

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIHIERO,
ON THURSDAY THE
3RD DAY OF JULY, 2025.

BETWEEN: **SUIT NO. B/224D/2024**

MR. EHIDIAMEN OMOKHUI -----PETITIONER

AND

MRS. MARIAN OSARUMWENSE OMOKHUI -----RESPONDENT

JUDGMENT

This Judgment is in respect of a Petition for the dissolution of marriage dated the 11th day of March and filed on the 12th day of March, 2024 on behalf of the Petitioner on the ground that the marriage between the Petitioner and Respondent has broken down irretrievably upon the assertion that they have lived apart for over One (1) year and the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

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

- 1) An Order of decree of Dissolution of the marriage; and***
- 2) That the Petitioner is allowed unlimited access to the children of the marriage anytime he wants to see them and during their holiday to enable the Petitioner participate fully in their welfare.***

The Petition was served on the Respondent by substituted means but she did not 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. At the hearing, the Petitioner opened his case and testified in proof of his Petition. The Petitioner testified that he and Respondent got married on the 3rd day of February, 2019 at the Living Faith Church International Inc, Benin City, Edo State. The Marriage Certificate was tendered and admitted as Exhibit 'A'.

He alleged that, after their wedding, they cohabited in his family compound where he has his own apartment at No. 6, Imadayor Road, Benin City, Edo State before the Respondent moved out of their matrimonial home on or about the month of January, 2023.

The Petitioner stated that the marriage is blessed with two (2) children namely:

- i. ***EHIZOFUA WONDER OMOKHUI (FEMALE) born on the 8th day of October, 2019; and***
- ii. ***ADESUA STAR OMOKHUI (FEMALE) born on the 18th day of April, 2021.***

He gave evidence of the various problems he had with the Respondent which started early in their marriage. He also alleged that the Respondent never paid any attention to his emotional needs instead she was only interested in the money he was bringing home.

The Petitioner gave evidence that he has not condoned or connived with the Respondent to bring this petition and there is no pending suit between him and the Respondent apart from this petition.

He also stated that he has been responsible for the upkeep, welfare and education of the two children of the marriage and he will continue to do so to the best of his ability.

The Petitioner concluded by praying the court to dissolve the marriage, and that custody of the two children of the marriage should be granted to the Respondent while Petitioner is granted unlimited access to the children of the marriage anytime he wants to see them and on their holiday to enable the Petitioner participate fully in their welfare.

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

In his Final Written Address, the learned counsel for the Petitioner, ***B. A. Iluobe Esq.*** formulated a sole issue for determination as follows:

“Whether from the evidence adduced by the Petitioner, the marriage between the parties could be held to have broken down irretrievably.”

Arguing the sole issue for determination, the learned counsel for the Petitioner submitted that it is the prayer of the Petitioner that the Court grants his reliefs for the dissolution of the marriage. He said that in his evidence, the Petitioner reiterated his prayer for the dissolution of marriage and gave reasons for the breakdown of the marriage but the Respondent did not file any answer to the Petition before this Honourable Court.

He submitted that these pieces of evidence were uncontroverted so the Court can draw the inference that the two parties are no longer interested in the marriage. Counsel cited ***Section 15 of the Matrimonial Causes Act*** which provides as follows:

(1) A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the Court by either party of the marriage upon the ground that the marriage has broken down irretrievably.

(2) 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:-

(d) That the Respondent deserted the Petitioner for a continuous period of 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.”

He posited that by ***section 15(2) (d) of the Matrimonial Courses Act***, the Petitioner must establish desertion for a continuous period of one year immediately preceding the presentation of the Petition before the Court can hold that the marriage has broken down irretrievably. He submitted that the Petitioner in this case has established that the Respondent deserted him since January, 2023, which is more than a year as stipulated in ***paragraph (d) of the subsection***.

He submitted that the Petitioner’s evidence that the Respondent left the Matrimonial home in January, 2023 without returning is sufficient proof that the parties have lived apart for at least one year before presenting this Petition.

Counsel submitted that the Respondent does not object to the granting of the reliefs sought and that this can be inferred from the fact that the Respondent never filed an answer or indicated any objection to the granting of the relief sought by the Petitioner. He referred the Court to ***Section 15 (2) (e) of the Matrimonial Causes Act.***

Counsel submitted that that the parties having lived apart for more than one year, the marriage has broken down irretrievably and he cited the cases of ***KALEJAIYE VS KALEJAIYE (1986) Vol. 11 QLRN 162*** and ***AKINWALE V AKINWALE (2010) 31 WRN 129 at 134.***

On the reliance on unchallenged evidence, learned counsel referred the Court to the case of ***AKOJU V ADEGOKE (2017) 12 WRN, PAGE 119 at 128.***

He therefore urged this Court to hold that having particular regard to the accumulation of the stated facts, the behavior of the Respondent is such that the Petitioner cannot be reasonably be expected to live with the Respondent and that the marriage has broken down irretrievably.

Finally, he urged the 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. Ekiola (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.*** Thus, even where the evidence is unchallenged, the trial court

has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim. See: *Gonzee (Nig.) Ltd. vs. Nigerian Educational Research and Development Council (2005) 13 NWLR (Pt.943) 634 at 650.*

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

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

- 1. Whether the Petitioner has proved that the marriage has broken down irretrievably?;and*
- 2. Whether the Petitioner is entitled to be granted unrestricted access to the two 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 Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of this Petition.

By virtue of *Section 15(2) of the Matrimonial Causes Act*, the Court upon hearing a petition for dissolution of a marriage shall hold that the marriage has broken down irretrievably if, but only if the petitioner satisfies the Court of one or more of the following facts namely:

- a) that the respondent has willfully and persistently refused to consummate the marriage;*
- b) that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*

c) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;

f) that the parties to the marriage have lived apart for a continuous period of at least 3 years immediately preceding the presentation of the petition;

g) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under the law; and

h) that the other party to the marriage has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

In effect there are eight grounds for divorce and proof of one of these grounds or facts is in the eyes of the law, conclusive proof of irretrievable breakdown of the marriage. See *Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383*.

A Court cannot dissolve a marriage or declare a marriage to have broken down though it appears the marriage has broken down irretrievably unless one of the listed facts is established by the petitioner. The law requires that the petitioner should state clearly the specific ground or grounds for divorce as listed in *Section 15(2)* above. See *Ibrahim v. Ibrahim (supra)* and *Damulak v. Damulak (2004) 8 NWLR (Pt. 874) 151*.

The law provides that in matrimonial causes, a matter or fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court. Thus in divorce suits, a decree shall be pronounced if the Court is satisfied on the evidence that a case for the Petition has been proved.

In the instant case the evidence adduced at the trial is to the effect that the Respondent deserted their matrimonial home on or about the month of January 2023. This petition was filed on the 12th of March, 2024.

The Petitioner testified that after the Respondent left her matrimonial home, he made several efforts to call her back but she refused and insisted on returning to her parents' home which she later left for a rented apartment.

By virtue of the provisions of *section 15(2) (d) of the Matrimonial Causes Act*, the evidence adduced is sufficient proof that the marriage has broken down irretrievably.

In essence, the Petitioner has established one of the grounds to prove the irretrievable breakdown of the marriage. As earlier stated, proof of one of these grounds or facts is in the eyes of the law, conclusive proof of 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 two children of the marriage. He has agreed that custody of the children can be granted to the Respondent. However, he is seeking an order granting him unlimited access to the children anytime he wants to see them and during their holiday periods.

The Petitioner also alleged that he has been responsible for the upkeep, feeding, school fees and medical expense of the child without any assistance from the Respondent. He submitted that he will continue with the upkeep and welfare of the children of the marriage.

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 two children should be given to the Respondent and the Petitioner is entitled to unlimited access to the children.

I therefore 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) An Order of decree of Dissolution of the marriage; and*
- 2) An Order that the Petitioner is allowed unlimited access to the children of the marriage anytime he wants to see them and during their holiday to enable the Petitioner participate fully in their welfare.*

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.AKHIHIRO
JUDGE
03/07/2025

COUNSEL:

- 1. B. A. ILUOBE ESQ.-----PETITIONER**
- 2. UNREPRESENTED-----RESPONDENT**