

COURT OF APPEAL OWERRI DIVISION
18TH APRIL, 2011. CA/OW/127/2009
CORAM:- A. J. ABDUL-KADIR, H. M. OGUNWUMIJU, M. A.
OWOADE, JJCA

MRS. HELEN NWOSU APPELLANT
AND
HON. DR. CHIMA NWOSU RESPONDENT

COURTS - Appeals - Issues - Suo motu raising - Propriety - It is wrong for a court to raise an issue - Not predicated on any of the grounds of appeal (H1)

COURTS - Powers - Issues - Formulation - Where issues framed by parties - Will not lead to a proper determination of the appeal - Court may frame issues - Provided they relate to the grounds of appeal (H2)

COURTS - Powers - Rights of parties - Declarations - Court has unlimited powers to make declarations - Concerning the right of parties - But it is bound to confine itself to the reliefs claimed (H3)

EVIDENCE - Evaluation - Appeals - Credibility of witness - Appellate court does not question the conclusion of trial court - Regarding the credibility of a witness - It can only evaluate the weight to be attached (H4)

FACTS

Defendant/appellant is plaintiff's/respondent's wife by virtue of a statutory marriage contracted on 7th December, 1998. The said marriage produced four children and the parties stayed together as a family. On 13th November, 2006 appellant left the matrimonial home with the four children who were underage. Appellant relocated with the said children to Calabar in Cross River State and stayed with her mother. Respondent went to Calabar but was not able to see his children or persuade his wife to return to Owerri. Thereafter, respondent instituted this action at High Court of Imo State, Owerri, in which he sought inter alia the following declarations and reliefs in his amended statement of claim: Declaration that defendant being the

wife of plaintiff in respect of subsisting statutory monogamous marriage, cannot unilaterally withdraw their said children from their school and take them to unknown place to plaintiff without an order of court dissolving their marriage or granting them judicial separation.

Subsequently on 18th January, 2008, appellant filed divorce proceedings at High Court of Cross River State, Calabar and also asked for custody of the children. Respondent did not oppose the dissolution of the marriage but opposed the grant of custody of the children to appellant. Respondent secured a stay of proceedings of the divorce petition at the same court. The Imo State High Court, Owerri made an order of accelerated hearing of the suit. The case went to trial. Respondent testified and called one witness. Appellant testified and called two witnesses. The learned trial judge granted declarations and made orders in favour of respondent. Dissatisfied with the decision of the court, appellant appealed to Court of Appeal, Owerri Division.

ISSUES FOR DETERMINATION

1. *Whether Respondent by his pleadings and evidence established his entitlement to his claims, and if he did, (which is denied), whether the reliefs granted him were those he sought?*

2. *Whether there was not a miscarriage of justice or a breach of the principles of fair hearing when without any consideration or adequate consideration of Appellant's most crucial defence the learned trial judge made unjustified strictures in regards thereof?*

Etc. see p. 1199

HELD (Unanimously allowing the appeal per **OGUNWUMIJU JCA**)

Appeals - Issues - Suo motu raising

1. The issue itself is inherent with substantive legal questions which I will come to anon. It is within the context of this issue that the first question raised suo motu by the court can be determined. On this issue the learned Appellant's counsel is also of the view that the issue of whether or not the Appellant has a legal right to take the children of the marriage from the matrimonial home without a formal order of custody as raised suo motu by the court is not a live issue and is not predicated on any of the grounds of appeal. That being so the court has no right to raise an issue not predicated on any of the grounds of appeal.

Learned Appellant's counsel argued that the Respondent predicated his reliefs on the absence of a court order dissolving the marriage or judicial separation while the relief granted by the trial court was predicated not on those reasons but on the absence of Respondent's knowledge and consent. I have earlier on expressed my reservations about this line of argument as pursued by the Appellant's counsel.

I cannot find any merit or substance in the argument that the issue of whether the Appellant had a legal right to take the children away from the matrimonial home was not a live issue in view of the phraseology employed by the learned trial judge in granting the orders sought. (p. 1203 E)

COURTS - Powers - Issues - Formulation

2. In our adversarial system of jurisprudence, parties are free to make their own case. However where the issues framed will not lead to a proper determination of the appeal, the court may frame issues provided they relate to the grounds of appeal. (p. 1204 H)

COURTS - Powers - Rights of parties - Declarations

3. The power of a court to make declarations concerning the rights of parties is unlimited and is an equitable remedy. However, the court is bound to confine itself to the reliefs claimed. The trial court has done this by ordering the return of the children to the matrimonial home. The learned trial judge gave unconstitutional and perverse reasons for making the declarations. If the Respondent was not entitled to the substantive reliefs in his claim, he cannot be entitled to consequential orders which would translate into custody of the children in whatever guise. I resolve this issue in favour of the Appellant. (p. 1218 F)

EVIDENCE - Evaluation - Appeals

4. On the evidence of PW2 who the learned trial judge took as a neutral thus credible witness, the appellate court is not at liberty to question the conclusion of the trial judge regarding the credibility of a witness. The Appellate court can only interfere in the conclusions drawn by the trial judge being matters of evaluation of the weight to be attached to the evidence of witness. I see no need to interfere in this case. I have read the record and I am convinced of the credibility

of P.W.2. The Appellant did not challenge the conclusions of the trial judge regarding the evidence of P.W.2

Thus I do not agree that the learned trial judge was wrong in believing the evidence of PW2. That issue is resolved against the Appellant. (p. 1219 H)

B

NOTABLE POINT OF INTEREST

OGUNWUMIJU JSC

1. Matrimonial Causes - Definition of "custody"

C In Black's Law Dictionary, 8th Edition, page 412, custody is defined thus: *"Family Law. The care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision making authority) and physical custody (care giving authority), and an award of custody usually grants both rights....."*

D At page 413 of Black's Law Dictionary supra "custody proceedings" is defined thus: *"Custody proceedings. Family Law. An action to determine who is entitled to legal or physical custody of a child. Legal custody gives one the right to make significant decisions regarding the child, and physical custody gives one the right to physical care*

E *and control of the child."* (p. 1217 F)

REPRESENTATION

Dafe Diegbe Esq. For the Appellants

F Emeka Ozoani Esq., with him U. S. Chukwu (Miss) For the Respondents

CASES REFERRED TO

AKPA v. THE STATE (2008) 4-5 SC Pt. 11 Pg. 1 at 18

G MOMODU v. MOMODU (1991) 1 NWLR Pt. 169 Pg. 60

AGBI v. OGBEH (2006) ALL FWLR Pt. 3290 Pg. 941 at 973

NZEKWU v. NZEKWU (1989) 2 NWLR Pt. 104 Pg. 373 at 422 8

ONIFADE v. OLAYIWOLA (1990) 7 NWLR Pt. 161 Pg. 130 at Pg.157

SHA (JNR) v. KWAN & ORS. (2000) FWLR Pt. 11 Pg. 1788

H JOHN BANKOLE & ORS. v. MOJIDE PELU & ORS. (1991) 8 NWLR Pt. 24 Pg. 523 at 537

LEAD JUDGMENT BY OGUNWUMIJU JCA

This is an appeal against the judgment of the Imo State High

Court sitting at Owerri delivered by Anunihu J. on 22/6/09 wherein he granted declaratory and injunctive orders in favour of the Respondent. The facts that led to this appeal are as follows:

The Appellant is Respondent's wife by a statutory marriage contracted on 7/12/1998. The said marriage produced four children and the parties stayed together as a family at Plot 72B Works Road, Owerri. On 13/11/06, the Appellant left the matrimonial home with the four children who were underage. The Appellant relocated to Calabar in Cross River State and stayed with her mother. The Respondent went to Calabar but was not able to see his children or persuade his wife to return to Owerri. He then instituted an action in which he sought the following declarations and reliefs in his amended statement of claim as contained in the judgment at page 179 of the record:

1. Declaration that the Defendant being the wife of the Plaintiff in respect of subsisting Statutory Monogamous Marriage, cannot unilaterally withdraw their said children from their school and take them to unknown place to the Plaintiff without an order of court dissolving their marriage or granting them judicial separation.

2. Declaration that the Defendant cannot unilaterally take her children with the Plaintiff out of Nigeria to another country under any guise or programme or arrangement, without the prior consent and authority of the Plaintiff in writing.

3. Declaration that the Defendant cannot unilaterally change their children's religious faith to Brotherhood of Cross and Star from the Catholic Faith, without authority of the Plaintiff in writing.

4. Declaration that the Defendant has no lawful authority to take their children to an unknown place to the Plaintiff and withhold the children from the Plaintiff, there being no order of court of law, dissolving their marriage or granting judicial separation.

5. Order of Court directing the Defendant to return the said four (4) children to their school at Madonna Schools, Works Layout, Owerri, Imo State.

6. Order of Court mandatorily compelling the Defendant to return the said children to Plot No. 92B Works Layout, Owerri, Imo State the matrimonial home of Plaintiff and the Defendant from where the Defendant forcefully took them to an unknown destination to the Plaintiff.

7. Order of Court compelling the Defendant to return the said four children to the matrimonial home at No. 92B Works Layout, Owerri, Imo State, where the Plaintiff can give them proper medical attention at all times.

B 8. Perpetual injunction restraining the Defendant from taking the said children from Plot 92B Works Layout, Owerri, Imo State the present matrimonial home to unknown place to the Plaintiff and/or changing the children's faith to the Brotherhood of Cross and Star from the Catholic faith without the prior written consent and authority of the Plaintiff."

C The Respondent filed his writ and served the Appellant on 23/11/06. The Appellant filed divorce proceedings at Calabar on 18/1/08 and asked for custody of the children. The Respondent did not oppose the dissolution of the marriage but opposed the grant of D custody of the children to the Appellant. The Respondent secured a stay of proceedings of the divorce petition at the Calabar High Court. The Imo State High Court made an order of accelerated hearing of the suit. The case went to trial. The Respondent as Plaintiff testified and called one witness. The Appellant testified and called two witnesses. The learned trial judge granted declarations and made orders E in favour of the Respondent at page 217 of the record in the following terms:

(a) I declare that the withdrawal from school and taking out of F home of the Plaintiff's children by the Defendant without the Plaintiff's knowledge and consent is not proper in law and is detrimental to the Plaintiff's interest in the said children.

(b) I declare that the Defendant has no lawful authority to take and keep the said children away from the Plaintiff without his consent. G

(c) I order the Defendant to immediately return the said children (1) CHIMA AUGUSTUS NWOSU (JNR) (2) NNAEMEKA ESHIET THADEUS NWOSU (3) NMESOMA ROSELINE NWOSU (4) NNEDIMMA MARY FIDELIA NWOSU to their family house and H home Plot 92B Works Layout Owerri, Imo State of Nigeria being the home of the Plaintiff.

(d) I hereby restrain the Defendant from further taking or keeping away or continuing to keep away the above mentioned children from their family house aforesaid or away from the Plaintiff or taking

the said children to any place or location whatsoever without the knowledge and consent of the Plaintiff.”

Hence this appeal. The Appellant filed notice of appeal dated 3/9/09 contained 17 grounds of appeal. The Appellant’s brief dated 29/10/09 was filed on the same day. A reply brief was also filed on 25/5/10. The Respondent filed an Amended Respondent’s brief dated 12/10/10 on the same day. From the grounds of appeal filed the Appellant distilled 5 issues for determination as follows:

1. *Whether Respondent by his pleadings and evidence established his entitlement to his claims, and if he did, (which is denied), whether the reliefs granted him were those he sought?*

2. *Whether there was not a miscarriage of justice or a breach of the principles of fair hearing when without any consideration or adequate consideration of Appellant’s most crucial defence the learned trial judge made unjustified strictures in regards thereof?*

3. *Whether the learned trial judge made his crucial findings on the issues joined by parties in their pleadings so as to render the said findings and his final decision valid?*

4. *Whether Respondent established by evidence that his marriage is a statutory marriage so as to attract the application and operation of the Infants Law of Imo State to his action?*

5. *Whether Exh. D, and the evidence of PW2 are admissible evidence, and if there are (which is denied) whether the learned trial judge given the entire circumstances of the case was right in attaching any weight to them?*

The Respondent on his part formulated 4 issues similar to those identified by the Appellant as follows:

1. *Whether the marriage between the Respondent and Appellant is a monogamous marriage as to attract the Infants Law of Imo State 1994?*

2. *Whether the Respondent proved his case at the trial court to entitle him to the reliefs sought and granted by that court?*

3. *Whether the relief granted to the Respondent by the trial court are materially different from the reliefs he sought at that court?*

4. *Whether there was a breach of the principles of fair hearing which occasioned a miscarriage of justice to the Appellant?”*

After reading the grounds and the issues distilled by counsel and arguments adumbrated therefrom, the court felt the need to

exercise its powers under S.15 of the Court of Appeal Act. S.15 of the Court of Appeal Act empowers the court to make an order for determining the real question in controversy in the appeal. To that end, this court asked the counsel in this case to file further briefs in respect of the following questions which were felt to be the real question in controversy between the parties. When the new issues came up for hearing, parties adopted their supplementary briefs in respect of the questions raised by the court. The questions posed by the court are as follows:

1. Whether or not the Appellant has a right to take the children away from the matrimonial home before a formal order of custody is made by a competent court with jurisdiction to determine the issue of custody of the children of a marriage under the Marriage Act.
2. Whether in the circumstances of this case there was a relief seeking for custody of the children to enable the court apply the provisions of the Infants Law of Imo State.

The Appellant's supplementary brief was dated 26/1/11 and filed on 31/1/11 while the Respondent's supplementary brief was dated 26/1/11 filed on 31/1/11.

I must say, this is a unique case and it deals with the rights and interests of the parents in a monogamous marriage over the children of that marriage pending formal order of custody. I have had to call for supplementary briefs to enable this court determine the real issues in controversy between the parties. In the briefs hitherto filed, I discovered that peripheral issues of fact were the focus of attention rather than the law regulating the rights of the parties in the circumstances of this case. I will go through the arguments of both counsel on the issues raised by them. I will adopt the issues as distilled by the learned Appellant's counsel in the determination of this appeal and also determine the questions raised by this court.

ISSUE ONE: There was a lot of ink and brawn expended with the greatest respect unnecessarily on the question of exactly when the Respondent knew that the Appellant took the children away and when he knew their whereabouts. Learned Appellant's counsel argued that the Respondent knew that the Appellant was no longer residing at the matrimonial home on 23/11/06 when he took out a writ and served her at the house of her mother at Calabar. Appellant's counsel argued that the Appellant made a stiff necked denial of the

knowledge of the whereabouts of his wife and children during his oral testimony in court claiming that his children were taken to an unknown place.

Learned Respondent's counsel argued that the Appellant conceded that she left the home without the consent of the Respondent at page 294 of the additional record when she admitted under cross-examination:

"Plaintiff had a busy practice and so I was left with no choice than to go with the children. I did not even ask for his consent to take children with me."

Counsel argued that this admission is evidence that the Respondent did not know her whereabouts. He cited AKPA v. THE STATE (2008) 4-5 SC Pt. 11 Pg. 1 at 18.

In my humble view the learned trial judge was quite right in concluding at page 212 of the Record as follows:

"It is clear to me that the Plaintiff, not being intimated with the plan to take the children to Calabar, cannot be said to know where the children were at the time the cause of action arose. His knowledge of the children's whereabouts was a later development in the case."

I am of the view and I think it stands to reason that the day the Appellant took the children away from the matrimonial home was the day the cause of action (if there is one) arose. This line of argument is resolved in favour of the Respondent.

The next point made by learned Appellant's counsel was that the learned trial judge did not grant the declaratory reliefs as prayed by the Respondent. He argued that the learned trial judge granted the Respondent reliefs not claimed by him. Learned Appellant's counsel argued that while it is the law that it is unnecessary for a judge granting a relief to frame his award in the exact language employed by a claimant, the law is also trite that it is no business of the court to search for reliefs for a party where the party has expressed his reliefs in clear and unambiguous terms. See AGBI & ANOR. v. OGBEH & ORS. (2006) ALL FWLR Pt. 329 Pg. 941 at 973 E-G, He cited MULTIBRASS/A ELECTRODOMESTICOS v. PATERSON ZOCHONIS CO. PLC (UK) (2006) ALL FWLR Pt. 326 Pg. 365 at 374 D-F. Appellant's counsel argued that while a trial court can thus make textual changes in the reliefs sought, they must not be such as

to amount to substantive amendments of those reliefs, the effect of which is to give an entirely different meaning from the reliefs sought. That function of substantive amendment of the relief sought is not the office of a judge, but the prerogative of counsel.

B Learned Respondent’s counsel in reply submitted that the learned trial judge is not under any legal obligation in granting the reliefs sought to couch same in the same verbatim words employed by the Respondent. He argued that the counsel to the Appellant acknowledged this much in para. 4.23 of his brief of argument. He cited ENGR. GOODNEWS AGBI & ANOR. v. CHIEF AUDU OGBEH & 3 ORS. (2006) ALL FWLR Pt. 329 Pg. 941 at Pg. 973 per MUS-DAPHER JSC, where it was held:

D *“It is argued by the learned counsel for the Appellant that what was granted to the 4th Respondent by the trial judge and affirmed by the Court of Appeal was not what the 4th Respondent claimed. While it is true that the 4th Respondent’s claim is not identical word for word with what was granted, in my view, the effect is clearly the same.”*

E Counsel argued that in the instant case, the relief granted by the learned trial judge is not framed word for word with the reliefs claimed by the Respondent, the yardstick to measure whether what was granted was what was claimed is to look at what the effect of the reliefs are. He submitted that the effect of the reliefs were the same. Let us examine what was prayed for from the trial court and what F was given to the Respondent.

“1. Declaration that the Defendant being the wife of the Plaintiff in respect of subsisting statutory monogamous marriage cannot unilaterally withdraw their said children from their school and take G them to unknown place to the Plaintiff without an order of court dissolving their marriage or granting them judicial separation.

2 3

4 Declaration that the Defendant has no lawful authority to take their children to an unknown place to the Plaintiff and withhold H the children from the Plaintiff, there being no order of court of law dissolving their marriage or granting judicial separation.”

His Lordship declared thus:

“(a) I declare that the withdrawal from school and taking out of home of the Plaintiff’s children by the Defendant without the

Plaintiff's knowledge and consent is not proper in law and is detrimental to the Plaintiff's interest in the said children.

(b) I declare that the Defendant has no lawful authority to take and keep the said children away from the Plaintiff without his consent."

I am inclined to agree with learned Respondent's counsel that the effect of the orders sought and the orders given are basically the same. The hair splitting in the argument of the Appellant's counsel to the effect that the injunction sought was an order restraining the Appellant from "taking away" but the court gave prayers which included "further taking" or "keeping away" or "continuing to keep away" "or away from the Plaintiff" is completely lost on me.

Appellant's counsel also objected that the court held that the taking of the children was "detrimental to the Plaintiff's interest in the said children" while the reliefs sought by the Respondent was that the children were taken to an unknown place "without the knowledge and consent" of the Respondent and "without an order of the court dissolving their marriage or granting judicial separation".

Learned Appellant's counsel never in his brief pointed out precisely how the declarations and reliefs differ in law and how the differential materially affected the rights of the Appellant. This line of argument I agree with learned Respondent's counsel is totally misconceived. I resolve same against the Appellant.

The issue itself is inherent with substantive legal questions which I will come to anon. It is within the context of this issue that the first question raised suo motu by the court can be determined. On this issue the learned Appellant's counsel is also of the view that the issue of whether or not the Appellant has a legal right to take the children of the marriage from the matrimonial home without a formal order of custody as raised suo motu by the court is not a live issue and is not predicated on any of the grounds of appeal. That being so the court has no right to raise an issue not predicated on any of the grounds of appeal. He cited SHA (JNR) & ANOR. v. KWAN & ORS. (2000) FWLR Pt. 11 Pg. 1788 at 1815; OVERSEAS CONSTRUCTION LTD. v. CREEK ENT. LTD. (1985) 3 NWLR Pt. 13 Pg. 407 at 414. ***Learned Appellant's counsel argued that the Respondent predicated his reliefs on the absence of a court order dissolving the mar-***

riage or judicial separation while the relief granted by the trial court was predicated not on those reasons but on the absence of Respondent's knowledge and consent. I have earlier on expressed my reservations about this line of argument as pursued by the Appellant's counsel.

B I cannot find any merit or substance in the argument that the issue of whether the Appellant had a legal right to take the children away from the matrimonial home was not a live issue in view of the phraseology employed by the learned trial judge in granting the orders sought.

C The 1st and 4th heads of claim require the court to determine that question, which the court did in the two declarations made in favour of the Respondent.

It is my humble view that grounds 2 and 3 of the grounds of appeal are solid platforms from which the issue was couched by the court. They are stated from page 224 of the Record as follows:

GROUND 2

The learned trial judge erred in law in granting both mandatory and restrictive injunctions against Appellant, WHEN

E PARTICULARS OF ERROR

1. Injunctive remedies being auxiliary reliefs must flow from principal reliefs.

2. Respondent having not proved his entitlement to any declaratory reliefs, no auxiliary reliefs ought to lie in his favour.

F GROUND 3

The learned trial judge erred in law in holding that Respondent proved his entitlement to the declaratory and injunctive reliefs, WHEREAS

G PARTICULARS OF ERROR

1. The grounds upon which Respondent predicated his entitlement to the said reliefs were contained in his Further Amended Statement of Claim.

2. Respondent failed to prove any of the said grounds.

H In our adversarial system of jurisprudence, parties are free to make their own case. However where the issues framed will not lead to a proper determination of the appeal, the court may frame issues provided they relate to the grounds of appeal. See NZEKWU v. NZEKWU (1989) 2 NWLR Pt. 104 Pg. 373

at 422; MOMODU v. MOMODU (1991) 1 NWLR Pt. 169 Pg. 608; ONIFADE v. OLAYIWOLA (1990) 7 NWLR Pt. 161 Pg. 130 at Pg.157 and JOHN BANKOLE & ORS. v. MOJIDE PELU & ORS. (1991) 8 NWLR Pt. 24 Pg. 523 at 537.

Apart from the reasoning above, this is the type of situation envisaged by Order 6 r 5 of the Court of Appeal Rules 2007. It provides as follows:

“5. Notwithstanding the foregoing provisions the court in deciding the appeal shall not be confined to the grounds set forth by the Appellant. Provided that the court shall not if it allows the appeal, rest its decision on any ground not set forth by the Appellant unless the Respondent has had sufficient opportunity of contesting the case on that ground.”

Therefore where the court is of the view that the grounds raised by the Appellant has not addressed the issues of law decided by the trial court, the Appeal Court is now at liberty to frame an issue outside the grounds where that issue will lead to a determination of the legal issues in controversy between the parties. It is only just and proper that the live legal issues decided by the trial court should be the basis of the determination of relevant questions in the appeal. In this case both parties have been given an opportunity to be heard in respect of both issues raised suo motu by the court.

The Respondent sought declaratory and injunctive reliefs which were among others that the Appellant had no lawful authority to take their children to an unknown place and keep them without a court order dissolving the marriage. The 2nd declaration made by the learned trial judge was that the Appellant had no lawful authority to take and keep the children without the consent of the Respondent. I agree with the view of the Respondent’s counsel that the issue of the legal right of the Appellant to take and keep the children was a live issue at the trial court and also a live issue in this appeal. This is clear from paragraph 5.09 page 5 of the Amended Respondent’s brief. The learned Respondent’s counsel in para 5.09 on page 5 of his main brief submitted that the Respondent’s case at the trial court was encapsulated in the following questions the resolution of which would dispose of the appeal:

(a) Did the Appellant move out of the matrimonial home of the Respondent with the four children without the knowledge of the

Respondent?

(b) Can the Appellant as the wife of the Respondent in a statutory monogamous marriage have the right in law to take the four children of that marriage away from the Respondent without any court of law granting her custody of the children and without the consent of the Respondent?

It was the failure of either party to address this question which the Respondent claimed was the gravamen of their case at the trial court that constrained the court to pose the question to them again so that the arguments can be canvassed and considered thereon. The second question posed by the Respondent's counsel and the first question posed by this court is in my humble view the crux of this appeal. Learned Appellant's counsel in arguing this issue in the supplementary brief went into a lengthy exposition of the Matrimonial Causes Act which I agree with the learned Respondent's counsel is quite misconceived. This is because learned Appellant's counsel argued that the right of the Appellant to take custody of the children without a formal order of court is supported by the provisions of the Matrimonial Causes Act dealing with proceedings for ancillary relief. Let me say with the greatest respect that Order XIV r 22 (1) referred to by counsel does not support that stand. It states as follows:

"22(1) Where, after proceedings for principal relief have been instituted a dispute arises with respect to the custody, guardianship, welfare, advancement or education, as the case may be, of a child pending the disposal of the proceedings, the Petitioner or Respondent may make application to the court for an order with respect to the custody, guardianship, welfare, advancement or education, as the case may be, of the child pending the disposal of the proceedings."

The implication of that rule is that the ancillary relief of custody can be sought after principal relief of dissolution of marriage had been first instituted. That was not what happened in this case. The Appellant herein unilaterally took the children away from the matrimonial home.

Be that as it may, Appellant's counsel on this issue also argued that no provisions exists in the Marriage Act, Matrimonial Causes Act, Children and Young Persons Law, and the Infants Law that forbid the wife from taking the children and moving with them where acrimony

persists in the home. Learned Appellant's counsel argued that the Supreme Court held in *WILLIAMS v. WILLIAMS* (1987) 1 NSCC 454 at 459 that both parents have the same rights to custody of the children. He submitted that a parent's custody of a child can only be unlawful when it amounts to custodial interference - where a parent violates a court order in respect of the children. Counsel argued that in the circumstances of this case, the children being very young and the Respondent being cruel to the Appellant, the Appellant had a right to leave the matrimonial home with the children. He cited *LAWSON v. LAWSON* (1974) 4 UILR 123; *UGOJI v. OKEKE* (1964) 2 ALL NLR Pg. 148. B
C

Learned Respondent's counsel on this issue argued that the Respondent had a right to demand for the return of his children under the Infants Law of Imo State. He argued that under Nigerian Law, a wife takes the domicile of her husband until death or divorce. He cited *MACHI v. MACHI* (1960) LLR 103; *ADEYEMI v. ADEYEMI* (1962) LLR Pg. 70. Counsel further argued that the domicile of an infant is that of his or her father. Counsel argued that it was unlawful for the Appellant to remove the children from the custody of their father before she sought for custody and dissolution of the marriage. Counsel argued that the Appellant required a court order to do so and it was unlawful to resort to self help. D
E

The question posed is whether the Appellant had a legal right to take the children away with her from the matrimonial home pending a formal order of custody. The learned trial judge at page 211 of the record was of the view that the focus of the suit was the propriety of taking the children of the marriage away from their established home, school and from their biological father. F

Let us look at available special and general legislation and case law to determine the rights of both parents. Sections 10, 12, 13 and 16 of the Infants Edict 1994 of Imo State are relevant. However, let me first set out the finding of the trial judge on the status of the children of the marriage. On page 216 of the record, the learned trial judge found on the date of the judgment as follows- G
H

"1. MASTER CHIMA AUGUSTUS NWOSU (JNR) was born on 22/7/1999 (a month less than 10 years).

2. MASTER NNAEMEKA ESHIT NWOSU was born on 16/5/2001 (eight years one month).

3. MISS. NMESOMA NWOSU was born on 25/10/2003 (five years, eight months).

4. MISS. UCHECHI NNEDIMMA FIDELIA NWOSU was born 22/11/2005 (three years, eight months).

Therefore as at the date of the judgment, none of the children was up to 10 years old. Now, the provisions of Sections 10, 12, 13 and 16 of the Infants Law referred to above can briefly be shown as follows:

S.10 (1) provides that the father can appoint a guardian for the child.

S.10 (2) provides also that the mother can appoint a guardian for the child.

S.12 provides that either parent of a child shall have like powers to apply to court in respect of any matter whatsoever affecting the child.

S.13 provides that on the application of either parent the court may make an order for custody of the child.

The purport of the above sections is that the Infants Law of Imo State recognizes that both parents have equal rights and interest in the children of the marriage. In WILLIAMS v. WILLIAMS (1987) 2 NWLR Pt. 54 Pg. 60 the Supreme Court held that both parents have equal rights in matters of custody of the children.

The Supreme Court put the legal position as follows:

"In regard to custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable by either without the other."

That is why for example, a parent cannot recover custody of a child from the other parent by a writ of habeas corpus.

I am of the view that a mother has equal right with the father over the children. In this case the Appellant had equal legal interest in the children of the marriage and had a right to protect that legal interest.

To narrow down the question to the circumstances of this case, is to determine the question whether the mother can unilaterally take the children away from the matrimonial home after deciding to leave same. The Appellant gave evidence supported by DW2 and DW3 that she was unhappy and that the Respondent repeatedly beat her

and maltreated her during the marriage. She said he threatened her life and told her to pack out. The Respondent denied this and the learned trial judge made no finding in that regard. Please note that desertion is a matter of fact and law for the court trying the dissolution of marriage to decide. Whether her testimony is found to be true or not, did she have a right to leave with the children when she left the matrimonial home? Her excuse was that she could not leave her children because they were too young. At the time she left the matrimonial home, on 13/11/06, the eldest child, a boy, was just a few months over seven years of age and the youngest child, a girl was about a year old. She would have been an unnatural mother indeed to leave the matrimonial home and abandon her children there at such tender ages. I am of the view that since she has an equal legal interest in the children, she had a legal right to leave the matrimonial home with the children. I cannot agree with the trial judge at page 213 of the record that it was improper or unlawful for her to do so.

Apart from a consideration of the ages of the children, in the circumstances of this case, I still hold fast to the view that so long as the children are legally minors and the mother decides to leave the matrimonial home, she has a legal right to taken them with her to protect her interest in them pending formal custody hearing by the competent court. Conversely, if the father for whatever reason decided that his children could not be left in the care of his wife, he has equal right to take the children from the matrimonial home and keep them somewhere safe pending divorce and custody hearing. I think the illustrations given by Appellant's counsel on paragraph 2.1 of the supplementary brief are very apt and symbolically and vividly illustrate and speak to the circumstances of this case. Counsel set out these two following scenario:

1. A wife decides to commence proceedings to dissolve her marriage contracted under the Marriage Act on the ground of cruelty. She must leave the matrimonial home to commence the proceedings. But she has a nursing baby. She must leave the baby in the matrimonial home in the care of the husband and go to court to obtain orders granting her custody of the baby. The justice delivery system is efficient and it took her 3 (three) days to obtain the custody orders. For these 3 (three) days, the baby was without the care and nurture of the mother!

2. A man is married to a wealthy woman. The wife has gone lunatic and violent. The couple have 2 (two) children between the ages of 3 (three) and 7 (seven) years and live in the matrimonial home wholly owned by the wife. The children have been victims of the violence of the wife. The husband wants a divorce. He intends to leave the matrimonial home but must leave the children behind until he obtains an order from a competent court granting him the custody of the children!

The law would be an ass indeed if a parent who has inherent legal interest in the children cannot do something to protect the children before the law can take its course. I am fortified in this position by the definition of what constitutes a legal right capable of being enforced.

In *A.G. LAGOS v. A.G. FEDERATION* (2004) 12 SCNJ Pg. 1 at 72 Niki Tobi, JSC in his contribution held on the issue of legal right as follows:

“What is a legal right? A legal right, in my view is a right cognizable in law. It makes a right recognized by law and capable of being enforced by the Plaintiff. It is the right of a party recognized and protected by a rule of law, the violation of which would be a legal wrong done to the interest of the Plaintiff, even though no action is taken. The determination of the existence of a legal right is not whether the action will succeed at the trial but whether the action donates such a right by reference to the enabling law in respect of the commencement of the action.”

The purport of the decision of the trial court is that the Appellant did not have equal legal right or indeed equal interest and right in the children of the marriage. I cannot leave this issue without considering some of the parameters used by the learned trial judge to arrive at his conclusion that the Appellant had no legal right to her biological children and to make an order compelling her to return them to the matrimonial home. I will set out a few of his Lordship’s reasoning in this case. They show us clearly the mindset of his Lordship. I will also want to emphasize that the learned trial judge without any evidence in that regard kept on insisting that the Appellant “forcibly” removed the children from the Respondent and matrimonial home. There is no evidence of the use of force by the Appellant to remove her children since there was no physical fight between the

couple in the course of removing the children. What is proved on record is that the Appellant took her children away without the knowledge and consent of her husband - their father. Wherein lies the "force"? The learned trial judge held as follows at page 212 of the record:

"I hold the firm view that the Plaintiff has been improperly subjected to grave deprivation by the forcible removal of his children from the home" ^B

His Lordship held at pages 212-213 of the record as follows:

"The removal and keeping away from the Plaintiff of the 4 children of the Plaintiff by the Defendant in the way it was done is in my view improper and unlawful." ^C

His Lordship posed the following questions on page 213 of the record -

"(1) Is it better for these children to have them forcibly detached from their father who is a renowned Medical Doctor and a D Politician and is ever willing to, have them around and give them the best he can afford to, prepare them for the life ahead?"

(2) Is it proper for these children who are indigenes of Owerri District of Imo State, to be uprooted from their indigenous base of Owerri, Imo State and planted in another nativity for their upbringing?" ^E

(3) Is it proper for these children who have a father, to be forced to be brought up as children of a single parent in the home where both Defendant and her mother are living without husbands?" ^F

He then went further to state as follows at page 214 of the record:

"There is also the need for the children of the marriage who are of Igbo extraction to be brought up in their indigenous environment to enable them imbibe the culture, norms and other ways of life of their kit and kin. To keep them and train them in Calabar will G amount to subjecting them to alien culture and ways of life thereby making them to loose their identity as Igbo children. This cannot be in their own interest. There is also the fact that the Defendant, having deserted her husband is now living with the said children as a single H mother. Her own mother who owns and lives in the house where these children are staying is also a single woman being divorced of long standing. I have the view that most women who are not under the influence of any man have no inhibitions or morals." (Underlining mine)

Page 210 of the record his Lordship opined:

"It is also not in dispute that the Plaintiff duly and formally married the Defendant and that they cohabited as husband and wife during which period the said children were born. It is not also in dispute, that the Defendant left her own home of Ibelo and in fact her own State of Akwa Ibom to join the Plaintiff in his own home of Mbaise. Owerri District of Imo State. By that marriage, the Defendant along with the said 4 children are indigenes of Imo State of Nigeria. While the Defendant can divest herself of the citizenship or membership of Imo State by relieving herself of the obligation of the said marriage through dissolution of the marriage, the four children of the marriage remain perpetual indigenes of Mbaise, Imo State unless they cease to be Nigerian citizens at their own instance at majority."

This was issue three raised by Appellant's counsel to the effect that none of the parties canvassed these points in their pleadings and evidence and that the learned trial judge's foray into ethnocentrism was completely unwarranted. His Lordship seems to have completely forgotten the provisions of S.42 of the 1999 Constitution which provides the right to freedom from discrimination. S.42 (1) (a) provides as follows:-

"42 (1) (a) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person -

(a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject. (Underlining mine)

Article 18(3) of The African Charter on the Human and Peoples Right ratified by Cap A9 Laws of the Federation 1990 provides in Article 2 and particularly in Article 18(3) that:

"The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions."

It is apparent that the reasons given by the learned trial judge

in arriving at the conclusion that the Appellant had no legal right to take the children from the matrimonial home were unconstitutional. The relief of declaration sought by the Respondent is for the court to declare a legal and factual state of affairs. The first and fourth declarations sought by the Respondent were granted by the trial courts stating that it was not proper in law and neither did the Appellant have any lawful authority to take the children away without the knowledge and consent of the Respondent pending formal custody hearing and orders. I have no hesitation in arriving at the conclusion that these declaration of the rights of the parents in relation to these children were based on a wrong premise which is that the rights of the very rich father are superior to the rights of the less affluent mother who is from a different tribe. There is discrimination on the basis of tribe, sex and financial means. Each parent has a right to take away and keep the children pending custody hearing. In the circumstances, the first issue of whether the Respondent established his rights to the declaration sought which included the issue of the legal right of Appellant to take the children away pending custody hearing and orders is resolved in favour of the Appellant.

ISSUE TWO The 2nd issue raised by learned Appellant's counsel is that there was breach of fair hearing by the learned trial judge for refusing to give adequate consideration to the defence of the Appellant before arriving at his conclusions. Counsel argued that the learned trial judge refused to consider the fact that the Appellant claimed she left the matrimonial home due to cruelty and had to take the children of tender years away. Counsel argued that the learned trial judge was obliged to decide the nature of the marriage whether it was a harmonious one or not and that his failure to do so amounted to denial of fair hearing. He cited *OKONJI & ORS. v. NJOKANMA* (1991) 22 NSCC Pt. 2 Pg. 462 at 478 & 474; *JAMGBADI v. JAMGBADI* (1963) 3 NSCC 281 at 282.

Learned Respondent's counsel in my view made a brilliant response to this complaint raised in this issue by saying that the Appellant did not understand the claim of the Respondent. The Respondent never quarreled with the desertion of the matrimonial home or her reason for doing so but for taking the children without a formal order of custody. I am of the humble view that the learned trial judge did not and rightly so, go outside the claims of the Respondent

by indulging in the reasons for the domestic dispute between the parties.

The trial court held as follows at page 211 of the records:

B *"I must say that the issue of the cause of Defendant's desertion or the propriety or justification of her said desertion is not a life issue in this matter. That issue is for the divorce court to consider..... The focus of this case is the propriety of taking the children of the marriage away from their established home, school and away from their biological father."*

C The complaint of fair hearing normally arises where a party is not given an opportunity to be heard in respect of crucial matters before the trial court. This court in DALORIMA MERCHANT (NIG.) LTD. v. UNITED BANK FOR AFRICA PLC & ANOR. (2001) FWLR Pt. 71 Pg. 1851 at 1860-61 G-A per OBADINA JCA held:

D *"The right to fair hearing is the foremost of the basic rights of the citizens. However, the expression "fair hearing" is indeed vague and incapable of precise definition. It can only be properly defined in relation to the facts and circumstances of a given case but not otherwise. One thing however is clear and it is that fair hearing must necessarily involve a "fair trial" according to the rules of law and when one speaks of a fair hearing of a case, it is the whole or entire conduct of the proceedings under consideration that has to be looked at and it has to be looked at objectively."*

F I agree with the learned Respondent's counsel that the learned trial judge was right in his decision not to be sidetracked by delving into the reasons why the marriage broke down which is for a court trying divorce proceedings. Refusal by a trial court to be drawn into a matter not before him cannot be denial of fair hearing. I resolve this
G issue against the Appellant.

H The 3rd issue raised by the learned Appellant's counsel is that the learned trial judge did not predicate his findings on the pleadings of the parties. He argued that the Respondent never pleaded ethnocentrism or loose morals of the Appellant in his claim for custody. He submitted that the Respondent sought custody of the children because the Appellant was jeopardizing the health, education, upbringing of the children and wanted to change them from the Roman Catholics to Brotherhood of Cross and Star. He argued that these were the only parameters open to the learned trial judge. Learned

Respondent's counsel replied that the Respondent did not pray for custody of the children but prayed for the return of the children to the matrimonial home and their school where they were forcibly removed by the Appellant which was what the court did. He urged the court not to tamper with the findings of the trial court because those findings were borne out of the evidence before the court. He cited *OJO v. OKITIPUPA OIL PALM PLC* (2001) FWLR Pt. 70 Pg. 1487 at 1503-1504. B

During the course of the trial, four reasons were raised by the Respondent as to why it was unlawful for the children to stay with their mother pending custody hearing- C

1. That the father is a wealthy legal practitioner and politician who is ready to give them the benefit of his wealth. Although the learned trial judge could not make a finding that the Appellant was financially incapable of taking care of them, his Lordship however concluded that "they cannot be starving in the midst of plenty" and that they would benefit better from the influence of their father. D

PW2 did not say they were in want of anything. I cannot agree with the conclusion of the learned trial judge that the children are presently starving. That is a perverse conclusion not supported by the evidence on record. E

2. That the children had various health challenges that could only be adequately resolved by their father alone. The learned trial judge did not find that the children had peculiar health challenges which could not be resolved wherever they lived. In fact the evidence of PW2 much relied on by the trial court confirmed this. See page 215 of the record. F

3. That the children were being converted to another religion. The Respondent claimed that he is a catholic but that his children were being converted to the Brotherhood of the Cross and Star. The learned trial judge also found that this particular allegation was not proved. G

4. That the children were being exposed to the promiscuity of their mother which was not good for them. H

The learned trial judge believed the evidence of PW2 that the Appellant received male visitors on a regular basis and she tried to shield the children from them by taking the children upstairs. PW2 much relied on by the trial judge did not go as far as to say that the

Appellant indulged in any action remotely improper in the presence or absence of the children. The learned trial judge held as proved on page 214 of the record the evidence that the Appellant had male visitors simpliciter.

His Lordship said he made this conclusion because the Appellant did not cross examine PW2 on these allegations even though PW2 confessed under cross-examination that the Respondent used to send him money. I read the evidence of the Appellant in that regard when she was lead and she swore categorically at page 192 of the record that “she has not had any boyfriend since she got married to the Plaintiff and has never been caught in a compromising situation as a married woman”. I have set out earlier the mindset of the learned trial judge which palpably influenced his Lordship’s conclusions. I need say no more. Suffice it to say that there is no proof on record that the Appellant kept the children in an immoral household. There is no doubt that none of the impediments raised against the Appellant having the children were proved. Indeed the conclusion of the trial judge was because he allowed his personal prejudices to influence his dispassionate consideration of the facts.

Indeed, that brings us to the next issue raised suo motu by this court which is whether in the circumstances of this case there was a relief by the Respondent seeking for custody of the children to enable the court apply the provisions of the Infants Law of Imo State. This question had to be put directly to both counsel since the record did not easily yield an answer. The Appellant’s counsel argued on this issue in the supplementary brief that there was no relief for custody of the children by the Respondent and there was no counter-claim for custody. He argued that the last further amended statement of claim filed on 15/1/09 contained only 8 reliefs which did not include custody of the children. Appellant’s counsel argued that none of the reliefs set out above excludes Appellant from care giving and decision making functions in respect of the children of the marriage. Conversely, none of the said reliefs confer any care giving or decision making functions on the Appellant. All Respondent required was the return of the children to the matrimonial home in Owerri.

Learned Respondent’s counsel in the supplementary brief made an about face and argued that the contextual nature of the reliefs sought by the Respondent is wide enough to accommodate the grant

of custody of the children under the Infants Law of Imo State. Counsel argued that the consequential order made by the court is epistemologically wide enough to accommodate custody of the children. He cited *AGBI v. OGBEH* (2006) ALL FWLR Pt. 3290 Pg. 941 at 973. He argued that the effect of the order given is the same as where the word custody is used. He argued that the Appellant had initially conceded on page 75 of the record before the trial court that this case involves the issue of custody of children and cannot now approve and reprobate. He cited *KAMALU v. UMUNNA* (1997) 5 NWLR Pt. 505 Pg. 321. Learned Respondent argued that the Respondent chose to approach the High Court for a declaration of the status of the parties by issuance of a writ rather than petition for dissolution of marriage and that the order for custody by the learned trial judge should not be disturbed.

I discovered from the record that the Respondent's last Further Amended Statement of Claim filed on 15/1/09 excluded a claim for custody and the trial court on pages 179-180 of the record referred to that last amendment seeking only eight (8) reliefs which did not include an order for custody.

Learned Respondent's counsel in the reliefs claimed in paragraphs 6-8 of the Further Amended Statement of Claim by the Respondent sought for injunctive orders compelling the Appellant to return the children to Plot No. 92B Works Layout Owerri, the matrimonial home.

In *Black's Law Dictionary*, 8th Edition, page 412, custody is defined thus:

"Family Law. The care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision making authority) and physical custody (care giving authority), and an award of custody usually grants both rights...." At page 413 of *Black's Law Dictionary* supra "custody proceedings" is defined thus:

"Custody proceedings. Family Law. An action to determine who is entitled to legal or physical custody of a child. Legal custody gives one the right to make significant decisions regarding the child, and physical custody gives one the right to physical care and control of the child."

In granting the reliefs, the learned trial judge also did not make

an order for custody. The court only made orders that the children be returned to the matrimonial home of the parties and specifically to Plot No. 92B Works Layout Owerri, Imo State. The orders did not attach to the Respondent specifically but to a location. An order for custody would attach to a person and not to a location. Therefore, in spite of the fact that the learned trial judge imported suo motu the Infants Law 1994 of Imo State into his decision, he could not follow through strictly the provisions of the law because he was not asked to do so by either of the parties since the Respondent never asked for custody under S.12 and S.13 of the Infants Law.

I agree with the learned Appellant's counsel that the Respondent never made a claim for custody of the children. I am of the view that the question the learned trial judge was asked to determine was whether the Appellant could take the children away without the consent and knowledge of the Respondent. It stopped short of a claim of legal custody of the children. I have decided earlier that either parent has a right to take the children away from the matrimonial home pending custody hearing. I have also decided that the reasons given for declaring the actions of the Appellant unlawful are unconstitutional. Furthermore, the reasons adduced by the Respondent for why the Appellant should return the children to the matrimonial home pending custody hearing have been found to have no factual basis. As I held earlier the Respondent wanted a declaration that it was unlawful for the Appellant to take the children to a place unknown to him and the court granted him a declaration that it was unlawful for the Appellant to take away the children depriving the Respondent of his legal right to them.

The power of a court to make declarations concerning the rights of parties is unlimited and is an equitable remedy. See DR. TAIWO OLORUNTOBA-OJU v. PROF. P. DOPAMU & ORS. (2008) 2 SCNJ 87. However, the court is bound to confine itself to the reliefs claimed. The trial court has done this by ordering the return of the children to the matrimonial home. The learned trial judge gave unconstitutional and perverse reasons for making the declarations. If the Respondent was not entitled to the substantive reliefs in his claim, he cannot be entitled to consequential orders which would translate into custody of the children in whatever guise. I resolve this issue

in favour of the Appellant.

The two other issues raised by the learned Appellant's counsel are in my humble view non-sequitur in the circumstances of this case. On the fourth issue which was whether the Respondent proved that the couple were married under the Act, the record shows that by the time hearing started in this case, the Appellant had already filed a divorce petition before the High Court of Cross River State confirming that the couple were married under the Act and seeking dissolution of the marriage. Why the need to contest the issue now and here on appeal the fact of whether the marriage was one under the Act? I will not bother with the greatest respect to consider irrelevant arguments on that issue. Suffice it to say that there was proof on the record that the couple were married under the Act. This issue is resolved against the Appellant.

The fifth issue is whether the trial court should have attached any weight to Exh D - the letter purportedly written by the first child of the marriage to his father and the evidence of PW2. Learned Appellant's counsel tried to impugn the evidence of PW2 which in my view for the most part did nothing to aid the case of the Respondent in proving his claims that his children were not living in decent accommodation, were being converted into the Brotherhood of the Cross and Star and had serious health problems. Learned Appellant's counsel argued that Exh. D and the evidence of PW2 were not pleaded and therefore inadmissible. Assuming without conceding that they were admissible, no weight ought to be attached to them. Exh. D was unsigned and therefore totally worthless. PW2 had an axe to grind with both Appellant and her mother. He was not a "neutral" witness as held by the trial court. Learned Respondent's counsel argued that Exh. D and the evidence of PW2 were pleaded and the trial court rightly admitted them and lent weight to them in the judgment.

I am of the view that there is no doubt that Exh. D being unsigned is inadmissible. That is apart from the fact that it was purportedly written by an eight year old boy to his father and passed through a third party. Given the circumstances of this case, and the claim before the court, the contents of the letter cannot serve as proof one way or the other of the Respondent's claims.

On the evidence of PW2 who the learned trial judge took as a

neutral thus credible witness, the appellate court is not at liberty to question the conclusion of the trial judge regarding the credibility of a witness. The Appellate court can only interfere in the conclusions drawn by the trial judge being matters of evaluation of the weight to be attached to the evidence of witness. I see no need to interfere in this case. I have read the record and I am convinced of the credibility of PW.2. The Appellant did not challenge the conclusions of the trial judge regarding the evidence of PW.2. See Mohammed v. Mohammed (2008) 6 NWLR Pt.1082 pg. 73 at Pg.86; Nnadozie v. Mbagwu (2008) 3 NWLR Pt.1074 pg. 363 at 381 - 382. **Thus I do not agree that the learned trial judge was wrong in believing the evidence of PW2. That issue is resolved against the Appellant.**

Having resolved the live issues in this appeal in favour of the Appellant, the appeal succeeds.

The orders of the learned trial judge are hereby set aside. This court hereby orders that the parties shall maintain the status quo ante bellum (before action was filed in court) pending outcome of the divorce and custody hearing already instituted at the Cross River State High Court. For the avoidance of doubt, since both parties have equal legal and equitable right in the children of the marriage, where equities are equal, the first in time prevails. The Appellant shall retain custody of the children to abide the order of the Cross River State High Court in respect of the divorce and custody proceedings. Appeal Allowed. No order as to costs.

ABDUL-KADIR JCA

I have had the privilege of reading in draft the judgment just delivered by my learned brother Ogunwumiju, JCA. I agree with it entirely. I have nothing to add. Accordingly, the appeal succeeds and is hereby allowed. The Orders of the learned trial judge are hereby set aside. I abide by all the consequential orders made in the judgment.

OWOADE JCA

I agree