

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP: THE HON. JUSTICE V.O. EBOREIME, JUDGE
SITTING IN HIGH COURT NO. 12, BENIN CITY
ON WEDNESDAY, THIS 20TH DAY OF JULY, 2016

SUIT NO. B/73/OS/2014

BETWEEN:

MRS. ANN ETEK OJEYOKAN	í ..	APPLICANT
AND		
1. ITOHAN OKUNGBOWA	} í ..	RESPONDENTS
(Parading herself as Mrs. Itohan Okungbowa-Ojeyokan)		
2. DR. TIMOTHY OZIEGBE OJEYOKAN		

J U D G M E N T

This Judgment is in respect of the Originating Summons brought pursuant to Order 3 Rules 7 and 8 of the extant Rules of this Court, the Matrimonial Causes Act(sic)/Marriage Act and/ Order under the inherent jurisdiction of this Honourable Court. It seeks the following reliefs:

õ2. RELIEFS BEING SOUGHT:

- i. A DECLARATION by this Honourable Court that the marriage conducted at the Oredo Local Government Marriage Registry, Benin City on 13/12/2008 between the 1st and 2nd Respondents is illegal, null and void of no effect as same is contrary to the provisions of the Matrimonial Causes Act/Marriage Act.

ALTERNATIVELY

A DECLARATION that there is/was no valid/lawful marriage between the 1st and 2nd Respondents known to law having regard to the first subsisting marriage between the Applicant and the 2nd Respondent.

- ii. A DECLARATION by this Honourable Court validating MRS ANN ETEK OJEYOKAN, the Applicant as the only Legitimate or Lawful wife of the DR TIMOTHY OZIEGBE OJEYOKAN, the 2nd Respondent.
- iii. AN ORDER of injunction restraining the Respondent either by themselves, Agents, Privies, personal representatives or any person, or group of persons however from doing anything (including posing, parading themselves as husband and wife) pursuant to the marriage conducted at the Oredo Local Government Marriage Registry, Benin City on the 13th day of December, 2008 and/or any other purported marriage.ö

The four (4) questions or issues for determination as couched by the Applicant are as follows:

- ö1. WHETHER under and by the provisions of the Matrimonial Causes Act/Marriage Act the 1st and 2nd Respondents are lawfully married while there was/is a subsisting traditional

marriage under the Okuni Native Laws and Customs between the Applicant and 2nd Respondent.

2. WHETHER or not the 2nd Respondent having duly contracted the 1st marriage under the Okuni Native Laws and Customs (with the Applicant) had any Legal right under the provisions of the Matrimonial Causes Act/Marriage Act to contract the subsequent marriage at the Oredo Local Government Marriage Registry, Benin City, Edo State with the 1st Respondent.

Alternatively, Whether or not the 1st Respondent had any legal right under the provisions of the Matrimonial Causes Act/Marriage Act to contract the purported marriage with the 2nd Respondent at the Oredo Local Government Marriage Registry on the 13th day of December, 2008 and/or any other purported Marriage having regard to the 2nd Respondent subsisting traditional marriage to the Applicant.

3. WHETHER the 1st Respondent acts of posing, parading herself as the Lawful wife of the 2nd (sic) on the basis of her purported marriage on the 13/12/2008 and/or any other marriage whatsoever, form, or manner is not illegal, null and void as same is contrary to the provisions of the Matrimonial Causes Act/Marriage Act.

4. WHETHER or not by the tenor, configuration, construction of the provisions of the MCA/Marriage Act and incidence of the traditional marriage under the Okuni Native Law and Custom between the Applicant and 2nd Respondent, the Applicant is the only lawful wife of the 2nd Respondent.ö

The application was supported by a 21-paragraph affidavit, 3 Exhibits, a 10-paragraph affidavit of verification of facts and a written address prepared by Tom J. Enakhena, Esq. wherein the Learned Counsel submitted on four (4) issues as follows:-

öISSUE ONE:

WHETHER under and by the provisions of the Matrimonial Causes Act/Marriage Act the 1st and 2nd Respondents are lawfully married during the subsistence of the traditional marriage between the Applicant and 2nd Respondent under the Okuni Native Laws and Customs.

ISSUE TWO:

WHETHER, or not the 2nd Respondent in the instance case, having duly contracted the 1st marriage under the Okuni Native Laws and Customs (with the Applicant) had any Legal right under the provisions of the Matrimonial Causes Act/Marriage Act to contract the subsequent marriage at the Oredo Local Government Marriage

Registry, Benin City, Edo State on 13th day of December, 2008 with the 1st Respondent.

Alternatively, whether or not the 1st Respondent had any legal right under the provisions of the Matrimonial Causes Act/Marriage Act to contract the purported marriage with the 2nd Respondent at the Oredo Local Government Marriage Registry on the 13th day of December, 2008 and/or any other purported Marriage having regard to the 2nd Respondent subsisting traditional marriage to the Applicant.

ISSUE THREE:

WHETHER the 1st Respondent acts of posing, parading herself as the Lawful wife of the 2nd Respondent on the basis of her purported marriage on the 13/12/2008 and/or any other purported marriage whatever form or manner is not illegal, null and void as same is contrary to the provisions of the Matrimonial Causes Act/Marriage Act.

ISSUE FOUR:

WHETHER or not by the tenor, configuration, construction of the provisions of the MCA/Act and incidence of the traditional marriage under the Okuni Native Law and Customs between the Applicant and 2nd Respondent, the Applicant is the only lawful wife of the 2nd Respondent.ö

On Wednesday, the 24th day of September, 2014, this Court granted an order for substituted service on the Respondents. (See pages 40 and 41 of the case file for this Enrolment of Order).

The Respondents were accordingly served the originating processes and hearing notice. (See pages 42, 43, 44, 51, 52 and 53 of the case file for these proofs of service).

On the 8th day of March, 2016 when the Learned Counsel to the Applicant was in Court to adopt his submission in support of the application under consideration, one T. A. Emenike, Esq. was also in Court holding the brief of Ernest Nwoye for the 2nd Respondent.

The Learned Counsel to the Applicant that day informed Court that it had been brought to his knowledge that there was a Counter Affidavit against this present application; that it was not served on them; that it was even more than a year the Respondents were served the originating processes and they needed extension of time to file a Counter; that the Respondents did not even file memorandum of Appearance.

COURT:

I have gone through the case file. I saw that at pages 55 ó 75, there was the Counter-affidavit of the 1st Respondent and other attached processes.

From the records, the 1st and 2nd Respondents were served the originating processes in this case on the 11th day of December, 2014 and the 6th day of December, 2014 respectively.

From the case file, I saw that it is only the Counter-affidavit of the 1st Respondent earlier referred to that was filed on the 2nd day of November, 2015 about a year later. This process was quite out of time as required by the Rules of this Court and no extension of time was sought and obtained by the 1st Respondent to file the process. See Order 37 Rule 2 (1) and (2) of the Rules of this Court which is reproduced as follows:

õ2. Application by Motion

- (1) Where by these Rules, any application is authorized to be made to the Court or a Judge in chambers or a Registrar, such application may be made by Motion which may be supported by affidavit and shall state under what Rule of Court or Law the application is brought. Every Motion shall be served within 5 days of filing.
- (2) Where the other party intends to oppose the application, he shall within 7 days of the service on him of such application, file his written address and may accompany it with a counter-affidavit.ö

The 1st Respondent's Counter-affidavit filed out of time without leave of this Court extending the time to so do is therefore unworthy of being considered by this Court as the Rules of Court are meant to be obeyed. See the NIGERIAN NAVY & ORS V. NAVY CAPTAIN D. O. LABINJO (2012) NSCQR VOL. 50

PAGE 236, Per O. O. Adekeye, JSC at page 2591 where the Supreme Court held that:

“The Rules of Court are meant to be obeyed.

The purpose of the Rules of Court is to regulate matters in Court and assist parties to any suit or appeal to present their cases for the purpose of a fair and quick trial or hearing. Where the Rules are quickly complied with, there will be quick dispensation of justice.”

The 1st Respondent’s Counter-affidavit which was never served on the Applicant and which is not in compliance with order 37 Rule 2 (2) of the Rules of this Court is therefore discountenanced by me.

Now the contention of the Applicant is that the 2nd Respondent was married to her under the native Laws and Customs of Okuni in Ikom Local Government Area of Cross Rivers State on 22nd March, 2008; that she was betrothed to the 2nd Respondent prior to that marriage; that she made publication of the marriage at the WEEKEND TRIUMPH NewsPaper and on Saturday, April 19, 2008; that she lived with the 2nd Respondent prior to the marriage/publication at Abuja and/or Port-Harcourt; that the consummation of their marriage resulted in the birth of three children; that the marriage to the 1st Respondent by the 2nd Respondent was done while her marriage to the 2nd Respondent was subsisting.

The above are contained in the uncontroverted affidavit evidence of the Applicant. The affidavit of verification of facts, which is also uncontroverted,

was deposed to by one Joseph Ojeyokan, the elder brother of the 2nd Respondent.

The law is trite that uncontroverted affidavit evidence ought to be accepted by the Court if it is probable to establish the case of the applicant. See CHIEF M. A. INGBEDION V. DR. SELO-OJEMEN (2013) NSCQR VOL.532 PAGE 59 where Olu Ariwoola, JSC held at pages 86-87 as follows:-

“It is trite law that any unchallenged and uncontradicted fact in an affidavit remains undisputed and is deemed admitted by the adversary and the Court will so hold. However, it is also the law that any such unchallenged and uncontradicted facts which are deemed admitted in the affidavit must be capable of proving and supporting the applicant relying on such facts. In other words, it has been held that the affidavit evidence which is said to be unchallenged must necessarily be cogent enough to sustain the case of the applicant.” (Underlining supplied by me for emphasis).

The marriage of the Applicant, according to her affidavit in support of the application, as held earlier, was anchored on custom. The *onus* of proof is always on the party alleging Customary Marriage to establish it under the Customary Marriage of the locality which would include a betrothal, ceremony of marriage and the handing over of the woman to the man’s family. See CHIEF O. N. NSIRIM V. ALERUCHI ETCHESON NSIRIM (ADELE

NLERUM) (2005) SMC VOL. 2 PAGE 267 where Onalaja, JCA held at PAGE 302 as follows:

“The other essentials of a valid customary marriage after betrothal is the ceremony of marriage and the handing over of the woman to the man’s family. The *onus* is always on the party alleging customary marriage to establish it under the customary marriage of the locality.”

From the above, three essentials to a valid Customary Marriage which a party relying on must prove are as follows:

- (1) Betrothal.
- (2) Ceremony of Marriage.
- (3) Handing over of the woman to the man’s family.

From the Applicant’s unchallenged affidavit evidence in support of the application, it was proved that the first essential above was proved at paragraph 4 therein where the Applicant stated thus:

“4. That prior to the aforesaid marriage, I was betrothed to the 2nd Defendant (sic) by my parents in accordance with Okuni Native Law and Customs.”

I am unable however, to find anywhere in the affidavit where it was stated of the ceremony of the marriage or the handing over of the woman to the man’s family. I then decided to peruse the three exhibits attached to the application. Exhibit ANN 1 was a Certified True Copy of an “Affidavit of

Marriageö deposited to by the 2nd Respondent before the Chief Magistrateø Court of River State of Nigeria on the 10th day of April, 2008. The second Exhibit ANN 2 was a Certified True Copy of the Weekend Triumph of Saturday, April 19, 2008 of Change of Name where the Applicant changed her name from Miss Ann Etek Akpet to Mrs. Ojeyokan Ann Etek. The third exhibit ANN 3 was a Certified True Copy of the Marriage Certificate of the 1st and 2nd Respondents at the Oredo Local Government Marriage Registry on the 2nd day of December, 2008.

Let me emphasize again that the evidence of the Applicant remains unchallenged. Unchallenged evidence is deemed to be correct and the Court can act upon. There are Plethora of authorities to support this position of the law. See for example the reasoning of F.A. Fabiyi, JSC where he held at page 370 in the case of ALHAJI FATAI ALANI MATANMI & ANOR V. VICTOR DADA (2013) NSCQR VOL. 53 PAGE 353 thus:

öAn unchallenged evidence is deemed to be correct and can be acted upon by the Courtö

See also HENRY STEPHENS ENGINEERING LTD V S.A. YAKUBU (NIG) LTD (2009) NSCQR PAGE 392 where I.F. Ogbuagu, JSC held at ratio 4 as follows:

öIt is now settled that an affidavit evidence constitutes evidence and any deposition therein not challenged is deemed admitted.ö

From the unchallenged affidavit evidence, I am of the firm view that there was a subsisting traditional marriage between the Applicant and the 2nd Respondent before the 1st Respondent contracted her Marriage with the 2nd Respondent.

The first question formulated by the Applicant as reproduced earlier is answered in the negative as the 1st & 2nd Respondents are not lawfully married while there is/was a subsisting traditional marriage between the Applicant and the 2nd Respondent. See Section 3 (1) (a) of the Matrimonial Causes Act, 1970 reproduced as follows:

- õ3. (1) Subject to the Provision of this Section, a marriage that takes place after the commencement of this Act is void in any of the following cases but not otherwise, that is to say, where ó
- (a) either of the parties is, at the time of the marriage, lawfully married to some other person.ö

The second question also formulated by the Applicant and reproduced earlier is answered by me in the negative as the 2nd Respondent, having duly contracted traditional marriage with the Applicant, had no legal right to contract another marriage with the 1st Respondent.

The third question couched for determination by the Applicant which was earlier reproduced is answered by me in the affirmative as the 1st Respondent acts of posing and parading herself as the lawful wife of the 2nd Respondent on

the basis of her purported marriage on the 13th day of December, 2008 is illegal, null and void.

The fourth question couched by the Applicant as reproduced earlier is answered by me in the affirmative as the Applicant is the only lawful wife of the 2nd Respondent.

Having answered all the questions or issues couched by the Applicant for determination in her favour and against the Respondents, I hold that the Three Reliefs sought by the Applicant are proved. They are accordingly granted by me as prayed.

HON. JUSTICE V. O. EBOREIME
JUDGE
20th July, 2016

COUNSEL:

T. J. Enakhena for Applicant.