**MORRISON A. LABODE**

**V.**

**ERINOLA O. LABODE**

HIGH COURT LAGOS STATE

FEBRUARY 28, 1972

SUIT AD/70/70

**LEX (1972) - AD/70/70**

OTHER CITATIONS

3PLR/1972/83 (HC)

**BEFORE HIS LORDSHIP:**

ODESANYA J

**BETWEEN**

MORRISON A. LABODE – Appellant

AND

ERINOLA O. LABODE – Respondent

**REPRESENTATION**

SOMADE for the petitioner.

Respondent in person.

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

FAMILY LAW – Grounds for grant of petition for dissolution of marriage – Adultery on the part of both parties to the marriage – Whether adultery simpliciter without more would be sufficient ground to ground irretrievable breakdown of marriage - Exercise of court discretion thereto

FAMILY LAW:- Petition for divorce on specific grounds – ‘Irretrievable breakdown’ due to adultery - Need to adhere to grounds recognized by applicable law

EDUCATION AND LAW:- Custodial proceedings and education of children of divorced parents – consequential orders of courts thereto

CHILDREN AND WOMEN LAW: Women and Matrimonial Causes/Divorce – Women and Justice Administration - Dissolution of marriage – Need to satisfy grounds set out by statute - Children and Divorce – Custody, Education and maintenance of children of divorced parents - Consequential orders thereto

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Cross petition filed irregularly or out of time – Implications for facts pleaded therein

PLEADINGS AND MATRIMONIAL CAUSES:– Reliance on fact which is badly pleaded – Whether can satisfy legal standards of proof

**MAIN JUDGMENT**

**ODESANYA J.:**

This is a husband’s petition for the dissolution of his marriage celebrated on October 29, 1953, with the respondent, a Senior Supervisor at the Federal Ministry of Communications. The relief is based on the ground that the marriage has broken down irretrievably. The statutory facts pleaded in support of the allegation that the marriage has thus broken down are:

(1) That the respondent has since the celebration of the marriage committed adultery and that she has been adjudged guilty of adultery by the Lagos High Court in suit No. WD/61 /65.

(2) That both the petitioner and the respondent have been living apart for a continuous period of at least three years prior to the presentation of this petition.

(3) That as far back as January 1967 and up till now the petitioner and the respondent have continuously been living apart.

The petitioner prays for the exercise of the discretion of the court in his favour notwithstanding his adultery during the marriage.

The respondent cross-petitioned for the dismissal of the petitioner’s prayer and the dissolution of the marriage on the same ground that the marriage has irretrievably broken down because:

(a) the petitioner has been adjudged guilty of adultery since the celebration of the marriage by the High Court of Lagos in suit No. WD/61/65.

The particulars of the adultery are:

(i) that some time in 1957 the petitioner met one Miss Biola Dosunmu in England and they lived together as husband and wife in that country. The petitioner had a baby girl by the said Miss Biola Dosunmu on August 8, 1958, and which the baby girl was christened Biola Labode by the petitioner.

(ii) from 1964 to the present date the petitioner in several places in Lagos and Zaria committed adultery with one Madam Omotayo Bodunrin, the party cited, and the said woman now lives with the petitioner as his wife.

The other ground relied upon in support of the respondent’s plea of irretrievable breakdown is that the petitioner has deserted the respondent for a period of at least three years preceding the presentation of the petition. The respondent avers that the desertion originated on June 22, 1965, when the petitioner forced the respondent out of the matrimonial home after taking the party cited in to live with him as his wife therein. The petitioner and the respondent have been living separately and apart.

Both the petition and the cross-petition suffer from defects which in the case of the petition are curable but are fatal in that of the cross-petition. These defects will be dealt with later on.

The history of the marriage is a very unhappy one. The petitioner left for the United Kingdom in January 1955, a year and a quarter after the celebration of the marriage on October 29, 1953. He did not return home until December 1960 although he did not take his wife along with him. When he arrived he and his wife were strangers to each other for more reasons than one. He met in England one Miss Biola Dosunmu whom he had known since he was young. His rediscovery of her led to an affair from which a baby emerged in 1958. The respondent on her part had while her husband was away in the U.K. temporarily transferred her affections to one Mr. Soji Bamgbose of the United Africa Company for whom she just missed having a child owing to a miscarriage in the fourth month of her pregnancy. The record of her illicit affair with the man was sedulously but indiscreetly preserved in a diary which her husband found in her wardrobe. Some of the entries in the diary including unfortunate references to the miscarriage and a weekend at Soji Bamgbose’s house are reproduced in exhibit “B”, a certified copy of the judgment in WD/61/65. The entries are enough to chill the affection of the most devoted husband and unfortunately the petitioner is far from being a loyal or devoted husband. Within four years of his return to Nigeria the petitioner drifted into another affair, this time with the woman cited in the cross-petition, Madam Omotayo Bodunrin. On January 3, 1965, matters came to a head. The petitioner brought the woman cited into the matrimonial home and installed her there. He informed some of his relatives that he intended to marry the woman and send the respondent away.

The three of them, the petitioner, the respondent and the woman now occupied the matrimonial home which the law strictly reserved for the husband and the wife. Every time the respondent complained about the woman cited she was beaten up by the petitioner who seemed to have teamed up with the other woman in order to make life so intolerable for the respondent that she would retire from the matrimonial home. In her tribulation the respondent’s parents-in-law stood by her until she was squeezed out of the matrimonial home by the combined pressure of the woman cited and the petitioner. The petitioner and the woman now live in Zaria as man and wife. Before they left for Zaria at the end of 1966 or early in 1967, the petitioner and the woman cited had succeeded in ejecting the respondent from the matrimonial home for good. This was just after judgment was delivered in suit No. WD/61/65 (exhibit “B “) on December 5, 1966. The Chief Justice dismissed the petition and the cross-petition of the respondent and the petitioner in the present case. He found proved the adultery pleaded against the present petitioner and Miss Biola Dosunmu and Madam Omotayo Bodunrin, the woman cited herein. He found the respondent in the instant case also guilty of adultery with Soji Bamgbose to whom reference was made above. He however refused to exercise his discretion in favour of either of them because they misled and deceived the court.

I would deal with the cross-petition first. It was filed out of time. The Registrar’s directions for trial clearly reflect this fact. The respondent nevertheless neither sought nor otherwise obtained leave to file her cross-petition in the irregular way she did. Furthermore, the grounds which she sets out in the cross-petition for asking that the marriage be dissolved at her instance are not now recognised as such by our law.

She pleaded the petitioner’s adultery with the two women mentioned above but did not do more. The petitioner’s solicitors made a similar mistake. Matrimonial Causes Decree No. 18 of 1970 which now applies to matrimonial causes in the High Court prescribes the grounds upon which reliefs by way of dissolution of marriage must be based. The grounds are enumerated in sections 15 and 16 of the Decree. The general ground which is “irretrievable breakdown“ is in section 15 but the particular or complementary grounds are also important.

A petition of cross-petition must be based on the prescribed general and the relevant particular ground or grounds. See Wilson v. Wilson [1971] 1 All E.R. 465 in which it was held that an answer filed after the coming into force of the (U.K) Divorce Reform Act 1969 even though the petition was filed during the currency of the old law must be based on the grounds set out in the new Act if it seeks as a relief the dissolution of the marriage. The Matrimonial Causes Decree, s. 15 does not recognise adultery simpliciter as proof of irretrievable break-down of a marriage. The adultery to be effective must be coupled with an allegation that the petitioner finds it intolerable to live with the respondent. This may sound like a mere technicality but the Decree prescribes this technicality and it is important. Section 15 (2) (b) of the Decree provides:

“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:

(b) that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.”

In my view adultery simpliciter without more will not support a plea of irretrievable breakdown. Section 15 (2) (b) of the Matrimonial Causes Decree set out above is verbatim et literatum identical with section 2 (i) (a) of the Divorce Reform Act 1969 in England. In interpreting the section, Lloyd Jones J. held in Goodrich v. Goodrich [1971] 1 W.L.R. 1142 that the respondent’s adultery and the petitioner’s finding it intolerable to live with the respondent were independent of one another. Every adultery charged in the present case omits the important words “ and the petitioner finds it intolerable to live with the respondent.” It may be that the petitioner and the respondent omitted this statutory prescription because they had both committed adultery. In fact the petitioner is still committing adultery as he lives with the woman cited even now. A husband who is guilty of adultery can find life intolerable with a wife who has also committed adultery. In fact, social reality in Nigeria is such that husbands often find life intolerable with their wives even when they themselves flourish in adultery openly. The test is subjective. In Goodrich v. Goodrich it was held that the intolerability of life with the respondent does not have to arise from the respondent’s adultery. The approach being a subjective one it appears that the question after the adultery pleaded has been proved is “ what are the present feelings of the petitioner? “ For the reasons set out above I dismiss the cross-petition and hold that the adultery pleaded in the petition cannot support the irretrievable breakdown on which relief is claimed. The cross-petition is of course not properly presented before the court and will for that reason be ignored even if nothing else is wrong with it. The other ground relied upon by the respondent is also defective. I am mentioning this in order to focus attention more on the necessity for going by the provisions of the decree and not allowing oneself to be led astray by the old law. The plea in the cross-petition that the petitioner has deserted the respondent for a period of at least three years preceding the presentation of the petition is different from what the decree prescribes. The decree refers to the period immediately preceding and not just preceding.

The petitioner relies on another fact in proof of the breakdown of the marriage. Although this is badly pleaded yet it amounts to what the decree prescribes. The petitioner and the respondent have lived apart for a continuous period of at least three years immediately preceding the presentation of this petition. This has been established by the evidence of the petitioner and the respondent. The decree recognises as conclusive indication of irretrievable breakdown of their marriage the physical fact of husband and wife living separate lives for a continuous period of three years immediately before the presentation of a petition. The petition therefore succeeds and I pronounce a decree nisi dissolving the marriage of the petitioner and the respondent celebrated on October 29, 1953.

The petitioner and the respondent have agreed that the respondent should have the custody of the two children of the marriage, namely Kofoworola Labode, a girl born on December 3, 1953, and Ololade Labode another girl born on August 22, 1955. I grant the respondent their custody. Both girls are in boarding secondary schools.

The petitioner will be responsible for their secondary and post-secondary education and will bear all expenses incidental thereto. During their holidays the petitioner will pay to the respondent every month £10 for the maintenance of each girl, i.e. £20 per month for the maintenance of both girls. The petitioner did not ask for any order for access to the children and none will be made.

The decree nisi will be made absolute three months hence unless another order is made otherwise. The petitioner will pay to the respondent the costs of the proceedings assessed at 60 guineas.