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APPRAISING JUDICIAL SEPARATION AS AN INTRODUCTORY STEP TO DIVORCE

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Abstract
This paper appraises judicial separation as an introductory step to divorce. Judicial separation is a preliminary step to divorce and not a divorce under the law. The court's pronouncement of judicial separation enables husband and wife to be judicially separated from each other. The court will grant judicial separation, on the petition of one of the spouses. A decree of judicial separation relieves the petitioner of the duty of cohabiting with the respondent. It enables the court to make orders about the division of money and property. This paper discusses the ground upon which the pronouncement of judicial separation can be made. The paper states that the order for judicial separation is similar to the orders which can be made on divorce, without actually terminating the marriage. The paper further states that, a petition for a decree of judicial separation may be based on one or more of the facts and matters, which are contained in Section 15(2) and 16(1) of the Matrimonial Causes Act, 2004. This paper is aimed at revealing the fact that, judicial separation is an introductory step to divorce. The researcher adopted the doctrinal method of research. The paper recommends that there is a need for the law to be reformed to enable the grant of judicial separation by the court to automatically be converted to a decree *nisi* of divorce two years after the pronouncement of judicial separation by the court if the parties are unable to resume cohabitation. The paper concludes that judicial separation is an introductory step to divorce.

Keywords: Marriage, Cohabiting, Judicial Separation, Husband, Wife, Divorce,

1. Introduction
Judicial separation is an introductory step to divorce and not a divorce under the law. But, a petition for which judicial separation is granted can also attract the grant of a decree of divorce. This is because the ground for which a petition for divorce is made is the same as the ground for a petition for judicial separation. Thus, a grant of a decree of judicial separation is an introductory step to divorce. Judicial separation is a formal separation sanctioned by the court, similar to the orders made on divorce, without terminating the marriage. Sections 39 to 46 of the Matrimonial Causes Act [1] contain provisions for judicial separation. A judicial separation is based on one or more of the facts and matters contained in Sections 15(2) and 16(1) of the Matrimonial Causes Act [2]. Thus, it is important to note that most issues relating to divorce are also applicable to judicial separation. But a marriage that is judicially separated is not a marriage that has been dissolved by the court as earlier mentioned, but can be referred to as a partial divorce. Judicial separation enables husband and wife to be separated by the court on the petition of one of the spouses, based on the same ground for a petition for divorce.

There are ways in which judicial separation differs from a divorce. For instance, with respect to judicial separation, a party may still have hope that, there could be reconciliation that may lead to

a discharge of a decree earlier made. But with respect to divorce, none of the parties will nurse the hope that, there could ever be any form of reconciliation, although reconciliation may still occur. However, in Nigeria the prohibition on the institution of proceeding for a decree of divorce within two years of the celebration of marriage except where the leave of court is obtained, is also applicable to petitions for judicial separation.[3]

Moreover, section 44 of the 2004 Matrimonial Causes Act provides that, the grant of judicial separation shall not prevent the institution by the parties to a marriage of proceedings for dissolution of marriage and that the court may in any proceedings for a marriage to be dissolved on the same, or substantially the same facts as those on which judicial separation has been made treat the judicial separation as sufficient proof of the facts that constitutes the ground for which judicial separation was pronounced. In addition, the section provides that, a dissolution of marriage shall not be granted by the court without the petitioner providing evidence that will support the petition. Thus, this paper evaluates judicial separation as an introductory step to divorce. It gave a conceptual examination of judicial separation, the ground for judicial separation and divorce and the application of absolute and discretionary bars to divorce and judicial separation.

2. The Concept of Judicial Separation

Judicial separation is a preliminary step to divorce. It is not a divorce under the law. The degree of judicial separation enables husband and wife to be judicially separated from each other, by the court on the petition of one of the spouses. Judicial separation is a case of a separation of husband and wife, wherein they are ordered to live apart, but remain technically married to themselves because they cannot celebrate a marriage with a third party. The fact is that, they are separated from cohabitation, but are still husband and wife who do not have the privilege of cohabiting with each other.

Divorce a *mensa et thoro* is popularly used in the definition of judicial separation. This is because it was formally or originally known and referred to as divorce a *mensa et thoro*. Hence, judicial separation is a divorce a *mensa et thoro*, which can be said to mean a partial or qualified divorce by which the parties were separated and allowed or ordered to live apart, but remained technically married. The parties are said to remain technically married because they cannot re-marry a third party because a final divorce has not been decreed or pronounced by the court. This form of divorce may be rather freely translated as "from bed and board".[4] Divorce a *mensa et thoro* has been defined by Black's Law Dictionary[5] as, bed and board or from board and hearth. Divorce a *mensa et thoro* has also been defined to mean a divorce from table and bed, or bed and board and that, it is a divorce that is partial or qualified that enabled the parties to be separated and forbidden to live or cohabit together, without affecting the marriage itself.[6] It has been held that this form of divorce did not sever the marital tie, and the parties remained husband and wife.[7] It has also been held that, where this form of divorce is pronounced, neither party could remarry during the spouse's lifetime, and the husband was normally required to provide his wife with permanent support.[8] Thus, this type of divorce, that was abolished in 1857 in England, was the forerunner of modern judicial separation.

Judicial separation is defined to mean a pronouncement of separation of a husband from his wife by a court that is not a complete or absolute divorce and that, it is a "limited divorce" or a "divorce a *mensa et thoro*.[9] Judicial separation has also been defined as a separation of a husband from his wife by the High Court or the country court, which has the effect, so long as it lasts, of making the wife a single woman for all legal purposes, except she cannot marry again and that, similarly the

husband, though separated from his wife, is not by a judicial separation empowered to marry again. [10] Judicial separation was not defined by the Oxford Dictionary of Law, [11] but the reference was made to separation order, with respect to judicial separation order. Separation order was however, defined by this Dictionary to mean a court order that a husband and wife should not cohabit, known as a judicial separation order under the 1973 Matrimonial Causes Act but renamed by the Family Law Act 1996 and that, the order frees a husband and his wife from their marital obligation, but fails to terminate marriage.[12] Thus, separation is appropriate when there are religious objections to divorce or when the parties have not made up their mind whether to divorce or not.

3. The Nature of Judicial Separation

Judicial separation is a creature of statute and was first introduced by the English Matrimonial Causes Act of 1857 to replace the old ecclesiastical divorce which that Act abolished.[13] The prime purpose of a grant of judicial separation is to free the person who petitioned from the duty of cohabiting with the respondent. The action for judicial separation is rarely brought and the courts are very reluctant to make the order for parties to a marriage to be judicially separated. This is because of the fact that, the decree keeps the parties together legally in a dead marriage. It is however, imperative to note that, judicial separation permits the parties to live separately in and apart, while they are still married to each other under the law.

It is not common to find couples petitioning for judicial separation. However, few people file for judicial separation because they hope for a future reconciliation with the other spouse. Some file for judicial separation because their religion forbids divorce. As a result, in order for them to continue to belong to their religious groups they file for judicial separation instead of divorce, to enable them to continue in such religion. Moreover, few people file for judicial separation plainly out of spite, as they wish some form of problem for the other party. For instance, some people petition for judicial separation in order to deprive the respondent of the freedom to contract a marriage with the co-respondent. For such set of people, who are mostly women, it is a way of punishing the man for committing a matrimonial offense against them, in most cases, adultery with another woman, whom the respondent intends to marry if he has the opportunity. The only way to deprive the respondent of such an opportunity, is to file a petition for judicial separation, which will make the respondent to be single for all legal purposes, except that, he will not have the right to re-marry. Thus, it is a preventive punishment for adulterous men, which prevents them from marrying the women they commit adultery with. The same position is applicable to men who marry adulterous women, whom they also wish to prevent from marrying the men with whom they commit adultery. Thus, judicial separation can be said to be a preventive punishment decree, which separates a man and his wife, and the petitioner is relieved from the duty of cohabiting with the respondent.

Judicial separation does not allow the respondent the freedom to marry the co-respondent, as it is with respect to a decree of divorce. As a result, women prefer to petition for judicial separation to be granted by the court, instead of a decree of divorce. This is because, they believe that, they could reconcile with the respondent. For example, in the case of *Lawoye v. Lawoye*, [14] the wife petitioned for judicial separation and was not prepared to consider the dissolution of the marriage on the ground that, if their troubles were happily settled, they could still live together as man and wife. In this case, the wife petitioned for judicial separation, alleging adultery and cruelty in the petition. However, both adultery and cruelty were established. It was pointed out that, the petition for judicial separation is rare and that, though there may exist in this case scruples or reasons for not asking for a complete divorce and that the petitioner appears unwilling to reconsider her plea.

But the petitioner remarked that if their troubles were happily settled, they could still live together as man and wife, but said in cross-examination: *"I am not willing to return. I wish to live separately and look after the children. I do not desire a divorce"*. However, the court was satisfied that the petition is presented *bona fide* and accordingly was bound to grant the judicial separation prayed for.

4. Ground for Judicial Separation and Divorce

A petition for a marriage to be judicially separated may be upon the same facts and matters which may ground a petition for a marriage to be dissolved as specified in section 15(2) and 16(1) of the Act. [15] Thus, the existing facts to be relied upon by a petitioner who petitioned for a marriage to be judicially separated are also the facts to be relied upon for a petition for divorce. In the case of *Comfort Bamgbala v. Fatal Bamgbala and Ibironke Otufowora,* [16] the wife petitioned for judicial separation, because of the respondent's adulterous relationship with the party cited and for behaviour that the petitioner could not put up with. At the time the petition was heard by the court, the 1970 Matrimonial Causes Decree provides under section 39 that:

> Subject to this Division, a petition under this Decree by a party to a marriage for a decree of judicial separation may be based on any of the facts and matters provided in Section 15(2) and 16(1) of this Decree. The grounds for judicial separation are the same as those for divorce.

The above pronouncement of the court confirms the fact that, the facts to be relied upon for judicial separation are the same for a petition for divorce and that judicial separation may be based on any of the facts and matters which are contained in the Matrimonial Causes Act, under sections 15(2) and 16(1). [17] Moreover, the facts and matters referred to in the case of *Comfort Bamgbala v. Fatal Bamgbala and Ibironke Otufowora*, [18] are the facts and matters contained in the same sections of the 2004 Matrimonial Causes Act. Under section 15(2), the Act [19] provides to the effect that, when the court hears a petition for dissolution of a marriage, it shall hold that, the marriage has broken down irretrievably if, the petitioner can satisfy the court of any of the following facts:

(a) that the marriage has not been consummated because the respondent willfully and persistently refused to consummate it;
(b) that the petitioner is finding it intolerable to live with the respondent because, after the celebration of the marriage, the respondent has committed adultery;
(c) that after the celebration of the marriage the respondent has behaved in a way that the petitioner cannot reasonably be expected to reside with him;
(d) that before the petition was presented, the petitioner had deserted the petitioner for a continuous period of at least one year;
(e) that before the petition was presented, the husband and his wife have lived apart for a continuous period of at least two years and the respondent is not objecting to the grant of a decree.
(f) That before the petition was presented, the husband and his wife had lived apart for a continuous period of at least three years;
(g) That for a period of not less than one year, the respondent has failed to comply with a decree of restitution of conjugal rights made under this Act;
(h) That the husband or the wife has been absent from the petitioner in such circumstances that enabled reasonable grounds to presume that he or she is dead.

Under Section 16(1), the Matrimonial Causes Act, [20] provides for other facts, any of which if proved will constitute behaviour for which the petitioner will not reasonably be expected to

reside with the respondent as follows:

Section 16(1) Without prejudice to the general Section 15(2)(c) of the Act, when the court hears a petition for dissolution of marriage, it shall hold that the petitioner has been able to satisfy the court of the fact mentioned in section 15(2)(c) if the petitioner satisfied the court that:

(a) After celebrating the marriage the respondent has committed rape, sodomy or bestiality or

(b) After celebrating the marriage, the respondent has been a habitual drunkard or has habitually been intoxicated after taking or using to excess any sedative, narcotic or stimulating drug or preparation, or has for some period, been a habitual drunkard and has, for some other period, habitually been so intoxicated for not less than two years; or

(c) After celebrating the marriage, the respondent has within five years:
    (i) frequently suffered convictions for crimes for which he has been sentenced, in the aggregate to imprisonment within three years; and
    (ii) habitually leaving the petitioner without any means of support; or

(d) After celebrating the marriage, the respondent has been in prison for about three years after conviction for an occurrence that carries death sentence or life imprisonment for about five years or more, and where the respondent is still in prison when the petition was filed; or

(e) After celebrating the marriage and within one year before the petition was filed, the respondent has been convicted;

(f) The respondent has attempted to murder or unlawfully kill the petitioner; or have committed an offense that involved the intentional infliction of grievous harm or grievous hurt on the petitioner or that the respondent intends to inflict grievous harm or grievous hurt on the petitioner; or

(g) The respondent has habitually and willfully refused, to pay maintenance for the petitioner, two years before the petition was filed:
    (i) ordered to pay an order of, or a registered order in, a court in the Federation; or
    (ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation; or

(h) the respondent:
    (i) is, at the date of the petition, of unsound mind and he is not likely to recover; and
    (ii) six months after celebrating the marriage and before the petition was filed, has been confined for periods aggregating, about five years in an institution where persons with unsoundness of mind are confined in accordance with law, or in any of such institution.

According to Itse Sagay, [21] what we have in sections 15 and 16 are twenty-two independent grounds of divorce rather than one ground as section 15(1) claims misleadingly. It will be interesting to mention here that, the ground mentioned by the MCA under Section 15(1), is that, the marriage has irretrievably broken down, but based on the twenty two facts contained in sections 15(2) and 16(1). Thus, the ground for a petition for a marriage to be dissolve is only one, but the petitioner must satisfy the court of the twenty two facts contained in Sections 15(2) and 16(1) of the Matrimonial Causes Act. [22] Thus, section 15 of the Act, [23] cannot be said to be misleading as there is one ground for a petition for divorce, based on twenty two facts. However, the above ground and facts are also applicable to judicial separation. But section 15(2) is applied in conjunction with section 16(1).

5. Application of Absolute and Discretionary Bars to Divorce and Judicial Separation

All the bars applicable to divorce apply with equal force to a petition for judicial separation. [24]

Section 40 of the Matrimonial Causes Act [25] provides for the application of some sections to judicial separation to the effect that, the provisions of section 18 to 24 and section 26 to 32 of the Act shall apply to judicial separation and its proceedings and the purposes of those provisions that apply a reference in those provisions to the dissolution of marriage shall be a reference for judicial separation.

Thus, the absolute bars of condonation, [26] connivance [27] and collusion, [28] and the discretionary bars, [29] are applicable to any suit for judicial separation. It is therefore necessary for these applicable bars to judicial separation to be examined as follows:

(i) **The Absolute Bars**

Absolute bars are absolutely the petitioner's right under the 2004 Matrimonial Causes Act. There are in all three bars to a petition under the Act. [30] They are condonation which is a reinstatement of a spouse to the position he or she was before committing marital misconduct for which he or she was forgiven, collusion which can be said to be an agreement to procure the initiation of divorce proceedings and connivance which can be said to mean an acquiescence by the petitioner for the matrimonial offense committed by the respondent.

(a) Condonation

Condonation is the reinstatement of a spouse to his or her position, after the forgiveness of a spouse who committed a marital misconduct, based on a condition. It operates to bar to a party from getting a divorce and is also applicable to judicial separation on the fact of adultery or unreasonable behaviour. Accordingly to Sir Jocelyn Simon P. in the case of Inglis: [31]

> Condonation is when a spouse who has committed a matrimonial offence is reinstated to his or her former matrimonial position with knowledge of all the material facts of the offence committed, with the intention to remit it, that is, having the intention not to enforce the rights, which has accrued to the wrong spouse in consequence of the offence.

Flowing from the above, condonation implies the act of forgiveness and reinstatement. Thus, condonation has two essential ingredients:

(i) forgiveness by the wronged spouse, and

(ii) the reinstatement of the spouse who committed a wrong in his former position.

Since forgiveness implies knowledge and so, there cannot be condonation without knowledge of the offence. [32] A mere promise to forgive without reinstatement of the spouse who committed an offence to his former position will not amount to condonation. Evidence of reinstatement is the resumption of living together by husband and wife. Evidence of long cohabitation, couples with knowledge of the wrong may give rise to an inference of forgiveness and reinstatement, which may constitute condonation. [33]

At common law, a single act of intercourse by the husband with the wife was conclusive of condonation on his part. While with regards to the wife, it was only a presumption of condonation. [34] In the case of *Beeby v. Beeby,* [35] Lord Stowell stated as follows:

> It would be hard if condonation by implication was held as a strict bar to the wife. It is not improper that she should for some time show a patient forbearance; she may find difficulty either in quitting his house or in withdrawing from his bed. The husband on the other hand cannot be compelled to the bed of his wife, a woman may submit to necessity.

In the case *Sotomi v. Sotomi,* [36] the wife cross-petitioned for the marriage to be dissolved on the fact of the petitioner's adultery. She confirmed during cross-examination that:

> "whenever the petitioner committed adultery, we would quarrel and l always forgave him."

The court then concluded that, the adulterer was on each occasion of adultery reinstated to his former position. It was therefore held by the court that, the respondent had condoned the acts of adultery, the cross-petition was then dismissed.

It is however important to note that, if condonation is obtained by fraud, it cannot prevent the petitioner from getting a dissolution of marriage from the court. In the case of *Roberts v. Roberts*, [37] the court held that the petitioner could succeed if he had forgiven the respondent as a result of her falsely telling him that she was seduced whilst dragged and this turned out to be true.

Although, in the case of *Henderson v. Henderson,*[38] it was held by the court that an effective condonation cannot be on a condition, an act condoned can be revived if the petition is on the condition that the guilty spouse commits no further matrimonial offence. Hence where a spouse is found guilty of an offence against matrimony, which the other spouse condones on the fact that the guilty spouse commits no such offence again, and he or she does so, the injured spouse may commence an action for divorce on that revived ground.

(b) Collusion

Under section 27 of the Matrimonial Causes Act, 2004 the court shall not give order for a marriage to be dissolved if the petitioner is guilty of collusion with the intention to prevent the course of justice, in bringing or prosecuting the proceedings. According to the section:

> Dissolution of marriage shall not be pronounced if the petitioner has been guilty of collusion before filing or prosecuting the proceedings with the intention to cause justice to be perverted.

Collusion means an agreement or bargain between the spouses or their agents or between the parties, as to procuring the initiation or conduct of the divorce proceedings. [39] In the case of *Brine v. Brine*, [40] it was stated by an Australian court that:

> The meaning of collusion, like that of any other language, may vary according to the circumstances in which it is used, its context and the subject matter dealt with. It may be an agreement of deceit or compact existing between two or more for a party to sue the other for some evil purpose, or in a certain context and with regard to certain subject matter, mere agreement or acting in context.

To constitute collusion, the act complained of must have been taken by the party concerned to thwart the course of justice or prevent it by deceiving the court. It is however doubtful whether there is any practical effect, once collusion has in fact been established. However, it was held in the case of *Ogunleye v. Ogunleye*, [41] that there was nothing collusive in an agreement between two spouses under which the husband undertook to pay three pounds to the wife as a monthly maintenance allowance for the only child of the marriage.

Collusion exists where the parties agree between themselves to have the court deceived into pronouncing a divorce that it would not have granted. In the case of *Olajumoke v. Olajumoke*, [42] living apart for three years was alleged and the exhibits brought to court included a document that was titled "Document of Mutual Understanding" signed by the parties. It was also stated that each party had children that were born out of wedlock and that neither would contest the divorce proceedings. It was concluded by Segun J. that the parties' agreement was collusion under section

27 of the 1970 Matrimonial Causes Act. The learned Judge therefore stated as follows:

> It seems that the parties were kind of tired of each other after choosing other partners and bearing children for them and therefore resolved to put an end to their association. While what they have done affects public policy and therefore void, I do not think it was done with any intent to cause perversion of justice. They were anxious to do away with each other and to reduce their relationship into writing. I will therefore not use the collusion in accordance with established practice to bar the marriage to be dissolved.

Divorce was then granted by the court. It has been stated that, there will be collusion where a spouse, on the promise of substantial financial settlement is induced not to contest the petition. [43]In the case of *Churchman v. Churchman*, [44] the husband made an effort several times to induce his wife with money to commence divorce proceedings against him, and in 1937, the wife accepted her husband's financial over times of 15 (pounds) on the agreement that she could apply it in filing her petition. She petitioned for divorce for her own comfort as she was about to establish a hotel business and would not to be disturbed or molested by her husband. This agreement was disclosed to their counsel by the parties. Their counsel then told the court about it. The sole evidence relied upon by the wife in her petition for divorce was a confession made to her by her husband that he spent a night in a hotel with an undisclosed woman. It was then concluded by the court that, the circumstances in which the husband made the confession of adultery gave strength to its suspicion of collusion.

(c) Connivance

Connivance is implied when a party acquiesced, encouraged or has given permission either expressly or impliedly for adultery to be committed. [45] It is provided under section 26 of the 2004 Matrimonial Causes Act, that, except where section 16(1) (g) of the Act applies, dissolution of marriage shall not be pronounced where the petitioner has condoned, or connived at the conduct that constituted the facts for which the petition was based. Thus, connivance is the intentional or passive acquiescence by the petitioner in the adultery that was committed by the respondent.

Where two married couple, consent to the exchange of spouses, connivance may be said to be expressed. [46] In the case of *Obiagwu v. Obiagwu*, [47] the spouse was married in 1942 and from 1944, the love formerly existing between the spouses started to diminish, because of the inability of the petitioner to bear children for the respondent and in 1954, the petitioner agreed that the respondent should cohabit with a lady called Patricia Nwodo in their matrimonial home in order for the said Patricia to bear children for the respondent. As a result of Patricia's relationship with the respondent, four children were born. The wife then petitioned for the marriage to be dissolved because her husband committed adultery with the co-respondent (Patricia Nwodo). The court then refused to order a dissolution of the marriage based on the ground that the petitioner connived at the respondent's adultery. Moreover, in the case of *Gorst v. Gorst*, [48] the petitioner reluctantly agreed that the respondent should have a sexual relationship with the co-respondent in the hope that, that would cure his sexual inhibitions towards her. It was held by the court that, she connived at the adultery and therefore barred from taking a proceeding against the respondent on that ground. Connivance concerns the fact that no act will be actionable at the suit of a person who expressly or impliedly assented to it contemporaneously or in advance, *volenti non fit injuria*. [49] In the case *Okala v. Okala*,[50] the respondent was absolutely barred from alleging the intolerability of her husband's adulterous acts, not only because she was found to have condoned the acts, but also because she seemed to have connived to the brining about of the act. It was then stated by the court

that, “Her evidence in the case of the housemaid, leaves the impression that she was a lady in-waiting ready at the beckon on the singer. Surely, if anything, this was a case for tolerable adultery or adultery by connivances.”

(ii) Discretionary Bars

Under section 28 of the 2004 Matrimonial Causes Act, the court may apply its discretion to refuse to pronounce dissolution of marriage if after the celebration of the marriage,

(a) the respondent has not condoned the adultery committed by the petitioner or, if condoned, was revived.

(b) the petitioner has willfully deserted the respondent before the matters relied upon by the petitioner occurred or, where the matters involved matters that occurred during or that extended over, a period, before that period expired; or

(c) the petitioner's habits have, or the petitioner's conduct has, conducted or contributed to why the matters relied upon by the petitioner existed.

Thus, the discretionary bars are:

(a) Petitioner's adultery

This is provided under section 28(a) [51] which states that, the petitioner's adultery that the respondent has not condoned, is a discretionary bar. According to section 28(a) of the Act, [52] the discretion of the court may be exercised and refuse to dissolve a marriage, if the respondent has not condoned the adultery that has been committed by the petitioner after the celebration of the marriage or where it was condoned, has been revived. Thus, where the respondent has condoned the adultery, it then becomes an absolute bar, unless it has been revived by the petitioner's subsequent matrimonial misconduct.

In the case of *Ambe v. Ambe*, [53] the evidence before the court showed that when the petitioner first had knowledge of her husband's adultery with his ex-wife, she confronted him and the respondent had stated that, she had to leave if she would accept it. The wife continued to live in the matrimonial home with her husband. When she discovered the respondent's adulterous act, a second time, with another woman, the respondent told her that, she was lucky that she did not find the adulterer in the matrimonial home on her return from her visit to her native country – Malaysia. The husband who had already started divorce proceedings withdrew them. The wife later moved out of the matrimonial home, and subsequently committed adultery. She petitioned for divorce based on the husband's adultery and his intolerability of it. The husband cross-petitioned on the fact of the petitioner's adultery and intolerability of it. Delivering judgment, the court allowed both the petition and the cross-petition to succeed, and then the decree of divorce was granted.

(b) Petitioner's Desertion

Desertion occurs when a spouse voluntarily and without a reasonable cause abandons the other spouse against his or her will and with the mind of permanently ending cohabitation. Under section 28(b) of the Matrimonial Causes Act, [54] the court has the discretion to deny a decree of divorce in favour of a petitioner prior to the occurrence of the ground for the petition. Thus, there is a defence, if the petitioner can satisfy the court that there is a good cause for deserting the other spouse.

(c) Petitioner's Conducting or Contributing Conduct

A petitioner may be barred from obtaining a decree dissolving the marriage, where his or her conduct contributed or conduced to the occurrence of the fact or facts relied upon in the petition for divorce. In the case of *Cunnington v. Cunnington* [55] the petitioner was sentenced to ten years in prison for theft. His absence provided the respondent ample chance to commit adultery with a third party. During the defence, she argued that the vacuum created by her husband's absence was the conduct that caused her to commit adultery. It was however held by the court that, the theft was not misconduct towards her. However, by virtue of section 16(c)(ii) of the 2004 Matrimonial Causes Act, the fact that the respondent's action has caused the petitioner to suffer within five years and has left the petitioner habitually without reasonable means of support, now constitutes a ground for divorce.

Similarly, in the case of *Coulthart v. Couthawaite*, [56] it was held by the court that, a petitioner who knowingly married a loose woman and then left her for four years without any means of survival is guilty of conduct conducing to the adultery committed by her. Moreover, in the case of *Cox v. Cox*, [57] it was held by the court that, the petitioner's continued flirting with other women in spite of his wife's objections constituted conduct that caused his wife to commit adultery with the co-respondent.

In the case of *Opajobi v. Opajobi*, [58] the wife petitioned for the marriage to be dissolved with the allegation of one-year desertion by the husband. The husband later cross-petitioned on the allegation of the petitioner's adultery. The court then found that, the respondent had left the matrimonial home for further studies, in spite of the objections of the petitioner and the wife's adultery which resulted in the birth of a child, which occurred a few year later, on her being transferred by her employer's away from the place of the matrimonial home. The husband's cross-petitioned was then dismissed by the court on the ground that his conduct had contributed or conduced the wife's adultery.

Moreover, in the case of *Dixon v. Dixon*, [59] the court held that willful refusal to have the marriage consummated or failure to show further sexual relationship after the initial act of consummation amounts to conduct conducing, if the deprived spouse solicits for sex outside the marriage.

The above absolute bars of condonation, connivance and collusion, and the discretionary bars applicable to petition for divorce are equally applicable to judicial separation.

6. Conclusion

This paper appraised judicial separation as an introductory step to divorce and examined the concept of judicial separation. The paper also examined the grounds for judicial separation and divorce. In addition, the application of absolute and discretionary bars to divorce and judicial separation was examined. The paper has shown that a petition for a marriage to be judicially separated may be filed on the basis of the facts and matters, which are contained in Section 15(2) and 16(1) of the 2004 Matrimonial Causes Act. The paper recommends that, there is a need for the law to be reformed to enable judicial separation to automatically be converted to a decree *nisi* of divorce two years after the pronouncement of judicial separation, where the parties are unable to resume cohabitation. Therefore, judicial separation is an introductory step to divorce.

Endnotes

1 Laws of the Federation of Nigeria 2004, Cap. M7.
2 Ibid.
3 Section 40, Matrimonial Causes Act, Laws of Federation of Nigeria, 2004, Cap. M7
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