

## DESERTION AS A GROUND FOR DIVORCE IN NIGERIA\*

### Abstract

Desertion is the willful and unjustified abandonment of a person's duties or obligation to a spouse or family. It is made up of five elements which includes: a cessation of cohabitation, the lapse of statutory period, an intention to abandon, a lack of consent from the abandoned spouse, and a lack of spousal misconduct that might justify the abandonment. This paper examines desertion as a ground for divorce in Nigeria. The researcher adopted the doctrinal research method. The paper states that, desertion is the unilateral withdrawal from cohabitation by a spouse without the consent of the other spouse, without just cause and with the intention to permanently bring cohabitation to an end. The paper concludes that, a petitioner must prove to the satisfaction of the court that the marriage has broken down irretrievably on ground of desertion, for the court to pronounce divorce.

**Keywords:** Spouse, Cohabitation, Consent, Desertion, Divorce.

### 1. Introduction

Desertion is the unilateral withdrawal from cohabitation by a spouse without the consent of the other spouse, where there is no just cause for desertion and where the deserting spouse has the intention of bringing cohabitation permanently to an end. The Matrimonial Causes Act<sup>1</sup> incorporated desertion as a ground for divorce and as a fact which if proved will lead to the courts holding that the marriage has broken down irretrievably. Thus, it has been provided under section 15(2)(d) Matrimonial Causes Act, that a marriage will be said to have broken down irretrievably where 'Respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition'.<sup>2</sup> Under the above section, a court will hold that a marriage has broken down irretrievably where the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of a petition for the dissolution of a marriage celebrated between the petitioner and the respondent. Thus, desertion for a continuous period of at least one year immediately preceding the presentation of a petition for the dissolution of a marriage is one of the grounds for which marriage can be said to have broken down irretrievably. Therefore, this paper examines the constituent elements of desertion and desertion as a ground for divorce.

### 2. The Constituent Elements of Desertion

The desertion of a spouse, will be constituted when the deserting spouse separate from the other spouse with an intention of bringing cohabitation permanently to an end without reasonable cause and without the other spouse consenting to such separation.<sup>3</sup> Therefore, to constitute desertion, four elements must be present at the same time. These elements which shall be examined below are:

- i. The *de facto* separation of the parties,
- ii. *Animus deserendi*,
- iii. Lack of just cause for the withdrawal from cohabitation and
- iv. The absence of the consent of the deserted spouse.

#### The *De Facto* Separation of the Parties

There will be a *de facto* separation of the parties when cohabitation has been ended by severing all marital obligations.<sup>4</sup> Desertion will occur when it is obvious that one spouse has physically departed from the matrimonial home.<sup>5</sup> We must note that, a *de facto* separation may occur, when a spouse repudiates all marital obligations. Therefore, desertion in this case does not necessarily need to be physical departure. The deserting spouse may still continue to live in the matrimonial home. In the case of *Pulford v. Pulford*<sup>6</sup> it was pointed out by Lord Merrival, P., that desertion is not the withdrawal from a place, but from a state of things. Therefore, living under the same roof does not prevent the occurrence of desertion as the test of desertion, is whether there is one household or more. In the case of *Hopes v. Hopes*,<sup>7</sup> marital intercourse ceased between the parties, when the wife started to

---

\* By **B.O. ALLOH, PhD**, Acting Head, Department of Jurisprudence and International Law, Faculty of Law, Delta State University Oleh Campus, Oleh, Delta State, Nigeria.

<sup>1</sup> Laws of the Federation of Nigeria, 2004, Cap.M7.

<sup>2</sup> Section 15(2) (d) Matrimonial Causes Act, 2004.

<sup>3</sup> *Perry V. Perry* (1952), ALL ER1076, 1082(CA)

<sup>4</sup> *Rayden's Prace and Law of Divorce* (ed, Jackson, J. and Turner, C.F., 9<sup>th</sup> Edn (Butterworth, London 1971). 165

<sup>5</sup> *Roseanwo v. Rosanwo* (1961) WNLR 297; *Shyngle v. Shyngle* (1923) 4 NLR 94

<sup>6</sup> (1923) P. 18, 21.

<sup>7</sup> (1949) P. 227.

occupy a separate bedroom because her husband was leaving very early for work and as a result goes to bed early. Moreover, the husband objected to his wife coming to bed after he had retired to bed. The wife was cooking for the household and the husband had his meals in a common dining room with his wife and daughters, establishing the fact that there was one household. Eventually, the husband left the matrimonial home. It was held by the court that, there was still one household and that the wife was not guilty of desertion. However, in the case of *Walker v. Walker*,<sup>8</sup> the wife who withdrew to a separate bedroom that was usually kept locked, refused to perform domestic duties for her husband, who did household jobs for himself and had most of his meals outside the matrimonial home. But the parties were compelled to use the same kitchen on Sundays, at different times and communicated with each other by exchanging notes. It was held by the court that the parties were not living together in the same matrimonial household, and that the wife was guilty of desertion. It should be noted however, that in some situations, desertion may not exist even when there is *de facto* separation. This may be the case, where the parties are living apart against their will. There may be *de facto* separation without desertion as a result of imprisonment or internment.<sup>9</sup>

### ***Animus Deserendi***

*Animus deserendi* means the intention to withdraw from cohabitation permanently.<sup>10</sup> Temporary withdrawal from cohabitation does not amount to desertion. Going on holidays or on business trips does not amount to desertion as a result of the fact that, in such situations, there is usually no intention to permanently withdraw from cohabitation. Where the separation is due to mutual consent, there is no desertion following the fact that, in such a case, there is no intention to permanently withdraw from cohabitation. There will be a presumption of an intention to desert *animus deserendi* where a spouse voluntarily abandons the matrimonial home. In a case of this kind, desertion starts at the moment of a spouse departure. In the case of *Agu v. Agu*<sup>11</sup>, the husband who is a Nigerian and petitioner returned to Nigeria on the mutual agreement that he would send for his German wife and children after settling down. The petitioner eventually made travel arrangements for the respondent and their children. The respondent cancelled the travel arrangements made by the petitioner on the ground that, she cannot make the journey on the ground that she was nervous. She later declared that she would not make the journey. The petitioner later made an unsuccessful trip to Germany to persuade the respondent to return. The court then held that the respondent deserted when the *animus deserendi* supervened. It was important to note that an involuntary separation maybe turned into desertion by the subsequent *animus deserendi* of spouse.<sup>12</sup> Moreover, with regards to insane persons, it is important to prove that the necessary animus exist in order to make the insane party guilty of desertion.<sup>13</sup>

### **Lack of Just Cause for the Withdrawal from Cohabitation**

A spouse will have a good excuse to desert the other spouse when there exists a conduct which makes the continuance of matrimonial cohabitation virtually impossible. Based on this element, it seems that conducts which will justify the dissolution of a marriage under section 15(2)(c),<sup>14</sup> may provide a just cause for desertion. There will be desertion when a spouse who withdrew from cohabitation lacks a just cause for doing so. Instances exist where a spouse may have a reasonable just cause to desert the other spouse. Therefore, it is clear that, where a spouse is guilty of adultery or other matrimonial misconduct, there will exist a just cause for the other spouse to desert. In such a case, if the innocent spouse fails to desert, he may forfeit his or her right to matrimonial relief on the ground that he or she has condoned or connived at the misconduct.<sup>15</sup> Generally, any conduct that makes the continuance of matrimonial cohabitation impossible will provide a just cause for a spouse to desert.<sup>16</sup> Thus, in the case of *Sowande v. Sowande*<sup>17</sup>, the petitioner who is a Nigerian married the respondent who is an American in 1936. They resided in London. But shortly after the outbreak of World War II, passages were offered to the citizens of America who wished to return to the United States of America by the United States Government. Against the wishes of the petitioner, the respondent then took advantage of the offer and returned to the United States and

<sup>8</sup> (1923) P 18, 21. (6) (1949) P. 227. (7) (1952) 2 ALL ER 138(CA)

<sup>9</sup> *Beeken v. Beecken* (1948) P 302(CA)

<sup>10</sup> *Odigie v. Odigie* (2000) 1 L.H.C.R. (Pt. 8). p.121

<sup>11</sup> Suit No. E/ID/1966 (Unreported), Oputa, J, Enugu High Court, 18 July, 1966.

<sup>12</sup> *Beeken v. Beeken* (1948) P 302 (CA).

<sup>13</sup> (5) *Kaczmarz v Kaczmarz* (1967) IALL ER 416.

<sup>14</sup> Matrimonial Causes Act, Laws of the Federation of Nigeria, 2004.

<sup>15</sup> *Beigan vBeigan* (1956) P. 313

<sup>16</sup> *Jackson v. Jackson* (1932) 146 LT 406.

<sup>17</sup> (1960) LLR58. But reversed by the supreme court; FSC130/1962 (unreported), 28 June, 1963)

never returned to the matrimonial home. It was held by Dickson, J, in the court of first instance that, the outbreak of war in Europe, was a just cause for her departure from England. But on Appeal, it was held by the Supreme Court that, the war was not a just cause for the wife to leave the matrimonial home without the husband consent. However, in the case of *Sode v. Sode*,<sup>18</sup> the wife who was the respondent in this case, left the matrimonial home in 1946 against her husband's wishes because of the dullness of social life in Zaria and also because of the discomfort she suffered during harmattan season. It was held that, her reasons were not just cause for deserting her husband. Moreover, the conduct of a spouse may create a reasonable or just cause for desertion. In the case of *Glenister v. Glenister*,<sup>19</sup> the husband who was a member of the Armed Forces, complained that he was infected with gonorrhoea by his wife, when he was home on leave. That on a subsequent return on leave, he found three men in the matrimonial bedroom with his wife. He also asserted that he was only allowed into the matrimonial home by the following morning and that, he concluded that his wife had committed adultery. The court held that, his belief that adultery might have been committed by the wife was reasonable in the light of the wife's conduct. It must be noted however, that the test of reasonable belief that the other spouse has committed misconduct must be an objective one. Therefore, a husband is not justified in deserting his wife simply because he has been told by his mother that his wife has committed adultery.<sup>20</sup>

### **The Absence of the Consent of the Deserted Spouse**

A spouse may be in desertion if she leaves the matrimonial home without the consent of the other spouse. In some cases, there may have been a separation between the spouses by mutual agreement. However, desertion will supervene when a spouse withdraws his or her consent to that state of affairs. Thus, in the case of *Ikpi v. Ikpi*,<sup>21</sup> there was a mutual agreement between the spouses that the wife who was expecting a baby, should remain at Ibadan because maternity facilities were not assured at Zaria, that the wife would join her husband in Zaria when maternity facilities were guaranteed. The husband later wrote to assure the wife of maternity facilities in Zaria. But the wife refused to join her husband in Zaria, on the ground that she would not get a teaching appointment in Zaria. It was held by the court that the husband had put an end to the agreed separation and that the wife was in desertion when she refused to join her husband in Zaria. Parties consent to separation must be genuine and must not be obtained by duress, fraud or misrepresentation.<sup>22</sup> Therefore, there will be no real consent when a wife tells her husband to go to his mistress, after making him to promise to return to her, when he was fed up with the mistress.<sup>23</sup> It should be noted that consent to separation may take the form of a separation agreement which may not be in writing or embodied in a deed. But such agreement must provide for the spouses living apart.<sup>24</sup> It should also be noted that, if there is no consent, there may be desertion even when the petitioner is happy to see the respondent go.<sup>25</sup>

### **3. Desertion as a Ground for Divorce**

For the court to pronounce divorce on ground of desertion, the petitioner must prove to the satisfaction of the court that the marriage has broken down irretrievably, on the ground that the respondent has deserted the petitioner permanently for a period of one year immediately preceding the date of presentation of a petition for the dissolution of the marriage which was celebrated between the petitioner and the respondent. A party to a marriage may have conducted himself or herself in a manner that will lead to a presumption that desertion has occurred. Some of these conducts which shall be examined below are:

- (i) Lack of communication
- (ii) Influencing the moving out of matrimonial home
- (iii) Leaving home for at least a continuous period of one Year
- (iv) Condoning or conniving the hurtful conduct

#### **Lack of Communication**

There may be presumption of desertion when there is no communication between the parties to a marriage. Therefore, lack of communication between the petitioner and respondent in respect of a petition for dissolution of

---

<sup>18</sup> Suit No. HD/35/1966 (unreported), Alexander, J, Lagos High Court, 6 June, 1967

<sup>19</sup> (1945) P. 30

<sup>20</sup> *Beer v Beer* (1948) P. 10

<sup>21</sup> 129 (1957) WNLR 59

<sup>22</sup> *Holroyd v Holroyd* (1920) 36 TLR 479

<sup>23</sup> *Bevan v. Bevan* (1955) 1 WLR 1142.

<sup>24</sup> *Crabtree v. Crabtree* (1953) 1WLR 708.

<sup>25</sup> Section 19 Matrimonial causes Act, 2004.

a marriage on ground of desertion, is a proof of desertion. This is because, where there is no desertion, the parties to the marriage will continue to communicate with each other, expressing the fact that, even when they are not physically in the same household, they are not in desertion. Therefore, there ought to be constant communication concerning how they are faring. Where there are children of the marriage the party that is with the children is supposed to be passing information concerning the welfare of the children to the party that is not with the children. Moreover, parties to a marriage are supposed to express their love and affection for each other by way of communication. As a result, where there is no communication from a party, who has left the matrimonial home to another home following the fact that, he or she has been transferred to another town, different from where both parties to the marriage were residing, is a clear fact of desertion. This is because, one in desertion may not bother to communication with the party he or she is deserting. The deserting party may not be concerned with the welfare of the party he or she is deserting. Thus, where there has not been any form of communication between the petitioner and the respondent, after the spouse who deserted left the matrimonial home, the court can hold that the marriage has broken down irretrievably<sup>26</sup> Where there is mutual agreement to leave in different apartments by parties to a marriage, there ought to be communication between the parties regarding the maintenance and education of the children of the marriage.

### **Influencing the Moving out of Matrimonial Home**

A party to a marriage may conduct himself or herself in a manner that may influence the moving out of the other party from the matrimonial home. Therefore, for there to be desertion, the petitioner must not have in anyway influenced the moving out of the respondent from the matrimonial home.<sup>27</sup> Where it is presumed that the respondent may have been offended one way or the other and the petitioner has made attempts for reconciliation and such attempts were rebuffed by the respondent, then the court can hold that, the marriage between the petitioner and the respondent has broken down irretrievably on ground of desertion. In such a situation, there would be further proof of desertion where, the respondent has not made any attempt to reconcile with the petitioner since the day he or she left the matrimonial home to his or her new home of resident.

### **Leaving Home for at Least a Continuous Period of One Year**

To establish desertion on the ground that the marriage has broken down irretrievably, leaving home may have been as a result of the fact that, there was a quarrel which may have led to a fight and before the other spouse returns from work, the deserting spouse packs his or her belongings and leaves the matrimonial home. In such a case, the deserting spouse will not try to communicate with the other spouse on why he or she left the matrimonial home. Such deserting spouse may have left with the intention that he or she will never return to the matrimonial home again. The occurrence of such a situation will make the court to hold that, the marriage has broken down irretrievably on ground of desertion. However, this act of desertion must last for a continuous period of at least one year immediately preceding the presentation of the petition for the dissolution of the marriage between the parties. For a marriage to be dissolved on ground of desertion, where the marriage is said to have broken down irretrievably, the deserting spouse must have left the matrimonial home without the consent of the other spouse. This is because spouses to a marriage may agree to live in separate homes, where for instance, one of the spouse secures a job in a different city from where they have been living. In such a case, if the other spouse has an existing job or business in that city where they have been residing, the parties to the marriage may agree that the spouse, who newly secured a job in another city, should secure an accommodation in the city where his or her job is located. In that case, there is no desertion. As the party who secured a job in a city different from where they were residing, is said to have got the consent of the other party, to secure a new accommodation in the city where his or her job is located. In most cases, a deserting spouse will pack all that belongs to him or her without a good reason, with the intention to permanently separate from the other spouse. Under the Matrimonial Causes Act, for desertion to exist, it must have been continuous for a period of at least one year immediately preceding the presentation of the petition. However, a petitioner may file his or her petition after one year. Such petition could be filed after ten years of desertion. In the case of *Ikewenobe v. Ikewenobe*,<sup>28</sup> the respondent deserted the petitioner from February, 1987 for no good reason. She packed all her belonging and left the matrimonial home without the consent of the petitioner. On the 11<sup>th</sup> day of November, 1998, which was over ten years after the respondent deserted the petitioner, the petitioner filed petition for dissolution of the marriage between himself and the *respondent* because the marriage has broken down irretrievably on ground of desertion. The court pronounced a decree *nisi* of dissolution of the marriage celebrated between the petitioner and the respondent, which was

<sup>26</sup> *Odogwu v. Odogwu* (1992) 2 NWLR (Pt. 225).

<sup>27</sup> *Adebusoye v. Adebusoye* (1978) 10-12 CCHCJ277.

<sup>28</sup> (2002) 1 L.H.C.R., Parts 4-5, p.21.

solemnized at the Ikoyi Marriage Registry on the 27<sup>th</sup> day of October, 1979. The court further pronounced that, the decree *nisi* shall be made absolute after three months from the day of pronouncement, unless within that period, sufficient cause is shown to the court why the decree *nisi* should not be made absolute.

Desertion may also occur, when one of the spouses withdraws from cohabitation or leave home unjustifiable and without the consent of the other spouse and provided that the deserting spouse withdrew from cohabitation with an intention to remain separated from the other spouse permanently.<sup>29</sup> This can be inferred from a situation where, the deserting spouse may have left the matrimonial home without informing the other spouse of his or her intention to leave home

#### **Condoning or Conniving the Hurtful Conduct**

A court would hold that a marriage has broken down irretrievably on ground of desertion, where there is proof of the fact that, the petitioner has not condoned or connived with the respondent to be in desertion. Conniving in this case, means a situation where a party to the marriage has conducted himself or herself in a manner that has caused the other party to the marriage to desert. The deserted party must have wrongfully helped the deserting party to desert. Moreover, the deserted party must have accepted the conduct that is morally wrong which may have made the other party to desert the matrimonial home.

#### **4. Conclusion**

This paper has examined desertion as a ground for divorce. It also examined the constituent elements of desertion. The paper has revealed that a court will hold that, a marriage as broken down irretrievably where the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of a petition for the dissolution of a marriage celebrated between the petitioner and the respondent. The paper has also shown that, before divorce can be granted on ground of desertion, a petitioner must prove to the satisfaction of the court that the respondent has actually deserted the matrimonial home and that there is *animus deserendi* or an intention by the respondent to permanently bring cohabitation to an end. The petitioner must also prove to the satisfaction of the court that he or she did not consent that the petitioner should leave the matrimonial home and that there was no just cause for him or her to leave.<sup>30</sup> Therefore, desertion is the unilateral withdrawal from cohabitation by a spouse without the consent of the other spouse, without just cause and with the intention to permanently bring cohabitation to an end.

---

<sup>29</sup> *Odigie v. Odigie* (2000) 1 L.H.C.R. (Pt. 8). pp. 117-121

<sup>30</sup> *Odigie v. Odigie* (2000) 1. L.H.C.R. (Pt. 8) p. 118.