

FOUNDATIONS FOR DISSOLUTION OF CUSTOMARY MARRIAGES IN NIGERIA

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1. Introduction

Nigeria has two primary systems or regimes of marriage. These are Statutory and Customary marriages. Whilst statutory marriages represent marriage conducted pursuant to and regulated by the Marriage Act and the Matrimonial Causes Act, Customary marriage, (under whose umbrella there is also marriage contracted in accordance with Islamic law), is basically marriages conducted in accordance with the customary law of the various ethnic groups or societies in Nigeria. A statutory marriage (also known as marriage under the Act) is in many respects different from marriage contracted under customary law. Although, the distinction is often lost to many writers who either completely fail to recognize the clear distinction in the nature, characteristics, responsibilities, incidents and ultimately in terminating a failed marriage under both systems. They also treat statutory marriages as superior to customary marriages. A lot has already been written on the law of customary marriage in Nigeria. See for instance, Law on Customary Marriages and Custody of Children in Nigeria by this writer in this area.¹ However there still appears to be lingering misconceptions, in some aspects, especially in the area of grounds for termination of customary marriages. This paper therefore, seeks to critically examine the principal grounds for dissolution of customary marriages in Nigeria with a view to clarifying some lingering grey areas and clearing some misconceptions. With the aid of extant laws, the paper underscores the point that although

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¹ See, Bright E. Oniha, "Dissolution of Marriage and Custody of Children Under Customary Law in Nigeria"(My earlier publication on this issue) available at www.edojudiciary.ng.gov. See also, Oniha O. M & Oniha B. E. "A Critique of the Law On Dissolution of Customary Marriage in Nigeria." Current Law Review 2018- 2019 (A Journal of Nigerian Institute of Advance Legal Studies) P.74-100

generally, no ground need be alleged or proved in the dissolution process², some grounds have become common. The categories of these grounds are however, not closed. The principal determination being that the differences between the parties have become so irreconcilable that the parties are not reasonably expected to continue to live together as husband and wife any longer or that the marriage has broken down irretrievably. Where therefore, parties to a customary marriage establish the fact that irreconcilable differences exist between them in the course of their marriage or that there has been abandonment or desertion by the other party. That certainly constitute legally valid grounds upon which customary marriage can be terminated dissolved judicially by a customary in Nigeria.

2. Customary Marriage

It has been defined by as, “a union of a man and a woman for the duration of the woman’s life, being normally the gist of a wider association between two families or set of families...”³

Similarly, Justice A.P Anyebe defined Customary marriage as, “a union of one man and a woman or women to the exclusion of all others.”⁴ According to him, the union extends even beyond the life of the man but terminates substantially at the death of the woman.⁵

What can be gleaned from the above definitions is that customary marriage is essentially a marriage contracted under the native laws and custom of the various communities in Nigeria. One of its principal features is that ample allowance is provided under customary law for the enjoyment of polygamy, given that there is no limit to the number of wives a man can marry under customary

² *Ibid*

³ Chinwuba Obi, S. N, “Modern Family Law in Southern Nigeria” London, Sweet & Maxwell, 1966, P. 155

⁴ Anyebe, A. P, “Customary Law: The War Without Arms” Fourth Dimension Publishers, Enugu 1985, P.45.

⁵ *Ibid*

law.⁶ This form a major incentive for some men to opt for this form of marriage because of its autochthonous content rather than the statutory marriage that imposes many European style restriction, some of which are unknown to indigenous Nigerians on the customarily married couples. It must however be said that the myth of superiority of statutory marriage over customary marriage is completely lacking in legal basis. In this relation to this issue of superiority, Justice A.P. Anyebe⁷ has long posited that, “Apart from the mentality that everything having a white origin is always superior to whatever is black, there is no reason advanced for the mysterious assumption that marriage under the Act is superior to marriage under customary law.”

Whilst, it is necessary to say in passing that only a valid marriage is dissoluble, we shall now consider the principal grounds that dissolution of customary marriage could be predicated upon.

3. Grounds for Dissolution

A major distinction between the statutory marriage and customary marriage is that unlike in customary marriage, the only ground upon which a parties to a statutory marriage, may seek for dissolution of marriage under the Matrimonial Causes Act is that, “**the marriage has broken down irretrievably.**”⁸ In this regard, section 15(1) of the Matrimonial Causes Act⁹ provide for a sole ground for terminating Marriages under the Act. The section provides that, “A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably. The conditions upon which a court shall hold that the marriage has broken down irretrievably are stipulated in section15 (2) (a) – (h) of the Act. In the case of customary marriage on the other hand,

⁶ Oniha, E. Bright, “Dissolution of Marriage and Custody of Children under Customary Law In Nigeria.” Available at www.edojudiciary.gov.ng

⁷ *Op cit* n.4 at P. 50.

⁸ See: *Bakau v Bakau* (2013) LPELR – 22687 CA

⁹ Cap. M7 Laws of Federation of Nigeria, 2004

this is not necessarily the case. According to S.N. Chinwuba Obi,¹⁰ there are strictly speaking, no “grounds” for dissolution of customary marriages in Nigeria, if that term is used in its technical connotation of facts which the law requires to be established before divorce could be granted by the courts as we have in the dissolution of statutory marriages. Given that marriage under customary law may be lawfully dissolved by mutual consent.- a state of affairs which will constitute, ‘ collusion” and therefore an absolute bar to divorce under the Matrimonial Causes Act. Generally, therefore whether dissolution of customary marriage is sought judicially or extra-judicially by parties, no reason or ground need be stated or given or established by the party seeking dissolution. (underlining for emphasis) before the customary marriage is dissolved by a Customary Court of extra judicially by the couples. It is sufficient if either or both parties state unambiguously that he or she is no longer interested in the marriage without necessarily alleging or establishing any ground. Nonetheless, over the years, a number of reasons and circumstances have been accepted and recognized by case law as constituting sufficient grounds to dissolve a customary marriage. These grounds have evolved out of a body of complaints that are commonly alleged and established by parties to a failing customary marriage upon which has formed the basis for the Judicial or non- judicial termination of a customary marriage. They do not however constitute a condition precedent for the dissolution sought by either or both parties. The common denominator of all these common grounds is that the parties to the failing customary marriage have “**irreconcilable differences**” or “**that the marriage has broken down irretrievably**” in the semblance of or akin to statutory marriages, such that they cannot reasonably be expected to live together as husband and wife. These irreconcilable differences can be due to numerous reasons. Therefore, once parties find that for reasons which shall soon be examined here, their marriage under customary law has completely broken down or irreconcilable differences exist, such a marriage can and will rightly be terminated either judicially or non-

¹⁰ *Op Cit*, n.3, P. 366

judicially. The established grounds for dissolution of customary marriage are numerous and the categories are never closed and largely vary from one community to another, society to society, village to village. In the labyrinth of this disparity, there are some common grounds. These grounds can basically be classified into two categories. They are (a) General, (b) Statutory grounds. Let us now examine these grounds in greater details.

3.1. GENERAL GROUNDS

Some common grounds for termination of customary marriages in most societies in Nigeria include the following:

(a) Irreconcilable differences;

Under this generic head, various acts which amount to a misconduct on the part of either of the spouses may give rise to differences that are grievous enough that all attempts to resolve it proved abortive. Any or all of the other grounds enumerated *hereinunder* may, either acting alone or in combination with other grievances, be sufficient to generate such differences that make it impossible for the couples to live together as husband and wife. For instance, adultery can on its own generate differences between couples that become irreconcilable enough to lead to the demise of customary marriage. Same can be said of any or all of the other general or statutory grounds highlighted below.

(b) Abandonment or Desertion

Any form of desertion of the marriage by either party to a customary marriage entitles the other party to seek the termination of the marriage. According to Professor Nwogugu,¹¹ desertion under customary law does not require separation for any specific period. Desertion by a husband is very rare, and almost unknown to customary law, as a man cannot leave his family simply because of the

¹¹ Nwogugu, E. I, “Family Law in Nigeria” 3rd Edition, HEBN Publishers Plc, Ibadan, 2014, P. 233

behavior of the wife. With respect, this view no longer holds true in modern societies in view of the fact that nowadays, men have been known to desert their wives in pursuit of the pleasure of another woman or women or some are simply fleeing from the aggression, violence, intolerance, threats etc of their wives. Once it is established therefore, that a man or woman in a customary marriage has unreasonably abandoned the matrimonial home without an intention of returning, this will form a veritable ground for terminating the marriage. The court has no power to compel a deserting party to return to the marriage because, “An attempt to do so will be an infringement of the Constitutional rights of the deserting party. This was the decision of the court in *Egri v Uperi*¹²

© Adultery

A very common highly contentious ground for dissolution of customary law marriage is the ground of adultery. Under customary law, when adultery is committed by a man, this is generally not a viable ground to premise an application or request for termination of marriage. This is so because, under customary law, a man is entitled to more than one wife, given the polygamous complexion of the marriage. Therefore, even if a man is caught in the act of adultery, it is common for such a man to either claim to want to marry the woman, actively laying the foundation to do so or marry her outright. A man is therefore entitled under customary law to be unfaithful to the wife or wives. But conversely, under customary law, where a woman is caught in the act of adultery, her husband is entitled to promptly seek the termination of the marriage. In most communities, the belief is that any condonation of adultery by a man of his wife’s adultery will result in either his death or that of the children of the marriage. In *Loye v Loye*¹³, the marriage between the couples was dissolved on grounds of adultery.

¹² [1974] E.C.S.L.R.632 at 634

¹³ (1981) O.Y.S.H.C.L.R. 140

Some writers, such as Margaret C. Onokah,¹⁴ have argued that the above position under customary marriage law calls for statutory reforms in consonance with the position in an Act Marriage; that is to say that any extra- marital relations should be grounds for divorce so that a customary law wife could divorce her husband for his adultery or, that adultery by either party should not constitute a, fact or ground for divorce, especially so in the case of a wife whose adultery did not result in pregnancy. With respect, this view does not take cognizance of the peculiar fact that customary law derives its source from the customs and usages of the people and is indeed reflective as a, “mirror of accepted usages.” Therefore, polygamy being an integral part of customary marriages in most African Societies, adultery on the part of a man, as have been stated above, does not draw the same revulsion as that of a woman.

(d) Lack of maintenance, Cruelty or ill-treatment of either party;

Under customary law, a man is under a legal obligation to provide his wife and children with the necessities of life such as food, shelter, clothing, medicare etc. The customary law wife could seek to terminate her marriage if the husband is unable or unwilling to perform any of his forgoing duties of maintenance towards her or their children. The same can also be said where either party is guilty of cruel or ill treatment. In *Adeyemi v Adeyemi*¹⁵, a husband obtained divorce after proof of cruelty of the wife which the court described as, “stranger than fiction.”

Similarly, in *Rebecca Kpera v John Kpera*¹⁶, a petition for divorce, the parties got married in 1962 in Kaduna under Tiv Customary law. The basis for the petition was cruelty, assault and adultery. The trial court declined to grant divorce on the ground of insufficient evidence of cruelty. On appeal, the

¹⁴ Onokah, M.C, “Family Law” (Spectrum Books Ltd, Ibadan,2012) P.172

¹⁵ (1969) 2 All N.L.R. 161

¹⁶ (Unreported Suit No: MD/361A/1980)

judgment of the trial Upper Area Court was set aside. The appeal was allowed and divorce granted on ground that there was sufficient evidence to justify cruelty.

(d) Impotence or Sterility

Impotence on the part of a man or sterility (inability to procreate) of either spouse is a very potent ground for dissolution of customary marriage. This is because most African societies place high premium on procreation of children as the main reason or at least one of the main reasons for contracting a marriage.

(e) Other General Grounds:

Other general grounds for dissolution of customary marriage include, Insanity, leprosy or other life threatening diseases, failure or inability to consummate the marriage, lack of respect; fetish practices or witchcraft etc.

3.2 STATUTORY GROUNDS

It is instructive that there has been statutory intervention in the area of a customary marriage, divorce and custody of children. For instance, the Marriage, Divorce and Custody of Children Adoptive by-laws Order¹⁷ applicable to the States of Ogun, Oyo, Ondo, Osun and Defunct Bendel State (now Edo and Delta States) contains elaborate provisions on these areas. Under the By- Laws Order, local government authorities are authorized to adopt these rules as they wish, with modifications in certain cases. The vast majority of local government authorities in the old Western region took advantage of this provision and adopted the By-laws with little or no modification.¹⁸ In relation to grounds for dissolution of marriage under customary law, which is been considered here, the law provides that,

¹⁷ (1958 W.R.N.L 456), which came into force on the 27th of November, 1958

¹⁸ Sagay, I, " Nigerian Family Law, Principles, Cases, Statutes and Commentaries, Malthouse Press Ltd, Ikeja, 1999, P.799

the following matters shall be taken into consideration by a customary court when making an order for the dissolution of any marriage¹⁹ These are:

- (a) Betrothal under marriageable age.
- (b) Refusal of either party to consummate the marriage.
- (c) Harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man
- (d) Impotency of the husband or the sterility of the wife
- (e) Conviction of either party for a crime involving a sentence of imprisonment of five years or more
- (f) Ill-treatment, cruelty or neglect of either party by the other,
- (g) Veneral disease contracted by either party
- (h) Lunacy of either party for three years or more,
- (i) Adultery
- (j) Leprosy contracted by either party.
- (k) Desertion for a period of two years or more.

The section also contains a proviso that no order for divorce shall be made in respect of an application made by a wife who is nursing a child under three years of age or who has three children or more by the husband unless the court is satisfied that there are special ground for making the order, where upon the reasons shall be recorded in the record of proceedings.

Similarly, section 14 of the Local Government (Declaration of Tiv Customary Marriage Law) Order 1985²⁰ stipulates the following grounds for dissolution of customary marriage: ill-treatment or cruelty, impotence of the husband, insanity, incompatibility, contagious leprosy disease, adultery,

¹⁹ Marriage, Divorce and Custody of Children Adoptive by-laws, Section 7

²⁰ BSLGN 1 of 1985, 12

such that the petitioner has neither condoned nor forgiven, separation of parties, or desertion by one of them, for a period of not less than one year, and for any reason other than the above, and such that the parties can no longer be expected to live together as husband and wife.

Finally, it must be said that under customary law, once a ground is sufficiently made out for dissolution of marriage and such marriage is lawfully dissolved, only a re-marriage can reunite the parties again as husband and wife. This principle was upheld by the Benue State High Court in *Rekia Agono v Salifu Adebo*²¹. In that case, the marriage between the appellant and the respondent was dissolved. Subsequently, the respondent sued his ex wife, the appellant asking her to return to his house since he had paid her money to settle with her to return. The trial court ordered her to return to the respondent. An appeal against this decision was allowed. For according to Appellate court, “ Once a marriage between a couple has been dissolved, no court has the power to order the woman to return to the former husband as the trial court did in this case and to do so is contrary to natural justice, equity and good conscience. It is also our view that before such couple can live together again as married couples, there must be a fresh marriage proved between them and this is totally lacking in the present case.”

4. Conclusion

In this paper, the grounds for termination or dissolution of customary marriage have been critically examined. In doing so, efforts have also been made to compare the ground for the dissolution of other forms of marriages such as statutory marriage with customary marriage. The product of which is that whilst the Matrimonial Causes Act provides for a sole ground for dissolution of statutory marriage, grounds commonly relied upon, judicially or non judicially for the dissolution of customary marriages are numerous and the categories thereof are never closed, largely varying from

²¹ (Unreported) Suit No: ID/18A/1981. Referred to by Justice A.P. Anyebe in, “Customary law: War Without Arms, “Fourth Dimension Publishing Co. Ltd 1985, Enugu at p. 95.

community to community. They may also be general or statutory. Any or all of these grounds can alleged and established by any of the parties may validly ground the dissolution of customary marriage. It is therefore lacking in legal basis and a misconception under the law in Nigeria for it to be alleged that simply because a ground was not expressly spelt out under existing case law or statute, such a ground cannot validly be relied upon by a court of competent jurisdiction to dissolve a customary marriage. This paper has clearly underscored the point that even where no reason has been alleged or proved, once party states that he no longer wants to continue with the marriage due for example to some irreconcilable differences between them, desertion or abandonment etc, such a marriage can validly be terminated under customary law in Nigeria.