity Bank PLC V. Alhaji Bello Sani Ali (2002) 7 NWLR (Pt. 766) 420** Omage JCA in his contribution stated at pages 445 and 446 of the report thus:-

It is elementary that the discretion is with the Judge presiding to weigh the balance of convenience before he determines whether or not to order an injunction. It is a discretionary power of the court which is generally exercised judicially and judiciously……………………

 In Halsbury’s Law of England, the provision is made in which the inherent jurisdiction of the Judge as ***diminis litis*** to ensure until determination of the issue that the subject matter of the suit before him remains undepleted.”

And in **Obeya Memorial Specialist Hospital Ayi-Onyema Family Ltd V. Attorney-General of the Federation & Anor. (1987) 7 S.C (Pt 1) 52** Obaseki JSC in the lead judgment of the apex Court stated at pages 71 – 72 of the report thus:-

“….. the decision whether or not to grant an interlocutory injunction has to be taken at a time when **ex hypothesis**, the existence of the right or the violation of it or both is uncertain and will remain uncertain until final judgment is given in the action.”

This is a Matrimonial Cause matter and in his address, Learned Senior Counsel submitted that this Court has the power to grant the injunctive order sought and he relied on **Sections 73(1)(H)** and **(I)** and **109 of the Matrimonial Causes Act**. **Section 109 of the Matrimonial Causes Act** providesthus:

“A Court exercising jurisdiction under this Act may grant an Injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks just.”

In paragraphs 5, 6, 8, 10, 11, 13, and 20 of the affidavit in support of this application, Petitioner/Applicant deposed:-

“5. That the Respondent’s cantankerous behaviour and attitude has totally robbed the marriage of love and affection and make the home most uncomfortable and unconducive for both of us to continue to live in.

6. That the Respondent has not performed any conjugal duties with me for the past ten (10) years and with no communication or marital relationship as we live in the same house as strangers.

8. That since more than three years now the Respondent has formed the habit of leaving the house very early every morning and returns very late without informing the Petitioner or anybody in the house about her movements.

10. That I now live in fear, constant tension and grave danger in my house as a result of the Respondent’s behaviour, who is always threatening physical and spiritual assault and various harms on me.

11. That these actions and attitude of the Respondent has affected my health adversely and have pushed me to the ultimate but inevitable option of instituting this divorce petition to save my life.

13. That my business currently revolves in and around my house at No. 3, Abuja Street, Banana Island, Lagos and I work in my house office.

20. That it will be most inconvenient and unsafe to me for the Respondent to remain with me while this Petition is pending before this Court since she always threatens to harm me.”

In the counter affidavit deposed by Promise Onyibe, a Legal Practitioner and to oppose this application, it was deposed in paragraphs 4, 6, 8, 11 and 12 thus:-

“4. I have read the Affidavit deposed to by the Applicant, Chief Leemon Ikpea (“the Affidavit”) in support of the Applicant’s Motion on Notice, and I believe that the facts deposed therein are largely untrue and are designed to mislead this Honourable Court, and in any case, the facts therein are not sufficient to justify the grant of the reliefs sought in the Applicant’s Motion.

6. In response to the depositions in paragraphs 2, 4, and 5 of the Affidavit, I was further informed by the Respondent under the circumstances described above and I verily believe her that it is incorrect that she has consistently engaged in unprovoked and intense quarrels with the Applicant or that she demonstrated cantankerous attitude or behaviour towards the Applicant. On the contrary, she has been nothing short of a good and loyal wife to the Applicant despite many indiscretions on the part of the Applicant and it is the actions of the Applicant as outlined below that have resulted in the strain in the parties’ marriage. Indeed, the Applicant has been insistent on frustrating the marriage, a fact which is made more evident by the filing of a Petition for dissolution of marriage and the filing of the instant application.

8. I was further informed by the Respondent under the circumstances described above and I verily believe her that although she had been putting up with many indiscretions on the part of the Applicant, things degenerated when the Applicant began philandering and bringing different women to the couple’s matrimonial home. The Applicant would bring in women into the family house and sleep with them there. He would instruct the Respondent to leave the room and he would proceed to have sex with other women right on the couple’s matrimonial bed.

11. Contrary to the Applicant’s depositions in paragraphs 6 and 7 of the Affidavit, the Respondent informed me that it is the Applicant who has not performed any conjugal duties with her for over 10 years. The Applicant brought in a second wife and ultimately relegated the Respondent to a mere ‘housemate’. The Applicant refused to reckon the Respondent as a wife and completely ceased all conjugal obligations to her.

12. Contrary to paragraphs 8 and 9 of the affidavit, the Respondent informed me that she did not form the habit of leaving the house in the morning without informing the Applicant of her whereabouts and returning late at night. Due to the animosity between the parties, there has been little or no communication avenue left between them. The Respondent also informed me that it is untrue that she now moves from one Pentecostal Church to another. It is also untrue that the Respondent patronizes native doctors.”

In the Further and Better affidavit filed on the 27th day of January, 2021, the Petitioner/Applicant further deposed in paragraphs 3, 4, 7, 9, 13, 14, 15 and 17 thereof thus:-

“3. That the facts, prayers and conclusions therein are lies, half truths and concoctions of falsehoods.

4. That G. C. Igbokwe SAN of Counsel informs me in his chamber on 25/1/2021 at 9.00pm and I verily believe him that paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17,18, 19, 20, 21 and 22 of the counter affidavit are prayers, legal arguments and conclusions

7. That I lived with the Respondent with great pain enduring physical and emotional stress and agony because of the children most of whom she has now indoctrinated and brainwashed to fight and disrespect me.

9. That paragraph 6 of the counter affidavit is false. I found her to be very disloyal, deceptive, self-centred, abusive and fetish, with neither respect for me, my brothers nor other family members, with this petition as a last resort for me.

13. That all conjugal rights ceased between the Respondent and I more than 10 years ago as she completely deserted all matrimonial responsibilities and duties towards me and the home, making us strangers in the same house.

14. That paragraphs 13 and 14 of the counter affidavit are mere denials as the Respondent is found of stopping her driver from following her into mysterious places and coming home to spray fetish substances on my doors, dining rooms and other places in the house. That I have survived her spiritual attacks by God’s grace and turning into prayer warrior together with my domestic staff, who all also feel the spiritual attacks on the homestead. The Respondent confessed to spraying “holy water” in the dead of the night whenever I was away.

15. Paragraphs 15, 16 and 17 of the counter affidavit are false. I filed this petition as a last resort, having reached the limit of my endurance on the clandestine efforts and attempts of the Respondent to hurt or kill me; and her irresponsible behaviours, incessant and unprovoked attacks and fetish manipulations, which have all resulted to my developing and suffering from acute hypertension and insomnia. Copy of my medical report thereon is herein attached and marked Exhibit “LAI”.

17. Contrary to paragraph 19 of the counter affidavit, the Respondent has many choices and options of where to live, including her children’s houses, her numerous properties, our matrimonial house at No. 21, Boundary Road, G.R.A., Benin City. Apart from these, I also offered on the plea of her children and a son-in-law to buy her a suitable residential house in Lagos but she declined and insists on tormenting me in my house that is devoid of love and peace with her presence for more than 10 years now.

From the averments in the affidavits, there are serious issues that call for the court’s intervention to preserve the “res” and secure the lives of both Respondent and Petitioner pending the determination of the substantive case.

Facts in this application as in all application are provable by affidavit evidence. It is indeed strange and inexplicable that the averments in the affidavit in support of the application as well as the further and better affidavit deposed by Petitioner as weighty and personal as they stand, Respondent chose to respond through a proxy, a Counsel. Ironically, the Counsel in deposing to the facts, unwittingly turned himself a witness and indeed a party in this case. I refer to the depositions in the counter affidavit reproduced above. I wish to state that Matrimonial Causes are actions ***in personam***. It is situation such as this that the apex court cautioned Counsel to guard against, when in **Ekpeto V. Wanogho (2004) 18 NWLR (Pt. 905) 394** Kalgo JSC stated at page 413 of the report thus:-

“This is undesirable and should be avoided.”

Also in **Iris Winifred Horn V. Robert Rickard (1963) 2 All NLR 40** Holden J, stated at pages 42 – 43 of the report thus:-

“I rule that there is nothing in this particular case to make the swearing of this particular affidavit by Mr. Murray abhorrent on principle. That does not mean that I would always support the swearing of affidavit by members of the Bar. I consider that to be in the main an undesirable practice. I cannot see that any affidavit which is of any real value on facts liable to be disputed can avoid offending against one or both of the principles set out above. There would be little harm in Counsel swearing an affidavit setting out formal facts required to be established to support a purely formal Exparte application where there is no possibility of those facts being disputed, but even in such a case there would be little need for counsel himself to swear the affidavit as some member of his staff could easily depose to the same facts as a matter of information and belief (due heed being paid to Section 87 and Section 88 of the Evidence Ordinance). If on the other hand Counsel finds himself in a position where he is the only person with the knowledge necessary to swear the affidavit, and where the facts to which he is to swear are likely to be in dispute, then he should for the purposes of that application withdraw from the case and brief other counsel.”

The deponent to the counter affidavit in this application – Promise Onyibe who introduced himself as part of the team of Counsel representing Respondent clearly fell into this error. For example, in paragraph 17 of the counter affidavit he started off “I also know that the Applicant claims that the actions of the Respondent……” This should not be.

Despite this indiscretion on the part of Counsel, I considered these affidavits on their merit.

As I stated earlier on, at this stage, the Court would consider what the “res” is and where the balance of convenience lies on whether to grant or to refuse the reliefs sought in this application.

Respondent’s Counsel has argued that the application would decide the substantive case. I do not think so. The substantive action is for the dissolution of marriage. From the affidavit evidence, it seems to me that both the Petitioner and Respondent have serious issues concerning each other. They have not been living in conviviality. There is mutual suspicion, fear and hate. The “res” to be protected and preserved in the circumstance is the lives of both parties. Respondent confirmed in paragraph 11 of the counter affidavit that there has not been any conjugal relationship between the parties for over 10 years. Paragraph 8 of the counter affidavit alleges infidelity. Applicant attached a medical certificate to his further affidavit which suggests great danger to his health resulting from disharmony in their home.

This mutual fear by the parties is further demonstrated by the exchange of letters between the parties as shown in Exhibits “LA2” and “LA3” attached to the further and better affidavit of Applicant. Details of the said letters and their effect would be reserved for the substantive case. Suffice it to say that they all call for the Court’s intervention, in the interim.

Parties should be alive to continue in their marriage or decide to put an end to it. Staying away from each other even for a while may heal the wounds and pains that is apparent.

As highlighted above, the lives of both Respondent/Respondent as well as Petitioner/Applicant matter not only to their immediate family but to the society at large. So also is their well being. The facts as laid in the affidavits of the parties reveal deep rooted hostility and animosity between the parties. For the Court to ignore these feelings of hostility, so that the parties can continue to live under the same roof when parties have by their affidavits and conduct demonstrated that they cannot, would amount to shirking its duties. The dire consequences of the Court not acting though in the interim could be of such catastrophic proportion that would place a moral burden not just on the Court but on the society as a whole. The Court should or must intervene, albeit as the marriage between the parties still subsists to preserve their lives and health.

From all I have said, the “res” to be preserved being the lives of the parties, Prayer 1 on the Motion paper succeeds and is granted as prayed.

Granting Prayer 1 would logically dovetail to Prayer 2 which is that Respondent vacate the matrimonial house at No. 3, Abuja Street, Banana Island, Lagos pending the determination of the substantive Petition. In support of this Prayer, Applicant deposed in paragraphs 14, 15, 16, 17, 18 and 21 of the affidavit in support wherein Respondent’s property were enumerated where she can move to. These facts were neither denied nor controverted by Respondent.

Respondent’s Counsel in his oral argument before Court submitted that Respondent would not mind and that Court should order that Applicant move out of No. 3, Abuja Street, Banana Island, Lagos. Applicant deposed in paragraph 13 of the affidavit in support that his business revolves in and around No. 3, Abuja Street, Banana Island, Lagos. Despite that, the Court would not make an order for Respondent to move out of the house without Petitioner/Applicant taking up the responsibility of providing suitable accommodation for her, since the marriage between them still subsists. Alternatively, Respondent move into the parties home at No. 21, Boundary Road, G.R.A., Benin City. Which means Petitioner would avoid going to the house pending the determination of the Petition.

 On the whole, in the interest of the parties, this application substantially succeeds on the following terms:

“1. Respondent is hereby restrained either by herself, her agents, servant and/or privies howsoever, from confronting, molesting, harassing, intimidating and causing or threatening violence against the Petitioner, his domestic and business staff, relatives and friends or in any manner whatsoever interfering with the Petitioner’s business or domestic life pending the determination of the substantive Petition.

2. It is hereby ordered that Petitioner provide a suitable apartment by way of accommodation within Victoria Island, Lekki axis of Lagos or anywhere convenient within Lagos outside Banana Island, Ikoyi, Lagos forthwith to enable Respondent move into, pending the hearing and determination of this Petition.

Alternatively,

3. Respondent move into the parties home at No. 21, Boundary Road, G. R. A., Benin City, forthwith pending the hearing and determination of this Petition. At which period, Petitioner shall stay away from and not go to the family house situate at and known as No. 21, Boundary Road, G. R. A., Benin City, pending the hearing and determination of this Petition.

4. Orders 2 and 3 above having been met, Respondent shall vacate the matrimonial house at No. 3, Abuja Street, Banana Island, Lagos forthwith, pending the hearing and determination of this Petition.”

I make no order as to costs.

Having made these orders, I hereby order accelerated hearing of this Petition. Hearing of this Petition, is adjourned till on the 3rd day of March, 2021 with the consent of Senior Counsel and the Respondent’s Counsel.

 **J. I. Acha**

(Judge)

17TH FEBRUARY, 2021

COUNSEL:

PETITIONER/APPLICANT … … … G. C. Igbokwe, Esq. SAN with him is T. A. Emenike, Esq.

RESPONDENT/RESPONDENT … … … O. A. Uka, Esq.