

IN THE CUSTOMARY COURT OF APPEAL  
EDO STATE OF NIGERIA  
HOLDEN AT BENIN CITY

ON TUESDAY, THE 1<sup>ST</sup> DAY OF MARCH, 2011

BEFORE THEIR LORDSHIPS

MARY NEKPEN ASEMOTA	-	JUDGE (PRESIDED)
PETER AKHIMIE AKHIHIRO	-	JUDGE
OHIMAI OVBIAGELE	-	JUDGE

APPEAL NO: CCA/2A/2010

B E T W E E N:

MR. SUNDAY OMOKARO í í í í í APPELLANT

A N D

MRS. OMOSEFE OMOKARO í í í í RESPONDENT

J U D G M E N T  
DELIVERED BY MARY NEKPEN ASEMOTA (JCCA)

This is an appeal against the judgment of the Oredo Area Customary Court, Benin City, in Suit No. OR/ACC/240/07 delivered on the 14<sup>th</sup> day of July, 2008.

The appellant (as petitioner), in a divorce petition against the respondent, asked for the following reliefs:

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- õ1. Dissolution of the said marriage between the parties.
  2. An order of court compelling the respondent to remove all her personal belongings and pack out of the petitioner's said house and stop collecting rent from the said property at No. 151, Old Benin-Agbor

Road, Benin City, including the said parcel of land.

3. An order of perpetual injunction restraining the respondent, her servant or privies from further entering into the petitioner's house, place of work and from further threatening of petitioner's life anywhere she sees him.

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The respondent initially filed a reply and cross petition against the appellant.

The reply/cross-petition was later struck out by the trial court at the instance of counsel for the respondent who applied to withdraw same.

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The appellant's case at the trial court was that the marriage between the parties was contracted in 1999 according to Benin customary law. There are three surviving children of the marriage. The respondent resides in the appellant's building opposite NNPC, Benin City. Sometime in 2004, information reached the appellant that the respondent was secretly erecting a house. When confronted, the appellant denied it but later owned up to building one.

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The respondent told the appellant that the piece of land was bought jointly with her mother and that she was erecting a building on it alone. The appellant refunded the sum of ₦180,000.00 (one hundred and eighty thousand naira) to the respondent's mother through the respondent, which sum was said to have been contributed by her towards the purchase of the land. The appellant's directives that an agreement in respect of the land be written to reflect the respondent's name as his wife was carried out.

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The respondent has been living in the appellant's house at No. 151, Benin-Agbor Road, Benin City and collects rent from tenants in the house. The appellant is now desirous of selling the said house. Subsequently, the relationship between the parties went sour, hence the divorce petition before the lower court by the appellant.

The respondent's case on the other hand, which was substantially similar to that of the appellant, was that she got married to the appellant in 1995 in accordance with Benin customary law. The appellant was aware of the land transaction and the building which she was erecting on it. She never had any disagreement with the appellant and that it was the appellant who refused either to see or telephone her. The respondent later got to know that the cause of the problem was the house she was building. She begged the appellant and even asked some persons to intervene, to no avail.

When the respondent had a miscarriage, the appellant refused to come to see her even when he was duly informed. The appellant also refused to attend the respondent's father's burial. The respondent turned down the appellant's request that she should join him to sell the house which was built for her. She resides with her children in the said house. The respondent is yet to complete the house she is building and has no alternative accommodation.

The respondent was not opposed to the dissolution of the marriage but asked for custody of the three children of the marriage, two of whom are twins and are

aged nine. The third child is four years old. The appellant who is a money lender can afford to pay ₦200,000.00 (two hundred thousand naira) per month for maintenance including school fees for the children as well as ₦100,000.00 (one hundred thousand naira) for their Christmas clothes and shoes.

5           The trial court after hearing evidence in the case, found in favour of the appellant and dissolved the marriage between the parties. It granted custody of the three children of the marriage to the respondent and awarded the sum of ₦150,000.00 (one hundred and fifty thousand naira) per month as feeding allowance, children education and medical bills until the children attain adulthood.

10           Furthermore, it awarded the sum of ₦100,000.00 (one hundred thousand naira) for clothes and shoes for Christmas and new year celebrations. Finally, the court ordered that the appellant should allow the respondent and her children to remain in the appellant's house at No. 151, Benin-Agbor Road, Benin City pending the completion of the respondent's house.

15           Dissatisfied, the appellant filed a Notice of Appeal containing two original grounds of appeal. By an amended notice of appeal, the appellant reformulated three grounds of appeal with their necessary particulars.

In essence, the three grounds of appeal without their particulars are as follows:

20           ō1. The learned trial President and Members of the panel of the Oredo Area Customary Court, Benin City erred in law in arriving at her decisions.

(sic)

2. The trial court's decision compelling the appellant to continue to allow the respondent to live in his house situate at No. 151, Benin-Agbor Road, Benin City and thereby forbidding the appellant from ejecting the respondent therefrom after dissolving the marriage between them is contrary to law.
3. The trial court erred in law when it ignored relief No. 2 as contained in the appellant's petition.

The appellant in consonance with the rules of this Court, filed his brief of argument which was duly served on the respondent's counsel who represented her on a number of occasions in this Court.

However, for reasons not made available to this Court, the respondent and her counsel, S. D. Noragbon-Osakue Esq. stopped appearing in court. On the 14<sup>th</sup> day of December, 2010, parties as well as their counsel were absent from Court. This Court ordered that fresh hearing notices be served on them.

On the next adjourned date, the 11<sup>th</sup> day of January 2011, the appellant's counsel was present in court and the respondent as well as her counsel were also absent despite their having been served with the hearing notice. The appellant's counsel, M. D. Odu Esq., prayed Court to allow him argue his appeal and he was obliged.

The learned counsel for the appellant formulated six issues from the three

grounds of appeal as follows:

- 5           ō1.   Whether the trial Oredo Area Customary Court, Benin City was right to have arbitrarily awarded a whopping sum of ₦150,000.00 (one hundred and fifty thousand naira) against the petitioner/appellant for the upkeep of the three children of the marriage.
2.   Whether the trial court was right to have awarded the sum of ₦100,000.00 (one hundred thousand naira) against the petitioner/appellant for clothes and shoes for xmas and new year celebrations.
- 10       3.   Whether the trial court was right to have compelled the petitioner/appellant to continue to allow the respondent to live in his house at No. 151, Benin-Agbor Road, Benin City thereby forbidding the appellant from ejecting the respondent from the said house until she completes a certain house she is building somewhere.
- 15       4.   Whether the trial Area Customary Court was right to have held at paragraph 6 of page 9 of the judgment that the appellant ought to have provided an alternative accommodation for the respondent even after dissolving their marriage.
- 20       5.   Whether the discretionary powers of the trial court has been used judicially and judiciously in arriving at the decisions herein complained about.

6. Whether the trial court was right to have ignored relief No. 2 of the appellant as contained in his petition wherein he prayed the court for an order compelling the respondent to remove all her personal belongings and pack out of the petitioner's said house and stop collecting rent from the said property at No. 151, Benin-Agbor Road, Benin City including the parcel of land thereon.

It is settled law that the issues for determination must not exceed the grounds of appeal. While it is permissible for the number of issues for determination to be the same as the grounds of appeal, it is wrong for a party to distill more issues than the grounds of appeal. This would amount to proliferation of issues which courts have always frowned upon. See the following cases:

1. E.A. Ltd. Ind. v. NERFUND [2009] 8 NWLR (part 1144) 535 at 554 ratio 25.
2. Kalu v. Oluabunwa (2004) 7 NWLR (part 87) 1
3. U.B.A v. Mode (Nig) Ltd (2001) 13 NWLR (part 730) 335
4. Agwarangbo v. Idumogu (2008) 5 NWLR (part 1081) 564 at 566 ratio 2.

Where issues are prolix as in this case, the attitude of the court is to strike out the extra issue or issues as the case may be.

See the following cases:

1. Ayangade v. O.A.U.T.H.C.M.B. (2001) 7 NWLR (part 711) 187
2. Rockshell International Ltd. v. Best Quality Services Ltd & anor (2009) 12 NWLR (part 1156) 640 at 653 ratio 19.

3. Madu v. Mbakwe (2008) 10 NWLR (part 1095) 293 at 305 ratio 27.

After a careful examination of the grounds of appeal vis-à-vis the issues as formulated, we are of the view that the issues are unnecessarily prolix. This is a proper case in which the issues can be reframed by this Court for a proper determination of this appeal. See the following cases:

1) Uko v. Mbaba [2004] 4 NWLR (part 704) 460 at 467 ratio 4

2) Bankole v. Pelu [1991] 8 NWLR (part 211) 523

In our view, the following three issues can be distilled from the grounds of appeal.

1. Whether the trial court was right when it awarded a whopping sum of ₦150,000.00 (one hundred and fifty thousand naira) per month and ₦100,000.00 (One hundred thousand naira) against the appellant for the upkeep of the three children and for christmas and new year celebrations, respectively. (Ground 1)

2. Whether the trial court's order on the appellant to continue to allow the respondent to live in his house at No. 151, Benin-Agbor Road, Benin City after the dissolution of the marriage until the respondent completes her house was right (Ground 2)

3. Whether the trial court failed to consider relief 2 as contained in the appellant's petition. (Ground 3)

Arguing Issue one, learned counsel for appellant, F. O. Edeki Esq., submitted



that there was no evidence before the trial court of the capability of the appellant to pay such an amount monthly for the upkeep of the children of the marriage. He contended that the discretionary powers of the court must be exercised judicially and judiciously. He added that it behoves on a party who seeks for an exercise of the court's discretion to supply the necessary particulars to justify such an exercise of discretion. He cited the case of Labara v. Okoye (1999) 4 NWLR (part 389) 303 at 311 ratio 9 in support of this proposition.

It was counsel's submission that the appellant's income was not taken into consideration by the trial court as the upkeep of children depends on the income of the parents. He contended that the discretionary powers of this court to determine the welfare of the children of a dissolved marriage ought to be exercised judiciously and not outrageously as to put a parent in jeopardy. According to counsel the awards were arbitrary. He cited the case of Chairman, Customary Court, Omoku v. Ojadi (2007) All FWLR (Part 380) 1607 at 1609 ratio 3 in support of this proposition.

Furthermore, he submitted that there was no evidence to support the monetary award particularly when the respondent withdrew her cross-petition. Counsel cited the case of Ojabo v. Inland Bank Nig. PLC (1998) 11 NWLR (part 574) 433 at 437 ratio 1 and submitted that the court is not a father christmas. He urged the court to set aside the monetary award.

We have carefully considered the submissions of learned counsel on this issue. The grouse of the appellant is that the sum awarded against him for the

maintenance of the children of the marriage is excessive. He seemed to have conceded and rightly too that the appellant is entitled to pay some amount of money for their upkeep, but certainly not for Christmas and new year celebrations.

5 The trial court at page 48 lines 18 ó 20 stated *inter alia* òin a dissolution of any marriage particularly that which is blessed with children, the paramount consideration by any court is the interest and welfare of children of such marriageí ö

10 We agree with the trial court because it reiterated the position of the Law whether it be a marriage under customary law or under the Marriage Act. See the case of Tabansi v. Tabansi [2009] 12 NWLR (part 1155) 415 at 416 ratio 2 and section 27(1) of the Customary Courts Law, 1984.

15 In the instant appeal, the trial court exercised its discretionary powers to determine what was in the best interest of the children with regard to maintenance and awarded the sum of ₦150,000.00 (one hundred and fifty thousand naira) per month and ₦100,000.00 (one hundred thousand naira) for christmas and new year celebration when there was no evidence before the court of the income of the appellant.

20 An appellate court will not interfere if the discretion is exercised judicially but where it was exercised arbitrarily or tainted with some illegality or irregularity this Court is duty bound to reverse or modify the trial court's order as it deems fit.

See the following cases:

- 1) Nzeribe v. Dave Engineering Co. Ltd (1994) 8 NWLR (part 361) 124
- 2) University of Lagos v. Aigoro (1985) 1 NWLR (part 1) 143
- 3) Nanna v. Nanna (2006) 3 NWLR (part 966) 1 at 13 ratio 12.

5 The award of ₦150,000.00 (one hundred and fifty thousand naira) per month by the lower court in our view is excessive and is accordingly reviewed downwards to ₦50,000.00 (fifty thousand naira) per month for maintenance i.e feeding, school fees etc, until the youngest of the children attains the age of 18.

10 We are mindful of the fact that there was evidence that the appellant had another wife and there was no evidence before the trial court of the income of the appellant. We are of the considered view that the sum of ₦50,000.00 (fifty thousand naira) per month is adequate for the upkeep of the three children of the marriage.

15 However the award of ₦100,00.00 (one hundred thousand naira) per annum for Christmas and new year celebrations has no basis whatsoever. In our view, the monthly allowance is adequate to take care of Christmas and new year celebrations for the children.

Consequently, issue one is partly resolved in favour of the appellant subject to the reduction referred to earlier in this judgment.

20 On issue two, learned counsel submitted that it was not in dispute that house No. 151, Benin-Agbor Road belonged exclusively to the appellant. He contended that the respondent did not seek a relief forbidding the appellant from ejecting

her from the said house nor was evidence led to the effect that the respondent had a lien over it. He submitted that the order by the trial court was wrong and capable of working serious hardship and psychological trauma on the appellant.

5 He contended that the order of the court compelling the appellant to allow the respondent live in his house is indefinite as no time limit was set as to when the respondent should complete the house she was building and vacate the premises. He added that the order is an encumbrance to the appellant's exclusive right to his property and should be set aside.

10 Furthermore, it was counsel's submission that the trial court lacked the jurisdiction to determine title to the house at No. 151, Benin-Agbor Road Benin City or any part thereof because the claim is not one of customary inheritance. Counsel cited the case of Erhunmwunse v. Ehanire (2003) 110 LRCN 1786 at 1791 ratio 2 in support of this proposition.

15 Finally on this issue, counsel submitted that the duty of care hitherto owed the respondent ceased when the marriage was dissolved. He contended that the trial court's pronouncement which foisted such duty on the appellant was unfounded.

20 We have also carefully considered the submission of learned counsel on this issue. We have observed that contrary to learned counsel's submission, the trial court did not in any way determine title to the said house. It stated clearly at page 46 lines 19 ó 20 that from its findings, the ownership of the house was not in dispute.

It is true that under a customary law marriage the duty to maintain a wife ceases on the dissolution of the marriage. However, in the case of the children particularly when they are minors, the husband owes a duty to provide for them. The trial court in this appeal stated in its judgment at pages 48 lines 18 ó 20 of the  
5 Record of Appeal that it took into consideration, the interest and welfare of the children of the marriage. One of the orders made was to the effect that as the appellant was yet to provide an alternative accommodation for the respondent and children, they were to continue to live in the appellant's house until she completes her house.

10 Much as we agree that the interest of children of the marriage is paramount, we are of the view that the order of the court was rather stretched too far thereby giving the respondent an undue advantage after the marriage had been dissolved. This is so because as submitted by learned counsel for the appellant no time limit was fixed by the trial court for the respondent to vacate the premises. With the  
15 dissolution of the marriage, the respondent occupies the house at the pleasure of the appellant and is at best what is known in law as a tenant at will.

The trial court had adequately provided for the upkeep of the children of the marriage. The appellant is not under a duty to provide an alternative accommodation for the respondent and the children. This is a proper situation in which this Court as  
20 an appellate court can review or modify the orders of the trial court. See the

following case of Nanna v. Nanna (2006) 3 NWLR (part 966) 1 at 13 ratio 12.

In the circumstance, the respondent shall vacate the house and premises at No. 151, Benin-Agbor Road, Benin City within six months of the date of this judgment. Issue two is resolved in the negative.

5 Issue three is whether the trial court failed to consider relief 2 as contained in the appellant's petition. In relief 2 of the petition, the appellant sought an order of court compelling the respondent to remove her personal belongings, pack out of the appellant's house and stop collecting rent from the property.

10 Arguing issue three, learned counsel submitted *inter alia* that the trial court completely ignored prayer 2 when that issue constituted one of the major issues before it.

He contended that there was uncontroverted evidence from the respondent that she had been collecting rent in respect of the property but the trial court chose to ignore it. He urged this Court to grant the said relief in the interest of justice.

15 We have considered the submissions of learned counsel on issue three. The trial court in its findings at page 46 of the record of appeal found that the ownership of the said house was not in dispute as the respondent had no lien over it. The trial court held that in the absence of any evidence from the appellant as to how he had been providing for the upkeep of the respondent and her children, it could be  
20 inferred that it was the appellant who authorized the respondent to collect the rent

and utilize same for her upkeep and those of her children.

Having so held that the house did not belong to the respondent and that she should move out after a certain period, it would have been superfluous to make a specific order that the respondent should stop collecting the rent.

5           The trial court in our view, adequately considered relief 2 as contained in the claim. Issue three is answered in the negative.

10           Having resolved issue one partly in favour of the appellant, issue two in favour of the appellant and issue three in favour of the respondent, we hold that this appeal succeeds in part. Consequently, the judgment of the Oredo Area Customary Court, Benin City delivered on the 14<sup>th</sup> day of July, 2008 in Suit No. OR/ACC/240/07 is hereby affirmed, save for the orders set aside and the following orders which are made in its stead:

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- (1) That the appellant shall pay the sum of ₦50,000.00 (fifty thousand naira) per month for the upkeep of the three children of the marriage until the youngest one attains the age of 18.
  - (2) That the respondent shall vacate the appellant's house and premises at No. 151, Benin-Agbor Road, Benin City within six months from the date of

this judgment.

We make no order as to costs.

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HON. JUSTICE M. N. ASEMOTA

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HON. JUSTICE P. A. AKHIHIERO

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HON. JUSTICE O. OVBIAGELE

M. D. Odu Esq., : : : Counsel for the Appellant