

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

TUESDAY 30TH MAY, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/GWD/CV/44/23

BETWEEN:

MRS ADEBOLA LOVETH OLUROTIMI.....CLAIMANT/APPLICANT

AND

MR OLUROTIMI OLALUWA DAVID.....DEFENDANT/RESPONDENT

JUDGMENT

The claimant by way of originating summons dated and filed on the 8th March, 2023 with suit No: FCT/HC/GWD/CV/44/2023 claims the following reliefs from the defendant.

1. **ADECLARATION that the affidavit of Declaration of marriage does not in itself constitute a marriage under law and custom, marriage under the Marriage Act, Cap M6, L.F.N. 2004 and/or Islamic marriage without the celebration of the said marriage or without complying with the legal requirements of the said marriage.**
2. **A DECLARATION that the affidavit of Declaration of marriage deposed to by MR. IRABOR JAMES of 14, Oshate Quarters Ikiran-Ile, Edo State before the Customary Court of Appeal, Abuja on the 6th November, 2018 does not constitute a marriage under native law and custom without the payment of dowry of the Claimant by the**

Defendant to the Claimant's family and celebration of the marriage in accordance with the native law and custom of Ikiran-Ile, Edo State.

- 3. AN ORDER setting aside the Affidavit of Declaration of Marriage deposed to by MR. IRABOR JAMES at the Customary Court of Appeal, Abuja, on the 6th November, 2018, as being incompetent, null void and of no effect whatsoever, the Defendant having not paid the Claimant's dowry to her family and/or celebrated the marriage under native law and custom of Ikiran-Ile, Edo State.**

- 4. AN ORDER setting aside the Affidavit of change of name from Miss Owolabi Adebola Loveth to Mrs. Olurotimi Adebola Loveth deposed to by the Claimant at the Customary Court of Appeal, Abuja, on the 6th November, 2018, being incompetent, null, void and of no effect whatsoever the Defendant having not paid the Claimant's dowry to her family and/or celebrated the marriage under law and custom of Ikiran-Ile, Edo State.**

Attached to the originating summons is an affidavit of 11 paragraphs deposed to by Mrs Adebola Loveth Olurotimi of c/o suit 19, plot 58 Olu, Owoteso Street, by Ecobank, B/stop, behind police pension office, beside class suit, Jabi Abuja Also attached to the Affidavit are exhibits marked:

- A- Being Declaration of marriage from customary court of Appeal, Abuja**
- B- Being the affidavit of change of name from customary Court of Appeal, Abuja dated the 6/11/2018.**

And a written address in support of originating summons, containing facts and questions raised for the determination of the court.

On the 8-3-2023, the claimant/Applicant counsel filed a motion exparte to effect service on the defendant by substituted service outside the Jurisdiction of this court. The said motion exparte was moved and the order sought therein granted on the 16-3-2023 and the enrolment order signed and the matter was adjourned to the 10th May, 2023 for hearing on that date, the claimant counsel who was present in court informed this court that the defendant has been duly served on the 27-3-2023 and that the 40 days required for the appearance of the defendant

has elapsed as the suit commenced by an originating summons. That No processes have been filed by the defendant in response to the originating summons, and sought the leave of the court to move its application. This was granted and the claimant moved same.

The claimant counsel in moving the said originating summons avers that they are seeking the determination of 3 (three) questions as in the face of the originating summons and that the questions are resolved in favour of the Claimant and seeks the four (4) reliefs as contained on the face of the originating summons.

He went further to state that, in the absence of the counter affidavit challenging the facts deposed to, the fact of the originating summons, and a written reply basically on point of law, urged the court to grant the reliefs sought.

Before I proceed to go into the merit of the application, I shall first highlight on the issue of service, *visa a vis* the affidavit evidence.

On the issue of service, service of court process is a pre-condition to the exercise of Jurisdiction by the court and where there is no service, subsequent proceedings are a nullity *ab initio*. This is based on the principle of law that a party should know or be aware that there is a suit against him so that he can prepare a defence. See *Aondoaka Vs Obot* (2016) 6 NWLR (PT. 1508) 280. Service of processes is essential to ensure that a party is put on notice of the pending litigation and what stage it is. Therefore, service on the defendant or on any party is for him to know the claims against him so that he may be aware of it and be able to resist, if he so desires, that which is claimed against him. (see *Guda Vs Kitta* (1999) 12 NWLR (pt. 629) 21.

In this instant suit, the service was effected outside the Jurisdiction of this court.

This it is on clause 5(e) of the Claimant/ Applicant's motion *ex parte* I quote.

“that the leave of the Honourable court is now being sought to serve the defendant the said court processes at 9 Ifeanyi, Chinonye Street, Star times Estate, Okota, Lagos, Lagos State by substituted means to wit;---” Here the law States that leave of the Honourable court---” Here it is therefore, mandatory for leave to be obtained before the issuance of a writ of summons involving a defendant who resides outside the jurisdiction of the court and for endorsement of the writ for service outside Jurisdiction of the court.

Therefore, it is trite that failure to comply with sections 98 of the Sherrifs and civil process Act is a fundamental vice, which goes to the issue of jurisdiction and renders the issuance of such writ void. See Caribbean Trading & Fidelity Corp V N. N. PC. (1992) 7 NWLR (pt. 252) 161.

In this instant case, the claimant counsel has complied with the rules as stated above.

The next is on the issue of Affidavit evidence. The learned claimant counsel submitted that in the absence of a counter affidavit challenging the facts deposed to the facts of the originating summons, and a written reply basically on point of law, urged the court to grant the reliefs sought, on this I wish to state that, affidavit evidence is already admissible evidence before the court and the court is bound to use and act upon it once it is not challenged or rebutted and is credible. See Adebisi V Umar (2012) 9 NWLR (PT. 1305) 229 (CA), Baba V N. C. A. T.C (1991) 5 NWLR (pt. 192) 388. Therefore, the rules governing affidavit evidence is that when a fact(s) asserted, is not denied or controverted by the adverse party, who has a duty to do so, the same is deemed to be admitted by him (adverse party) and the court would be justified to rely on the fact and use it to settle the issue in controversy if the asserted fact (s) is plausible.

It is equally trite that, when in a situation in which facts are provable by affidavit, one of the parties deposed to certain facts, his adversary has a duty to swear to an affidavit to the contrary if he disputes the facts, where such a party fails to swear to an affidavit to controvert such facts, the fact may be regarded as duly established. See Ajomale V Yaduat No:2 (1991) 5 NWLR (pt. 191) 266.

In this instant case there is an evidence before this court that the defendant was duly served by substituted means, it is trite law, that where a party in litigation is served with an affidavit containing some allegations against him or facts which are against his interest and he fails to contradict those facts through a counter affidavit, he is deemed to admit the content of the plaintiff's affidavit as true. See Moto V Hember (2018) 5 NWLR (Pt. 1612) 258 CA.

It is equally the submission of the claimant counsel that the defendant despite being served with the originating summons did not file any counter. On this it is trite law, that where a respondent fails to file a counter- affidavit to oppose, controvert or deny the depositions in an Application supporting affidavit, he is deemed to have admitted the latter's averments unless they are found by the court as palpably false. A counter affidavit must be filed to controvert the facts in the affidavit insupport otherwise the facts in the affidavit would be taken as

conceded by the adverse party who ought to controvert and the facts in the affidavit in support. Similarly, where no reply affidavit is filed, the facts in the counter- affidavit is deemed admitted and established to the satisfaction of the court. See A-G Ondo State V A.G. Ekiti State (2001) 19 NWLR (pt. 743) 706.

It is also in the affidavit of the claimants where he attached exhibit A, B, C, and explained in this judgment. This it is the duty of the trial court to look at and utilize a document in it's file while writing its judgement despite the fact that the document was not tendered and admitted as an exhibit at the trial. The purpose of this principle is that the court is created to do substantial Justice between the parties in resolution of the issues in controversy between them. See Akinnols V VC Unilorin(2003) 11 NWLR (PT. 885) 616.

Having said all these, I will now look at the facts in the affidavit, the exhibits attached to the affidavit and the written address so as to resolve the reliefs and the three (3) questions set out by the claimant counsel. But before then, I will set out the facts of this suit as itrelates to the claimants as stated on the affidavit which will be reproduced hereunder.

Clause 3,

That the defendant cohabited with me at my residence at Nigerian customs Quarters, Karmo, Abuja between 2018 and 2019, as husband and wife without being formally married under native law and custom or under the marriage Act.

Clause 4,

That in the course of my cohabitation with the defendant, my elder brother by name, Mr Irabor James deposed to an affidavit of declaration of marriage at the customary court of Appeal, Abuja, on the 6th November, 2018, on the erroneous believe that the defendant and i are already married under native law and custom since we are already cohabiting as husband and wife. A copy of the affidavit is attached and marked exhibit A.

Clause 5,

That based on the said affidavit of declaration of marriage. I deposed to an affidavit of change of my name of Miss Owolabi Adebola Loveth to Mrs Olurotimi Adebola Loveth at the customary court of Appeal, Abuja on the same date of 6th November, 2018 believing that the defendant would shortly

after marry me formally by payment of my dowry/bride price and celebration of the marriage in accordance with the native law and custom of Ikiran Ile-Edo State A copy of Affidavit of change of name is hereby attached and marked exhibit B.

Clause 6

That I used the said affidavit of change of name to change my name in my official record with Nigeria customs Service, Abuja.

Clause 7,

That contrary to my expectation and assurance of the defendant to me, the defendant has failed to pay my dowry/bride price and/or marry me in accordance with Native law and custom of Ikiran-Ile Edo State till date.

Clause 8,

That as a result of the depositions of the said affidavit of declaration of marriage by my elder brother, Mr Irabor James and the subsequent failure of the defendant to pay my dowry/bride price and solemnise/celebrate the relationship/marriage, no other person is ready and willing to marry me as my marriage status is unclear or undefined hence institution of this suit for the interpretation of the legal effect of the affidavit of the declaration of marriage deposed to by Mr. Irabor James and my Marriage Status in the absence of payment of my dowry/bride price and celebration of the marriage by the defendant and for the Honourable court to make necessary declarations.

The three questions for the determination by this Honourable court are as follows and will be resolved one after the other based on the argument canvased by the claimant's counsel.

1st

Whether the affidavit of declaration of marriage between the claimant and the defendant deposed to by one Mr Irabor James of 14 Oshafe Quarters Ikiran-Ile Edo State before the customary court of Appeal, Abuja on the 6th November, 2018 constitutes any of the three (3) Types of marriage to wit: marriage under native law and custom, marriage under native

law and customs marriage under the marriage Act CAP M6 LFN 2004 and/or Islamic marriage without the celebration of the said marriage or without complying with the legal requirement of the said marriage.

In answering this question one, it is the submission of the claimant's counsel, that there are only 2 (two) types of marriage recognised under the marriage Act Cap M6, LFN, 2004. On this referred the court to the case of Chukwurma Vs Chukwuma (1996) 1 NWLR (pt. 426) 543 atPAGE 563 paragraphs D-E. the court of Appeal held that:

“Under Nigeria law a monogamous marriage supported by a registrar's certificate as well as a marriage certificate can only be characterized as a marriage under the marriage Act. Excluding marriage under Muslim rites, there is no third type of marriage under the marriage Act.

At pages 561-562 paras H-A. the court of Appeal held that:

“A wilful celebration of a purported marriage under marriage Act without the parties first being armed with the registrar certificate is null and void”

That the law is also trite that in order to constitute a valid marriage under native law and custom or customary marriage, there must be payment of dowry/bride the ceremony of marriage and the handing over of the woman to the men's family.

In the case of Nsirim V Nsirim (1995) 9 NWLR (PT. 418) by 144 at 167 paragraph A, D, E, 168 paras A, B. the court of Appeal held that

“to make it valid there are essential and formal requirements for the celebration of a valid customary law marriage. The details of such requirement vary from one locality to another but are broad principle which are sometimes similar via:

- a. The parties to a customary marriage must possess the capacity under the law to marry each other**
- b. There must be payment of dowry, or bride price as which is a gift or payment.** It may be in money, natural produce or any other kind property. This must be paid on account of a marriage of a female person and it must be for a marriage which is intended or has taken place and.

(c) there must be a ceremony of marriage and the handing over of the woman to the man's family, on this referred the court to the case of Agbeja V Agbeja & Anor (1985) 3 NWLR (PT11) at paragraph D where the court of appeal held that:

“for a marriage under native law and custom to be valid, there must be on the one side the ceremony of the giving of the dowry and on the other side the ceremony of the giving of the bride for a marriage under native law and custom”

He went further to state that in order to constitute a valid marriage, under the marriage Act CAP M6, LFN 2004, the parties must take steps and adopt the procedure contained in the marriage Act Reference to the case of Nwangwa Vs Ubani (1997) 10 NWLR (PT.526) 555 at PARAGRAPH E-F 11, the court of appeal held that.

“in order to convert a customary marriage into a statutory marriage the parties must consciously take the steps and adopt the procedure contained in the marriage Act. As no such steps were taken in the instant case there was in law no marriage between the 1st respondent and Mr Ubani”

That to evidence a statutory marriage under the marriage Act, the Registrar of marriage shall issue to the parties a marriage certificate as proof of the marriage under section 28 of the marriage Act CAP M6 LFN 2004 period thus.

“the Registrar shall then fill up and he shall sign, the certificate of the marriage in duplicate, the counter foil as here in before prescribed in the case of a marriage by a minister, and shall deliver one certificate to the parties and he shall file the other in his office”

In the case of Adeyemo V Omobhude (1993)8 NWLR (PT.311)291 at Pg. 304-305 paragraph H-A. The court of Appeal held that:

“marriage, as constituting status, must be strictly proven, and this is done, in the case of marriage contracted under English law of the ordinance by the production of the Register of Marriage”

On all this he submitted that an affidavit of declaration of marriage by a person cannot by itself constitute a marriage under native law and custom and/or marriage under the marriage Act without the payment of dowry, in the case of marriage under native law and custom and/or the issuance of marriage

certificate by the marriage Register, after the celebration of the marriage by the parties before the registrar of marriage, in the case of marriage under the marriage Act, in view of the foregoing he urged the court to resolve the first issue in favour of the claimant.

On issue two for determination, he adopted his submission in respect of the first question and further submits in the light of the decision of the court of appeal in the case of Chukwuma Vs Chukwuma (Supra) Nsirim V Nsirim (Supra), Nwangwa V Ubani (Supra) and Adeyemo V OMobhuda (Supra) and submitted that the deposition to an affidavit of declaration of marriage by a brother or relation of the female/bride as in the instant case does not without the payment of dowry, in the case of marriage under native law and custom and/or without a marriage certificate issued by the Registrar of marriage in the case of marriage under the marriage Act constitute a marriage under the native law and custom or marriage under the marriage Act.

He further submitted that, cohabitation between a man and a woman without the payment of dowry/bride price and the handing over of the bride to the man by the bride's parent or authorized family member does not constitute marriage under native law and custom.

On this, he relied on the case of Lawal Osula V Lawal Osula (1993)2 NWLR (Part 274)158 at 172 paragraph A-E. Where the court of Appeal held that:

“Living with a man and having children for him alone does not necessarily make a woman the wife of the man under native law and custom”

In view of the foregoing, that the affidavit of declaration of marriage between the claimant and the defendant deposed to by the claimant elder brother, one Irabor James on the 1st November, 2018 at the customary court of Appeal Abuja does not constitute marriage under native law and custom of Ikiran Ile Edo State and urge the court to resolve the second question in favour of the claimant.

On the 3 (third Question he submitted that since there was no valid marriage between the claimant and the defendant under native law and custom, of Ikiran Ile – Edo State vide the payment of dowry by the defendant to the parent/family of the claimant and the handing over of the claimant to the Defendant by the parent/family of the claimant as at the date of 6th November, 2018 when the affidavit of declaration of marriage was deposed to, the said affidavit is null, void and of no effect whatsoever as it was predicated on a non-existing marriage between the claimant and the defendant.

That the law is trite that you cannot put something on nothing and expect it to stand.

MACFOY V UAC (1962) AC 152, also that a court of law cannot act on possibilities conjecture and/or speculation. It is a trite principle also that, a court should not decide a case on mere conjecture or speculation courts of laws are courts of facts and laws. They decide issues on facts established before them and in laws.

The law as settled by many decisions of the supreme court, is that the court has a duty not to indulge in conjecture, guess work or speculation. The principle is also trite, that a trial court is precluded and should not decide a case on mere assumption, conjecture or speculation, Indeed, courts of law are courts of both facts and laws. Hence, they decide issues placed before them on facts as pleaded and established by evidence adduced before them, predicated on applicable laws. Courts are enjoined to avoid speculation of whatever coloration. See *Adetula V Okulaja* (1996) 9 NWLR (pt. 473) 668, *Orhue V NEPA* (1998) 7 NWLR (pt. 557) 187 per Oradola J.CA Pp. 47-48 paragraph F-B, *Lawson Nnamdi Chukwuma & An or V HM Lolo Stella C. Chukwuma & ors* (2018) LPELR – 45482 (CA).

In view of the foregoing, he urged the court to grant the claimant claims/reliefs in its entirety.

Thus which I have to agree to all submissions of the claimant counsel. I so hold.

I cannot end this judgment without detailed explanation of how marriage is being conducted in both marriage Act and customary law or native law and custom.

It should be noted that, English marriage is a union between one man and one woman for life to the exclusion of all other persons. It is a sacrosanct union that begets lots of right, benefits duties privileges and responsibilities for couples and offspring from such union.

As it was stated by the claimant counsel, that there are two types of marriage in Nigeria (Statutory, Court or Registry marriage) and Traditional marriage (customary, native cultural marriage or pure religious/church marriage).

In all these, there are laid down procedure and requirement that must be fulfilled before an English marriage can be legal and lawful.

Essential and sacrosanct, whether a person wants a Bishop or a general overseer to wed him, he/she must take the process of English marriage from step 1 and end in step three(3). the law is that where there is a missing step, the marriage cannot be a valid English marriage, it may just be a mere church marriage.

In this type of marriage, a prospective couple must give notice of their marriage to the registrar of marriage, the registrar of marriage would in turn register such notice in the marriage notice book and equally cause same notice to be published on his doors and notice board for twenty-one days, during the 21 days, the general public is expected to report any reason why the prospective couple should not be wedded.

Where there is no protest from the public to the impending union at the expiration of 21 days, the registrars of marriage shall issue a registrar certificate to the couple. The certificate empowers the couples to go ahead and celebrate their marriage (exchange vows) within three months the steps therefore are:

- a. Give notice of marriage to the registrar of marriage.**
- b. Celebrate marriage in license church or office.**
- c. Signing of marriage certificate.**

It is when all these are done, the law will then recognise the marriage as valid.

The summary of what I am saying is that a marriage is invalid without the knowledge and wilfulness of the couple:

- i. It was celebrated under a false name or names or**
- ii. It was celebrated without a registrar's certificate or.**
- iii. It was celebrated in a place other than a licenses place of worship or the office of the Registrar of marriage or**
- iv. It was officiated by a person other than a recognized minister of same religious denomination.**
- v. This from all indication and based on the affidavit evidence before this court there steps where not followed, all that was stated and exhibit end before this court is a declaration of certificate of marriage at the customary court of Appeal, Abuja and nothing more.**

In view of the foregoing therefore and what has been stated in this judgment hold that since there is no counter to dispute the facts as disclosed by the claimant, I shall grant all the reliefs of the claimants.

In the final analysis, and in fulfilment of the requirement of the law, the claimant led evidence in support of the pleadings, which has not been contested, challenged or controverted, the law is trite that where evidence is unchallenged or uncontroverted and manifestly credible, a reasonable court or tribunal is at liberty to accept it and indeed act on it.

See Ikwuka V Anachuna (1996) 1 NWLR (pt. 424)355 at 1. Therefore, prepared to accept the evidence of the plaintiff. In view of the foregoing, all

issues are answered as follows from the position arrived at in the determination of all the issues.

The evidence and the exhibits before the court were not questioned, contested, or challenged. There is nothing placed before the court to deprive the claimant of the grant of the declaration sought therein.

In the final analysis, it is the judgment of this court that the claimant has proved its case. Therefore, grant all the relief of the claimant.

This is my Judgment.

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HON. JUSTICE A. Y. SHAFI

APPEARANCE:

1. S. G. Kekere-akpe for the Claimant

