**ADEREMI ADEDAMOLA AJIDAHUN**

**V.**

**MRS. DAPHINE OTERI AJIDAHUN**

IN THE COURT OF APPEAL, LAGOS JUDICIAL DIVISION

17TH JANUARY 2000

CA/L/124M

**LEX (2000) - CA/L/124M**

**OTHER CITATIONS**

3PLR/2000/9 (CA)

(2000) 1 NWLR (Pt.654) 605

**BEFORE THEIR LORDSHIPS**

GEORGE ADESOLA OGUNTADE, JCA

SULEIMAN GALADIMA, JCA

AMIRU SANUSI, JCA

**BETWEEN**

ADEREMI ADEDAMOLA AJIDAHUN

**AND**

MRS. DAPHINE OTERI AJIDAHUN

**ORIGINATING COURT**

LAGOS HIGH COURT

**REPRESENTATION**

C.A. CANDIDE–JOHNSON for the appellant

KEHINDE SOFOLA, SAN – for the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

EDUCATION AND LAW – CHILD CUSTODY PROCEEDINGS:- Evidence that child requires special education – Evidence that a parent has been providing suitable education for child of the marriage for which divorce petition has been granted – Relevance in determining proper custodial orders

HEALTHCARE AND LAW – CHILD CUSTODY PROCEEDINGS:- Evidence that child has since birth had a precarious health condition, including asthma and suffers from delayed child development requiring daily medication and special education – Parent who proves history in providing that required care – Whether entitled to custody of child in divorce proceedings

FAMILY LAW - MATRIMONIAL CAUSES - DIVORCE:- Petition for divorce on ground marriage had broken down irretrievably section 15(e) (f) of the Matrimonial Causes Act – Requirement for at least 3 years separation - What petitioner needs to prove

FAMILY LAW – MATRIMONIAL CAUSES – DIVORCE:- Proceedings under Matrimonial Causes Rules, Order VII Rule 1 (i) (a) – (d) – Requirement that Respondent file an answer to the petition if he so wanted to, after due Service – Effect of failure thereto – Power of Court under provisions of Order XI Rule 39(1), (2) and (3) of the Matrimonial Causes Act to issue a Certificate that suit was ready for trial in the absence of an appearance and/ or an Answer by the Respondent – Whether breach of constitutional right to fair hearing

FAMILY LAW - – MATRIMONIAL CAUSES – DIVORCE PROCEEDINGS:- Rule that the court should always merely maintain supervision over marriage contracts like in all other contractual obligations – Whether court obliged not to lend its support to parties who try by collusion to determine their marriage – Justification

FAMILY LAW – MATRIMONIAL CAUSES – CUSTODY OF CHILD:- Duty of court to take the welfare of the child into consideration before making order as to custody – Relevant evidence thereto – Healthcare and educational needs of child – Duty fo court thereto

CHILDREN AND WOMEN’S LAW:- *Children/Women and Divorce/Justice Administration* - What a petitioner must prove to succeed – When court may properly grant petition as to divorce and custody of child without the appearance of one party to the marriage

*Children and Education/Healthcare* – Child with special needs requirement – Asthmatic with long stranding health condition – Duty of court to consider nature of education and care required in granting custody to contending parents during divorce proceedings

CONSTITUTIONAL LAW AND HUMAN RIGHTS - FAIR HEARING:– Essence of and fundamental nature – Implication for judicial proceedings where not observed – Default judgment – When default judgment based on the undefended and uncontradicted evidence of plaintiff may deemed not to be in breach of fair hearing

CONSTITUTIONAL LAW AND HUMAN RIGHTS– FAIR HEARING:- Issue of Service of court processes – Whether fundamental to the jurisdiction of the Court – Where there is no proof of no proper service - Whether renders action as improperly constituted and deprives Court of jurisdiction to entertain action

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Service of writs – Fundamental nature of - Need for the Defendant to be served with the process so as to enable him appear in Court to defend the relief being sought against him

ACTION – SERVICE OF WRITS:- Proof of service of writs - When Bailiff has sworn to the proof of service – Whether that is in law a compelling prima facie proof of Service of writ – How rebutted

ACTION – SERVICE OF WRITS:- Service by substituted means – What constitutes proper execution of same – Pasting on last known address of defendant - When deemed effective

ACTION – SERVICE OF WRITS:- Challenge of proper service of writ by substituted means on ground that it was secured through deception/fraud – Burden of proof – On whom lies – Duty on defendant to either prove by credible evidence alleged deception/fraud or apply to set it aside or even an appeal against the said order.

ACTION – DEFAULT JUDGMENT:- Default judgment – Application to set aside on ground that there was no default upon which court could presume to grant same and that the said judgment was a nullity having been obtained in such a manner as to deny the Appellant fair hearing guaranteed under the constitution – What must be proved

ACTION – UNCHALLENGED EVIDENCE:– Civil proceedings – Duty of court not to permit indolent or unwilling party to frustrate or depress a party who has genuine complaint – When entitles court to act on the unchallenged evidence before it from just one of the parties

EVIDENCE – Uncontroverted and unchallenged evidence – Duty of court thereto

EVIDENCE - AVERMENT:- Averment that party was not properly and duly served with the petition at a place where he was living or at his last known place of abode – Claim that party was out of the country at time of substituted service of writs – How proved – Whether presentation of international travel document is necessary

JURISDICTION:- Rule due appearance by the party or his Counsel are the fundamental conditions precedent required before the Court can have competence and jurisdiction to hear a matter – Justification under Principle of Natural Justice

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Respondent filed a petition against the Appellant for decree of dissolution of marriage on the sole ground that the marriage has broken down irretrievably by reason of the parties to the marriage having lived apart for a continuous period of at least three years immediately preceding the presentation of the Petition. While the requisite notice was made to the Appellant, he failed to file a brief or an appearance leaving the petition undefended.

On 13th February 1977, the trial judge granted an order of Decree Nisi for the dissolution of marriage between the Appellant and the Respondent.

DECISION(S) APPEALED AGAINST

Trial court also granted custody of the only child of the marriage to the petitioner. The responsibility for the education of the child from kindergarten school to the University Education level and the cost of such education was to be borne by the petitioner, while the Appellant had free access to the child during reasonable hours of the day.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT(S):*

"1. Whether the Appellant was denied fair hearing and if a miscarriage of justice has occurred?

2. Whether the refusal to hear the Appellant was not a perversion of the undefended divorce procedure."

*BY RESPONDENT(S)*

"Whether in the light of facts of this case, the trial judge was right in law in proceeding to hear the divorce petition as undefended and if any miscarriage of justice has occurred.”

*AS ADOPTED BY COURT*

*“*It is needless for the Appellant to fragment or split issues. They are merely repetitive. I am of the view that the simple and single issue formulated by the Respondent above will determine this appeal.”

DECISION OF COURT OF APPEAL

1. The learned trial judge took the interest, rights and welfare of the child into consideration before granting the custody to the respondent.

2. The court has a delicate and difficult task in determining to whom the custody of the child should be granted. To make this task lighter, the parties are required to furnish the court with the necessary materials and evidence. The respondent did and gave evidence. Nothing whatsoever was placed before the lower court by the appellant, despite ample opportunity he had to do so. It is only the evidence of the respondent on the issue of custody of the child which was before the lower court. Where the defendant does not call evidence at trial, the onus of proof on the plaintiff will be discharged on a minimal of proof.

3. Failure of the appellant to submit his case for consideration as he was required to do under the Rules of Court makes his submissions on the responsibilities sought to be accorded him untenable. The learned trial judge was right in hearing of the petition undefended. There is no denial of fair hearing in the circumstance.

4. The evidence before the court has not been challenged, or contradicted by the appellant. The evidence of the respondent is to the effect that since the birth of the child, he has a precarious health condition, especially asthmatic condition. The respondent has been solely responsible for the child education as well as his physical and mental welfare, daily medication and the constant attention he needed since the appellant abandoned him from the date of birth.

5. Appeal fails. It has no merit and it is dismissed. The decision of the lower court is affirmed and the respondent is entitled to costs.

**MAIN JUDGEMENT**

**SULEIMAN GALADIMA, JCA (delivering the leading judgment)**

The Respondent was the Petitioner in Suit No. WD/195/95 before the Lagos High Court. He filed a petition against the Appellant for decree of dissolution of marriage on the sole ground that the marriage has broken down irretrievably by reason of the parties to the marriage having lived apart for a continuous period of at least three years immediately preceding the presentation of the Petition.

On 13th February 1977, the trial judge granted an order of Decree Nisi for the dissolution of marriage between the Appellant and the Respondent. He also granted custody of the only child of the marriage to the petitioner. The responsibility for the education of the child from kindergarten school to the University Education level and the cost of such education was to be borne by the petitioner, while the Appellant had free access to the child during reasonable hours of the day.

The Appellant was dissatisfied with this judgment and has accordingly brought this appeal against it. Two grounds of Appeal were filed. Parties exchanged briefs. Appellant further filed Reply Brief. In his Brief the Appellant identified two issues for determination as follows:

"1. Whether the Appellant was denied fair hearing and if a miscarriage of justice has occurred?

2. Whether the refusal to hear the Appellant was not a perversion of the undefended divorce procedure."

The Respondent on the other hand formulated a single issue for determination as follows:

"Whether in the light of facts of this case, the trial judge was right in law in proceeding to hear the divorce petition as undefended and if any miscarriage of justice has occurred.

It is needless for the Appellant to fragment or split issues. They are merely repetitive. I am of the view that the simple and single issue formulated by the Respondent above will determine this appeal.

The Appellant raised the issue of fair hearing which is fundamental in any judicial proceedings. The learned trial judge compelled by the antecedents of this matter proceeded to hear the petition as undefended. Whether the Appellant was given reasonable opportunity to present and defend his case, this will be found from the peculiar facts of this matter as presented before the lower Court and the analysis of the Rules of the Court that govern matrimonial proceedings.

The facts presented before the lower court were simply this. The Respondent filed her petition on 31/10/95 for dissolution of her marriage with the Appellant celebrated on the 26th October, 1991. After all relevant documents (which will be referred to later in the course of this judgment) had been served on the Appellant and he failed to file any document to challenge the petition the Registrar set down the petition for trial at the Lower Court as undefended. At a stage the Respondent brought a motion for accelerated hearing of the undefended petition. On the10th day of February 1997, the motion was heard and an order for an accelerated hearing of the petition was granted and the hearing of the petition was fixed for the 12th day of February 1997. On that date the Respondent appeared in Court with her Counsel but the Appellant was absent in Court. However, his counsel who appeared in Court applied for an adjournment of the hearing of the Suit. Learned trial judge took arguments from both counsel and having been satisfied that the Appellant had earlier filed a petition for dissolution of the marriage in another Suit in 1994 and it was struck out for want of diligent prosecution, he decided to proceed with the hearing of the petition and accordingly refused to grant an adjournment. Consequently, the learned trial judge gave judgment in favour of the Respondent.

Learned Counsel for the Appellant has contended that the Appellant was denied fair hearing and as such this has occasioned miscarriage of justice. He made the following submissions:

(i) That even if the Court would have reached the same decision after hearing the Appellant, the obvious denial of fair hearing is a substantial fault in the determination and the proceedings are a nullity. He relied on the case of African Continental Bank v. Losada (1995) 7 NWLR (Pt. 405) 26 at 53.

(ii) That the conduct of the trial in the lower Court was contrary to principle and practice of the Court. That the Court ought to have heard first the motion for extension of time before deciding that the suit in which he ordered service of hearing notice on 10/2/97 has suddenly become undefended on 12/2/97. Relying on the case of Mohammed v. Musawa (1985) 3 NWLR (Pt. 11) 95 at 96, the learned counsel submitted that the Judge’s view that the motion for extension of time was not before him was not significant as he ought to have had the motion indicated by Counsel from the bar, brought from the Registry.

(iii) That the learned trial judge ought not have heard the petition as an undefended ex parte action even in the presence of the Appellant.

(iv) That beyond the manner in which the trial was conducted, there was no proper service of any process including the petition itself, because

(a) the order to obtain substituted service of the petition was obtained by deception and is liable to be set aside,

(b) there was no order for their service by substitution either by posting or by serving another persons to wit, the mother of an adult Nigerian whose address (opposite the High Court of Lagos) was well known to his wife.

I am of the firm view that the issue of Service of processes is fundamental to the jurisdiction of the Court. If there is no proper service it follows that the action is improperly constituted and the Court is without jurisdiction. The Defendant must be served with the process so as to enable him appear in Court to defend the relief being sought against him. Due appearance by the party or his Counsel are the fundamental conditions precedent required before the Court can have competence and jurisdiction for this very well accords with the principle of natural justice. See Union Beverages Ltd. v. Adamite Co. Ltd. (1990) 7 NWLR (Pt. 162) 348 at 356; Madukolu v. Nkemdilim (1962) 2 SCNLR 341.

It would appear to me that when the bailiff was unable to effect personal service of the petition for Divorce verifying affidavit; Certificate relating to reconciliation and Notice of Petition after several attempts, on the Appellant, an application was then made and granted for substituted service, by posting at the Appellant’s last known place of abode. This was at No. 82 Abule Nla Road, Ebute-Metta. The Baliff at paragraphs 4, 5, 6, and 7 of the Affidavit in support of the motion deposed as follows:

"4. That the petition for Decree of Dissolution of marriage, verifying Affidavit, Certificate Relating to reconciliation, Notice of Petition and the Acknowledgment of Service in this suit filed on 31st October 1995 were assigned to me for service on the Respondent.

"5. That my efforts at effecting Service of the said process on the said Respondent made on 15th and 21st September, 1995; 3rd and 9th January, 1996 were unsuccessful.

"6. That on each occasion, I visited the residence of the Respondent for the purpose of serving the said process of Court, I met persons on the premises who confirmed that the Respondent lived at the said address that he could only be found between 11.30 p.m. and 5.30 a.m. every day.

"7. That it is not reasonably practicable to effect personal Service of the said processes on the Respondent because of the reason deposed to in paragraph 6 above."

As already indicated above the petition processes were duly served by substituted Service after it became virtually abortive to service (sic) the Appellant personally. The application for substituted Service was made almost seven months after the filing of the petition. By virtue of Order VI. Rule 7 of the Matrimonial Causes Rules 1990 and inherent jurisdiction of the Court the granting of the application was proper. The learned judge took cognisance of the High Court Bailiff’s Affidavit in support of the motion. Having sufficiently disclosed the fruitless efforts made by the Bailiff to effect personal service order was made for substituted service: See Haruna v. Ladeinde (1987) 4 NWLR (Pt. 67) 941 at 954 – 955.

When the Bailiff has sworn to the proof of service, that is in law a compelling prima facie proof of the Service on the Appellant of the divorce petition. It is in his Brief the Appellant sought to challenge belatedly the Service of the petition processes on him by substituted service on the ground that it is secured through deception. The burden is on the Appellant to debunk the presumption of Service of the petition. This is done by placing materials which will unable the Court decide on the issue of Service and it will require credible evidence upon which the Court is obliged to rely in arriving at such a decision. If the order for substituted Service of the petition and other processes made by the lower Court on 10th June 1996 was obtained by fraud or deception there has not been any application by the Appellant to set it aside or even an appeal against the said order. I agree with Mr. Kehinde Sofola learned Senior Counsel for the Respondent, that the arguments adduced on it are simply non-sequitur. He made an important alternative submission that the Appellant’s application for extension of time to file his Answer to the divorce petition which is found at page 20 – 21 of the Record conclusively belies the suggestion that the processes were not served. I think Mr. Sofola is right in his submission because in paragraphs 4 and 5 of the Affidavit in support of the application the Appellant averred as follows:

"4. That in making enquiries he discovered that the petition was pasted on his mother’s residence at 82, Abule Nla Road,Ebute Metta, where he used to live but where he has ceased living prior to the pasting.

5. That he would have learnt of this petition and responded to same earlier but because for a larger part of 1996 including the period when the petition was pasted he was out of the country". (italics supplied).

Does it not become apparent flowing from the above averments that the Appellant was properly and duly served with the petition at a place where he was living or at his last known place of abode? Certainly it does. It follows also by his admission that he would have received the processes served at No. 82, Abule Nla but for the fact that he was out of the country for a larger part of 1996. The Appellant should have indicated when he ceased to live at No. 82 Abule Nla and also when he left this Country to which country and when he returned. There are many ways he could have proved this. The easiest was for him to have exhibited his passport or other traveling documents in order to substantiate these averments above. I am of the strong opinion that in view of the Appellant’s clear depositions, his submission that the order or substituted Service was obtained by "deception" becomes untenable, tenuous and flimsy. For, if the Appellant was away from the country as he had claimed for considerable period of time in 1996 including the period when the petition was pasted, then personal service of the processes would have become extremely difficult. The Respondent could have all the same been quite right to apply to serve the processes by substituted Service. That was the only alternative the Respondent had. She had no other choice. I am of the view that the Appellant was duly served with all the relevant petition papers. The fact of service on him stands unchallenged and it is not contradicted. The Appellant having been properly and duly served, the lower Court was competent and had jurisdiction to hear the Respondent’s petition.

It is the Appellant’s contention also that there was no default upon which the learned trial judge could presume to grant a default judgment. The Appellant seeks to set aside the said judgment as it was obtained in such a manner as to deny the Appellant fair hearing guaranteed under the constitution and is a nullity. The Matrimonial Causes Rule Order VII Rule 1 (i) (a) – (d), requires the Appellant to file an answer to the petition if he so wanted to, after due Service. In the absence of an appearance and/ or an Answer by the Appellant to the divorce petition, the Registrar of Court issued a Certificate that the suit was ready for trial. This is in line with the provisions of Order XI Rule 39(1), (2) and (3) of the Matrimonial Causes Act. The answer to the question whether the Appellant was given a reasonable opportunity to present him case, has been shown in the peculiar facts of this matter. It has been said earlier and it is very important that I must reemphasise here the very fundamental point on which both parties are ad idem. The petition was based on section 15(e) (f) of the Matrimonial Causes Act, that is, 3 years separation. The Appellant had not provided any answer as the law required. In the absence of any contrary evidence the lower Court could not exercise any discretion in the matter in favour of the Appellant. When the learned trial judge granted an application for accelerated hearing on 10/2/97 and adjourned the matter for hearing on 12/2/97, he further ordered that Hearing Notice should be forwarded to parties to appear in court for the hearing of the petition. The Hearing Notice was duly served at 82, Abule Nla Road, Ebute-Metta. Affidavit of service was duly made available to court. Appellant cannot be heard to complain that he did not receive the hearing notice. He had deposed in his Affidavit in support of his application to file an answer to the divorce petition out of time that he got notice of the petition for the first time on 10/2/97.

It is noted that even on 12/2/97 when the matter came up for hearing the Appellant was not present in court despite the service and acknowledgment of the receipt of hearing notice on him. In his Affidavit in support of motion for extension of time to file Appellant’s Answer, one Jimmy Ufot a Litigation Clerk in the Appellant’s Chambers, deposed thus:

"1. That I am a litigation clerk in Strachan partners, solicitors to the Respondent/Applicant and am authorised by my employers and the Respondent/Applicant to depose to this Affidavit.

2. That on 12th day of February 1997 at about 2 p.m. in the office of my employers, the respondent/applicant informed me and I verily believe him as follows:

3. That he got notice of this petition for the first time on the 10th day of February 1997 when the hearing notice was served and when he and his counsel got to court on the 12th day of February 1997 he learnt that the petition had been served by substituted means." (italics supplied)

The learned counsel for the Appellant sought for an adjournment on the grounds that the Appellant was served the previous day. The learned trial judge refused the application for adjournment and proceeded with the hearing in the light of the fact that the suit has been set down for hearing as undefended and order for accelerated hearing granted.

The paraphrase of the relevant portion of the Ruling and subsequent judgment of the learned trial judge on 13/2/96 are as stated below. First in the Ruling the learned trial judge stated thus:

"Petitioner had given evidence in this petition and has concluded her evidence in a petition set down for hearing as undefended. Respondent was duly served with all the relevant documents related to divorce and up till date the Respondent had not entered appearance in the suit. Hearing was commenced after the court had granted accelerated hearing of the petition. Respondent had not given any reason why nothing had been filed till date."

This is the portion of the ruling of the learned trial judge after he had asked both counsel to the parties in the suit to address the court of the need for the Appellant to give evidence as a result of sudden appearance of counsel for the Appellant in court on the 12th day of February, 1997. The Learned trial judge reiterated further in his judgment thus:

"On the 12th day of February 1997, petitioner appeared in court with her counsel Mr. Kehinde Sofola SAN. Respondent was absent in court. But Mr. O.J. Ajakpoyi Esq. appeared for the respondent and applied for an adjournment of the hearing of the suit. After listening to arguments of both counsel and on being satisfied that the Respondent had earlier filed a petition for dissolution of the marriage before Sotuminu J in Suit No. ND/I/94 on the 14th of January, 1994 and which petition was struck out because of want of prosecution on the 25th day of September, 1995. I decided and refused with the hearing of the petition and refusal to grant an adjournment."

The appellant agrees that he does not oppose the divorce. A point has been made in the appellant’s Reply Brief. The court should always merely maintain supervision over marriage contracts like in all other contractual obligations. I agree with the learned counsel for the appellant that parties cannot by collusion determine a marriage, as collusion itself is one of the bars to a petition for divorce. Certainly, the fact that the appellant had earlier on initiated petition for dissolution of the marriage in another court form sole basis for judgment given in favour of the respondent. This fact is brought about to show that the appellant does not now oppose the divorce, as he had once done; the very fact that the appellant has himself undispatably (sic) admitted.

The analysis of peculiar fact and the other antecedents of the matter as given above, no doubt, justified the petition being heard undefended. The respondent did all the law requires of her in the circumstance. She led positive evidence in support of her divorce petition. The appellant was given opportunity to defend the petition when the matter came up for hearing there was nothing filed by the appellant before the court to indicate that he was quite ready to contest the petition. The essence of the concept of fair hearing is that a party ought not to be deprived of what he is entitled in law.

However, our civil jurisprudence does not permit indolent or unwilling party to frustrate or depress a party who has genuine complaint. The appellant cannot be coerced into attending proceedings and defend the petition when he has clearly shown and exhibited indifference despite due service of all the court processes on him. The positive evidence given by the respondent in support of her divorce petition was not challenged or contradicted, by the appellant who was given opportunity to do so. The learned trial judge was right to act on the unchallenged evidence before him. See Odeinsi v. Bamgbala (1995) 1 NWLR (Pt. 374) 641; Agagu v. Dawodu (1990) 7 NWLR (Pt. 160) 56 at 69.

The appellant has contended in his Brief that the learned trial judge acted contrary to the laid down principle and practice, when he refused to hear his application for extension of time to enter appearance and file an Answer to the petition. The case of Mohammed v. Musawa (1985) supra relied upon by the appellant is not on all fours with the instant case. In Mohammed’s case, the application for extension of time within which to file and serve the defendant’s statement of defence was not only filed but it was served on the plaintiff’s counsel in court. In the instant case counsel for the appellant only informed the court orally that the application was filed. The court was not expected to conjecture the veracity of the appellant’s assertion. It is not for the Court to order for the production of a copy of a motion once a Counsel asserts that he has filed one without furnishing the court with a copy of what was filed and the receipt issued to indicate the seriousness in defending the matter. The appellant did not do either. The least the appellant could have done, if indeed anything was filed, was for him or Counsel to produce from the Bar his own copy and receipt for filing to the Court. This procedure is quite familiar and consistent with the practice in our Courts.

I agree with Mr. Sofola SAN that the issue of dissolution of the marriage is no longer germane, to the appeal, having been clearly admitted and conceded by the appellant. In the circumstances of this matter, I am of the opinion that the learned trial judge has been quite fair to both parties. In fairness to the appellant he indicated that he would contest the custody of the only child of the marriage. The learned trial judge conscious of the welfare and rights of the child ruled in this regard thus:

"Respondent is at liberty to bring an application at any time in respect of the welfare and custody of the child of the marriage and Court is ready and willing to hear any application by either of the two parties any time such application is brought."

Although it would appear that the appellant did not take the advantage of this ruling, but he now complains that the fundamental rights of the infant male child were ignored by the learned trial judge. It must be noted that the appellant did not file any appeal challenging that ruling. Consequently, this ruling remains valid and binding. This is the legal position. However, since the learned trial judge made a finding on the question of custody of the child in his judgment, and the appellant complains in his 1st Ground of Appeal and formulated an issue for consideration by this court, his complaint ought to be so considered.

I am of the view that the learned trial judge took the interest, rights and welfare of the child into consideration before granting the custody to the respondent. The court has no doubt, a delicate and difficult task in determining to whom the custody of the child should be granted. To make this task lighter, the parties are required to furnish the court with the necessary materials and evidence. The respondent did and gave evidence. Nothing whatsoever was placed before the lower court by the appellant, despite ample opportunity he had to do so. It is only the evidence of the respondent on the issue of custody of the child which was before the lower court. Where the defendant does not call evidence at trial, the onus of proof on the plaintiff will be discharged on a minimal of proof. See Aina v. U.B.A. Plc. (1997) 4 NWLR (Pt. 498). 181 at 189. The evidence before the court has not been challenged, or contradicted by the appellant. The evidence of the respondent is to the effect that since the birth of the child, he has a precarious health condition, especially asthmatic condition. The respondent has been solely responsible for the child education as well as his physical and mental welfare, daily medication and the constant attention he needed. The respondent told the lower court that the child suffers from delayed child development which requires that the child be given special education. She also said that the respondent has never shown any concern for the welfare and development of the child, as he had no time and facility to take care of the child. That she had been responsible for the upkeep and education of the child from birth since the appellant abandoned him from the date of birth.

Failure of the appellant to submit his case for consideration as he was required to do under the Rules of Court makes his submissions on the responsibilities sought to be accorded him untenable.

The right of a party to be heard is important but it must always be confined within the circumscribed limits. It is never allowed to run wild. See London Borough of Hounslow v. Twickennam Garden Dev. Ltd. (1970) 3 All E.R. 326 at 347. In the case at hand the appellant having failed to take any steps whatsoever despite proof of service of all the court processes, he did not impress me that he wanted to contest the dissolution of marriage. The learned trial judge was right in hearing of the petition undefended. There is no denial of fair hearing in the circumstance.

In the final conclusion, this appeal fails. It has no merit and it is dismissed. The decision of the lower court is hereby affirmed. The respondent is entitled to costs as assessed in the lower court and in this court which I fix at N3,000.00

**GEORGE ADESOLA OGUNTADE, J.C.A.**

I read before now a copy of the lead judgment by my learned brother Galadima JCA. I agree with his reasoning and conclusion.

I would also dismiss the appeal. I also affirm the judgment of the lower court. I abide by the order on costs.

**AMIRU SANUSI, J.C.A.**

I agree.

**Cases referred to in the judgment**

African Continental Bank v. Losada (1995) 7 NWLR (Pt. 405) 26 at 53

Agagu v. Dawodu (1990) 7 NWLR (Pt. 160) 56

Haruna v. Ladehinde (1987) 4 NWLR (Pt. 67) 941

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

Mohammed v. Musawa (1985) 3 NWLR (Pt. 11) 95

Odeinsi v. Bamgbala (1995) 1 NWLR (Pt. 376) 641

Union Beverages Ltd. v. Adamite Co. Ltd. (1990) 7 NWLR (Pt. 162) 348