

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIHIERO,
ON TUESDAY THE
18TH DAY OF MARCH, 2025.

BETWEEN:

SUIT NO. B/98^D/2024

MR. OGHAE EMMANUEL USEH-----PETITIONER

AND

MRS. PRECIOUS USEH-----RESPONDENT

JUDGMENT

This Judgment is in respect of a Petition for the dissolution of marriage dated and filed on the 2nd day of February, 2024 on behalf of the Petitioner on the ground that the marriage between the Petitioner and Respondent has broken down irretrievably upon the facts that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent and also that the two parties have been living apart for a period of not less than two years before this petition.

In his Petition, the Petitioner is seeking the following reliefs:

- 1) ***A Decree of the Dissolution of the marriage contracted between the Petitioner and Respondent on the ground that the marriage is froth with irreconcilable differences and behavior not compatible with the Petitioner;***
- 2) ***Custody of the Children of the marriage may be granted to the Respondent on the ground of their ages. However, the Petitioner is seeking an order of this Honourable Court to grant the Petitioner unrestricted access to his***

children based on the ground that he wants to be part of their lives and well-being which is paramount to him;

- 3) An Order that the Respondent should allow the Petitioner to take responsibility of his children's education in their current school where the Respondent and her mother are proprietresses and teachers provided that the actual fees are disclosed as well as other necessities; and*
- 4) An order of perpetual injunction restraining the Respondent from further denial of the Petitioner's access to their children and or relocating with the children outside Nigeria, as well as taking the children to unknown destination without his consent, his consent first sought and had.*

The Petition was served on the Respondent but she did not to appear before this Court to defend the petition or take part in any of the proceedings despite several hearing notices served on her. The matter was eventually fixed for hearing and the Petitioner opened his case and testified in proof of his Petition. The Respondent was foreclosed from cross-examining the Petitioner.

The Petitioner testified that he married the Respondent on the 28th day of March, 2013 at the Marriage Registry at Ramat Park in Ikpoba Okha Local Government Council, Benin City. He tendered the original copy of the Marriage Certificate which was admitted in evidence as Exhibit "A".

The Petitioner alleged that, after their wedding, they cohabited at No 15 Emmanuel Street, off Siloko Road, Benin City and No 2 Ogbemor Street, Off Upper Lawani, New Benin, Benin City, before he moved out of their matrimonial home sometime on the 20th day of December, 2021 to where he presently resides at No 6, Godwin Erebor Street, Off Country Home Motel Road, Benin City.

The Petitioner also alleged that since his marriage to the Respondent, she has exhibited intolerable behaviors such as being insolent, disrespectful to him and his relatives, always nagging and hauling insults at him.

The Petitioner testified that on one occasion, he had to present the misunderstanding between them before his elderly uncle (Pa Enase Iboje who is the overall head of the Petitioner's extended family), and that this said uncle invited them over to his house for a peaceful resolution of their differences.

The Petitioner alleged that the Respondent walked out on the old man and his wife simply because his uncle's wife cautioned her to stopped being insolent, haughty and disrespectful to the Petitioner in their presence. According to the Petitioner, it

was at this moment that he made up his mind that he could no longer live with the Respondent.

The Petitioner alleged that this and other series of events led him to seek an alternative accommodation in order to avoid constant quarrels with the Respondent. He stated that since he left his matrimonial home, he has made concerted efforts to have access to his children and each time he tried, the Respondent denied him access to them.

The Petitioner stated that the marriage is blessed with three (3) children namely:

- i. EFEZINO USEH - Born on the 6th day of July, 2014;*
- ii. UZIEZI USEH - Born on the 20th day of October, 2016;and*
- iii. OGHENEFEGO USEH - Born on the 8th day of March 2020.*

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

In her Final Written Address, the learned counsel for the Petitioner, *Princess (Mrs.) P. I. Iyomon* formulated a sole issue for determination as follows:

“Whether having regard to the Petition which is unchallenged, the Petitioner has proved that his Petition is meritorious?”

Arguing the sole issue for determination, the learned counsel for the Petitioner submitted that subject to *Order V Rule 27(1) of the Matrimonial Causes Act*, a marriage contracted under the Act must be proved. Learned counsel for the Petitioner submitted that the Petitioner has fully complied with the provision of the law by filing a marriage certificate in proof of the existence of a valid marriage.

She stated that upon satisfying this requirement, all that is left is to ascertain whether the petition for dissolution fulfills the requirements of *Section 15(1&2) (a-h) of the Matrimonial Causes Act*.

She submitted that it is the requirement of the law that for dissolution of marriage, the Petitioner must plead and prove that the marriage has broken down irretrievably and she cited *Section 15(1) of the Matrimonial Causes Act*. The learned counsel also stated that in order for the Petition to succeed, evidence must be led in support of any of the facts contained in *Section 15(2) (a)-(h) of the Matrimonial Causes Act of 1990* and she cited the case of *Ekerebe v. Ekerebe (1993) 3 NWLR Pt. 596 at 514* in support.

Learned counsel also stated that what is expected of the Petitioner is to prove one or more of the grounds as stated in *Section 15(2) (a)-(h)*. Learned counsel posited

that the Petitioner has successfully led evidence in support of the facts contained in *Section 15(2) (c) and (e)* which provide thus:

“The court hearing a petition for a decree of dissolution of a marriage shall 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:---

(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;

“(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...”

With regards to *Section 15(2) (c)*, the learned counsel posited that the behavior of the Respondent has been intolerable and in support of this allegation, the Petitioner led evidence of how the Respondent walked out on his aged uncle and his wife during a reconciliatory meeting.

She said that the aforesaid conduct of the Respondent made the Petitioner to take a decision to file for the dissolution of the marriage. She maintained that up till the moment of filing this Petition, the Respondent remains unremorseful over her misbehaviour.

She said that the Petitioner also led evidence to show that the Respondent does not allow him to enjoy peace in their home and has been disrespectful to him and every member of his family.

She said that the Petitioner also led evidence that sometime between 2020 to 2021, the Respondent refused to cook their meals and he was the one cooking their meals. She said that all these events made the Petitioner to move out of their matrimonial home.

On the second ground that the parties have lived apart for a continuous period of not less than two years preceding the presentation of this petition, counsel posited that the Petitioner adduced evidence to show that he moved out of their matrimonial home on the 20th day of December 2021 as a result of the behavior of the Respondent and never returned there until this Petition was filed on the 2nd day of February 2024. She maintained that the parties have been living apart for over two years before the Petition was filed.

Finally, the learned counsel urged this Court to grant the reliefs sought by 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 contained in the court's file in this petition, all through the case, the Respondent never bothered to enter appearance in this matter despite several 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 unchallenged and uncontroverted evidence of the Claimant if it is cogent and credible. See: *Arewa Textiles Plc. vs. Finetex Ltd. (2003) 7 NWLR (Pt.819) 322 at 341.* Even where the evidence is unchallenged, the trial court has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim. See: *Gonzee (Nig.) Ltd. vs. Nigerian Educational Research and Development Council (2005) 13 NWLR (Pt.943) 634 at 650.*

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

I am of the view that there are two issues for determination in this Petition. These issues are as follows:

- 1. Whether the Petitioner has proved that the marriage has broken down irretrievably?;and***
- 2. Whether the Petitioner is entitled to be granted unrestricted access to the three children of the marriage.***

ISSUE ONE:

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

On issue one it must be noted that 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 upon the fact that the Respondent has behaved in a manner that he cannot reasonably be expected to live with her and that both parties have lived apart for a continuous period of over two years.

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 dissolution of marriage 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. See *Ibrahim v. Ibrahim (supra) and Damulak v. Damulak (2004) 8 NWLR (Pt. 874) 151*.

In this Petition, the Petitioner has alleged that since the marriage, the Respondent has behaved in such a way that he cannot reasonably be expected to live with her. It is trite law that a Petitioner who relies on the ground of intolerable behavior as contained in *Section 15(2) (c) of the Act* must establish by cogent evidence that it would be unreasonable to require him to live with the Respondent. See the case of *Emmanuel v. Funke (2017) LPELR-43251 (CA) (Pp. 16-19 paras. A-A)*.

The test of whether the behavior of the Respondent is so intolerable that the Petitioner cannot reasonably be expected to live with her is an objective test. Therefore what the Petitioner deems as intolerable may not pass this objective test. *Section 16(1) (a)-(g)* of the Act lists out the various acts that qualify as intolerable behavior that it would be unreasonable to expect the Petitioner to continue to live with the Respondent.

In the instant case, the acts of the Respondent which the Petitioner has adjudged to be intolerable include the Respondent's alleged rudeness, constant insults, and refusal to cook for the Petitioner. None of these conducts fall within the intolerable behaviours as envisaged by *Section 16(1) (a)-(g) of the Matrimonial Causes Act 1990*.

Consequently, the ground of intolerable behaviour as envisaged by the Act has not been established in this Petition.

Aside from the ground of intolerable behaviour, in this Petition, the Petitioner is also relying on the ground that the Respondent and he have lived apart for a continuous period of at least two years immediately preceding the presentation of this Petition and the Respondent does not object to a decree being granted.

At the trial, the Petitioner adduced evidence to show that he moved out of their matrimonial home on the 20th day of December 2021 as a result of the behavior of the Respondent and never returned there until this Petition was filed on the 2nd day of February 2024.

Clearly, from the evidence, the Petitioner has established the fact that both parties have lived apart for a continuous period of at least two years immediately preceding the presentation of this petition.

By virtue of the provisions of **Section 15(2) (e) of the Act**, the Court upon hearing a petition for the dissolution of a marriage shall hold that the marriage has broken down irretrievably if the Petitioner satisfies the Court **“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”**.

Thus, the law provides that in addition to proving that the parties have lived apart for a continuous period of two years immediately preceding the presentation of the petition, it must also be established that the Respondent does not object to the degree being granted.

In some cases the courts have agreed that non participation in the proceedings by a Respondent after service of court processes may be regarded as evidence of non-objection. See **Aderinwale v. Aderinwale (1976) 4 CCHCJ p.1201**. I subscribe to this reasoning that where a Respondent fails to file an answer or participate in the proceedings, the court can infer from that the Respondent is not opposed to the decree of dissolution being granted. Thus, based on the Respondent’s absence throughout the proceedings, it is deemed that she does not object to a decree being granted.

In essence, the Petitioner has successfully established one of the facts to prove the irretrievable breakdown of the marriage. As earlier stated, proof of one of these facts 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**.

Issue one is therefore resolved in favour of the Petitioner.

ISSUE TWO:

Whether the Petitioner is entitled to be granted unrestricted access to the three children of the marriage.

Section 71(1)(4) 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”

“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.”

It should be noted that the Petitioner is not seeking full custody of the three children of the marriage. In his petition, the Petitioner has agreed that custody of the children can be granted to the Respondent because of their ages. However, he is seeking an order granting him unrestricted access to his children.

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*.

Taking all the circumstances of this case together, I am of the view that the custody of the three children should be given to the Respondent and the Petitioner is entitled to unrestricted access to the children.

The Petitioner is also seeking an order of this Court allowing him to take the responsibility of his children’s education. This is a responsible request which should be granted as of right.

It is on these grounds that I resolve issue two in favour of the Petitioner.

On the whole, I hold that this 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 on the fact that the Petitioner and Respondent have lived apart for a continuous period of over two years immediately preceding the presentation of this petition and the Respondent does not object to the degree being granted;*

- 2) *An Order granting the Petitioner unrestricted access to his children based on the ground that he wants to be part of their lives and well-being which is paramount to him;*
- 3) *An Order that the Respondent should allow the Petitioner to take responsibility of his children's education in their current school where the Respondent and her mother are proprietresses and teachers provided that the actual fees are disclosed as well as other necessities; and*
- 4) *An order of perpetual injunction restraining the Respondent from further denial of the Petitioner's access to their children and or relocating with the children outside Nigeria, as well as taking the children to unknown destination without his consent, his consent first sought and had.*

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
18/03/2025

COUNSEL:

1. **PRINCESS (MRS.) P. I. IYOMON-----PETITIONER**
2. **UNREPRESENTED-----RESPONDENT**