DISSOLUTION OF MARRIAGE CONTRACTED UNDER CUSTOMARY LAW IN NIGERIA: COMMENTS ON EZEAKU V. OKONKWO[1]

Babatunde A. Oni[*]

This comment reviews the Nigerian Court of Appeal decision in Ezeaku v. Okonkwo (2012) All FWLR Part 654 @ Page 128 which considered the dissolution of marriage contracted under customary law. It reasoned that customary marriage in Nigeria cannot be dissolved by mere wishful thinking or assertion, a woman who is a wife of the man under the native law and custom does not divorce the man merely by leaving him and staying with another man for who she has children, and it is not sufficient that one of the parties to the marriage declares that he or she no longer wants the other. There must be a formal act on the part of the party who is tired and not willing to continue. This review contends that the proof of the dissolution of customary marriage requires a high degree of certainty and can only be dissolved by a court; or either unilaterally or by mutual consent subject to refund of bride price.

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INTRODUCTION

The recent decision of the Court of Appeal, Enugu Division in the case of *Ezeaku V. Okonkwo*[2] on the proof and dissolution of customary marriage and its effect on succession reveals the need for a proper understanding of the clear distinction between proper customary marriage, dissolution and its

[1] All FWLR Part 654 @ Page 129 (2012).

[*] Dr., Senior Lecturer, Faculty of Law, University of Lagos, Akoka, Nigeria. Research fields: Law of Succession, Land Law, Equity and Trusts, Administration of Estate and Restitution

[2] *Ibid*.

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effect on Succession under the Customary Law in Nigeria.

The case under review caught the attention of the writer in view of the 'drama personae' involved i.e. one of the parties being a Senior Advocate of Nigeria (SAN) on one hand and a learned Chief Judge of Enugu State Honourable Justice I. A Umuzuluke, a brilliant judge, a well known author and scholar who delivered the judgment at the lower court.

The main issue that generated controversy and the fact of which shall be discussed later in this paper is whether a sworn affidavit is sufficient to dissolve a marriage contracted under the customary law as to deprive a spouse right of inheritance.

The paper discusses applicable laws and custom in the area and thereafter examines the decision of the lower court and the Court of Appeal in the case under review.

I. FACTS OF THE CASE

The deceased a Senior Advocate, was married to the 1st defendant under native law and custom. They had an issue and thereafter separated and the deceased got married to the plaintiff. He also made an affidavit wherein he deposed that the plaintiff was his only wife. After his demise intestate, the 1st defendant sought to partake of the estate of the deceased which was placed under the management of the office of the Administrator General/Public Trustee of Enugu State. The plaintiff therefore commenced an action in the High Court of Enugu State via originating summons seeking determination of the following question:

1. Whether the affidavit deposed to by the deceased carry the force of law.
2. Whether the said affidavit was not sufficient notice to the whole world with respect to the marital status of the deceased under native law and custom
3. Whether the affidavit did not determine effectively the purported rights of the 1st defendant vis-à-vis the estate of the deceased
4. Whether the 2nd defendant ought not to restrict himself to the expressed intention of the deceased with respect to his marital status as revealed in the affidavit in issue in the handling of his estate[3]

The plaintiff answered the above issues in the affirmative upon which she premised her claim. The trial court however granted the plaintiff's claims. The 1st defendant was aggrieved and appealed to the Court of Appeal.

[3] *Supra*, at 160.

II. THE RULING

The Court of Appeal considered the following issues:

On the presumption of validity of marriage celebrated under Marriage Act or Customary Law and whether can be dissolved by assertion the court of Appeal held that where there is evidence of the *de facto* celebration of marriage either under the Marriage Act or under Customary Law, there is a very strong presumption in favour of the validity of the marriage. In the same vein, the said marriage cannot be said to have been dissolved by mere wishful thinking or assertion. In the instant case, the deceased swore to an affidavit to the fact of plaintiff being his only wife without taking the proper step to dissolve the marriage between him and the 1st defendant, the trial court erred by holding that the marriage was dissolved.

On how a marriage contracted under Customary Law can be dissolved the court held as stated earlier that the proof of the dissolution of customary marriage requires a high degree of certainty. Living with a man and having children for him alone does not necessarily make a woman a wife of the man under the native law and custom. In the same way, a woman who is a wife of a man under native law and custom does not divorce the man merely by leaving him and staying with another man for who she has children. A marriage under the native law and custom CAN ONLY be dissolved by a court and it is not sufficient that one of the parties to the marriage declares that he or she no longer wants the other. A marriage under native law and custom can also be dissolved either unilaterally or by mutual consent, subject to the refund of dowry. Usually, the dissolution of customary law marriage is affected or accompanied by the refund of the bride price paid in respect of that marriage. Where a domestic dispute leads to the non judicial dissolution of the marriage, the refund bride price is one of important subject to be settled by the family group that unsuccessfully attempts to reconcile the parties. It is however open to a husband to exercise or renounce his right to claim a refund of that bride-price. Any renunciation of that right must be formally and unequivocally before the joint family. In the instant case the 1st defendant's family did not return the bride price of the deceased to signify the end of the marriage between them therefore, the trial court erred by granting the plaintiff's claims to that effect.

III. COMMENT

A. *What Is Marriage?*

It is universally accepted that marriage is an institution, governed by

the social and religious norms of the society. It is a union between a man and a woman[4].

B. Types of Marriage in Nigeria

Basically, there are two types of marriage recognizable under Nigeria law. The first is marriage conducted under the Marriage Act which is monogamous in nature. The second is however, marriage contracted under native law and custom which does not exclude marriage under Islamic law[5] which is polygamous in nature. However for a proper understanding it is pertinent to explain the nature of these forms of marriage at this juncture.

C. Monogamous Marriage

A monogamous marriage in Nigeria is the same in England. It is the marriage which Lord Penzance described as a voluntary union for life of one man and one woman to the exclusion of all others[6]. This definition deserves further elaboration. Firstly, the union unites the man and the woman as one person. Secondly, the union must be voluntary: the man and his wife must freely consent to the union. None of them should be forced to consent. Thirdly, the union must be for life, that is, it must be intended from the beginning. If the marriage was intended to last for a period of time, then it does not qualify as a union under the law. For this reason, it is submitted that a form of marriage that in modern time has been referred to as "convenience" or "contract" marriage does not qualify as a marriage union in the eyes of the law. Fourthly the union must be between one man and one woman[7].

The laws which govern the celebration and incidents of monogamous marriage in Nigeria are found principally in the Marriage Act[8] and the Matrimonial Causes Act[9]

D. Polygamous Marriage

A polygamous marriage may be defined as a voluntary union for life of one man with one or several wives. Its essential characteristic is the capacity

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[4] E. I NWOGUGU, FAMILY LAW IN NIGERIA, at ixxviii (3rd edition, Claverianum Press Ibadan 1999).
[5] IKECHUKWU D.U GUIDE TO MATRIMONIAL PROCEEDINGS, at 2 (2nd edition 2012).
[6] Hyde v. Hyde, L. R 1P & D 130 (1866).
[7] At 70
[8] Cap M6 Laws of Federation 2004.
[9] Cap M7 Laws of Federation 2004.

of the man to take as many wives as he pleases[10]. Both customary and Islamic laws recognize polygamy.

Customary Marriage is one contracted in accordance with Native Law and Custom. Thus marriages contracted under customary law are valid marriages in the eyes of the law provided such marriages complied strictly with the native law and custom governing marriages in the locality where the marriage was contracted. Customary marriages are said to be potentially polygamous in that they permit a man to marry more than one wife. However where a person married under customary law maintains one man one woman relationship with his only wife, then his marriage is only potentially polygamous and does not actually become polygamous until he marries other wives[11].

Islamic marriage is another form of marriage which comes under polygamous marriage. This is because it permits a man to marry a minimum of one wife and a maximum of four, depending on the man's financial capabilities and his ability to love them equally.

For the purpose of this discussion, our focus will be on Customary Marriage and Marriage under the Act vis-à-vis their validity and dissolution.

E. Requirement of a Valid Customary Marriage

The details of the essential and formal requirements for the celebration of a valid customary law marriage vary from one locality to another but there are broad principles which are sometimes similar, namely

a. The parties to a customary marriage must possess the capacity under that law to marry each other;

b. There must be payment of dowry, or bride price which is a gift or payment. It may be one of money, natural produce or any other kind of property. This must be paid to the parent or guardian of the bride. It must be paid on account of a marriage of a female person and 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[12]

Thus, 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 the same way, a woman who is the wife of a man under native law and custom does not divorce the man merely by leaving him and staying with

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[10] E. I NWOGUGU, FAMILY LAW IN NIGERIA, at ixxviii (3rd edition, Claverianum Press Ibadan 1999).
[11] At 73
[12] Agbeja v. Agbeja, 3NWLR (Part 11) 11 (1985).

another and having children for that other[13].

F. Dissolution of Customary Marriage

The dissolution of a customary law marriage is not as stringent as that under the Marriage Act. A customary law marriage can be dissolved without judicial pronouncement or intervention. The spouses may decide to break the union and the usual defences of collusion or condonation under statutory marriage is not available. But there must be a formal act on the part of the party who is tired and not willing to continue with the union or association. In most places the two families are involved in the dissolution[14].

Customary marriage may be dissolved by mutual agreement between the husband (or his parents where he is young) and the parents of the wife in the presence of the marriage middlemen and one or more elders from each of the two families. The parties in the presence and, where necessary, decide how much of the bride-price and other marriage expenses paid on the woman concerned should be refunded to the husband. In coming to this, factors like the duration of the marriage and whether or not there are children of the marriage are taken into consideration. The bride price and other marriage expenses which are refundable are then paid over to the husband through the hands of the marriage middlemen. This being done the marriage is declared dissolve[15].

G. Requirement of a Valid Marriage under the Act

By the combined effect of the provisions of the Act particularly the under listed provisions

Section 33 (1) provides thus

> 'no marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person with whom such marriage is had'.

Section 33(2) also provides as follows

> 'A marriage shall be null and void if both parties knowingly and wrongfully acquiesce in its celebration'.

Section 35

> Any person who is married under this Act or whose marriage is declared by

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[13] Lawal Osula v. Lawal Osula, 2 NWLR part 274 @Page 158 (1993)

[14] Okpanum v. Okpanum, ECSLR 561 (1972).

[15] Nwangwa v. Ubani, 10 NWLR Part 526 @ page 559 (1997).

> the Act to be valid, shall be incapable during the continuance of such marriage, of contracting a valid marriage, but under customary law save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law or in any manner apply to marriages so contracted.

The author humbly aligns himself with the position of the Court of Appeal in the instant case that the trial court erred in law considering the essential elements for a valid dissolution of customary law marriage as stated below.

The author also aligns himself with the position of the Court of Appeal but disagree in the area highlighted above. In the author's opinion and as stated by Ikechukwu D.Uzo Esq, in his book "Guide to Matrimonial Proceedings[16]" a customary marriage can be dissolved extra-judicially without judicial pronouncement or intervention.

There is a standard process for the dissolution of marriage whether statutory or customary and concrete evidence that the necessary requirements were satisfied must be adduced before a court can hold that there has been a divorce and the validly contracted marriage between a couple had formally and legally come to an end. It is not enough for either party to a customary marriage to suo motu bring it to an end by merely deposing to an affidavit to that effect…. in the instant case, there is no iota of evidence anywhere, including the controversial affidavit (exhibit A) that the deceased learned Senior Advocate made effort or attempted to dissolve the marriage between him and the appellant or that there was any meeting held between both families in connection with the refund of any dowry.

In addition, a marriage, whether statutory or customary is not dissolved by effluxion of time, thus the 17 years of living apart cannot be a ground to hold that the marriage between the 1st defendant and the deceased Senior Advocate had been dissolved.

It is the author's humble submission that in the instant case there is no proof of dissolution of marriage between the 1st defendant (appellant) and J.C Okonkwo (deceased). The fact of living apart for 17 years and the content of the affidavit (Exhibit 'A') does not provide sufficient moral or legal justification to hold that the said marriage had ceased to subsist prior to the death of the deceased.

Sharing the mind of Samuel Chukwudi Oseji[17] what the deceased ought to have simply do was to have gone to a customary court to seek judicial dissolution of the marriage without much ado, rather than resort to a

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[16] At 444

[17] Honourable Justice of the Court of Appeal.

solitary and unorthodox act of deposing to an affidavit which is entirely strange to law and custom.

On the other hand, considering the status of the plaintiff as regards her marriage with the deceased, she is in no way married to him putting together the combined effect of the provisions of the Act as stated above. Her celebration of marriage with the deceased at the time when he is married under customary law to the 1st defendant is invalid under the Act[18].

The situation would have been different if the plaintiff was married to the deceased under customary law as provided for in the Act as follows:

> Any person who is married under this Act or whose marriage is declared by the Act to be valid, shall be incapable during the continuance of such marriage, of contracting a valid marriage, but under customary law save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law or in any manner apply to marriages so contracted.[19]

Bearing in mind that customary law permits a man to marry more than one wife and with the provision of the act as stated above the deceased can validly marry another wife while his customary marriage with the 1st defendant still subsists under customary law but not under the Act. In the instant case the purported marriage of the deceased and the plaintiff was done under the Act and not under customary law and as such invalid. The trial court and the appellate court did not however avert their minds to these provisions as no reference was made to the Act in their varying submissions.

CONCLUSION

Efforts have been made in this case review to appraise the position of law in Nigeria in relation to the dissolution of marriage under the Customary Law which is often taken for granted simply because it is not a statutory marriage that needed to comply with any of the grounds stipulated under the Matrimonial Causes Act. The law is clear that dissolution of marriage under the customary law equally requires the order of court to have it terminated and not by mere affidavit or personal verdict by the parties involved. Compliance with the provision of the law should be the yardstick for a proper dissolution of marriage.

Consequently, people should respect the institution of customary marriage and approach competent customary court when they find it expedient to dissolve such marriages.

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[18] Section 32 (1) of the Marriage Act Cap M6 LFN 2004.

[19] Section 35 of the Marriage Act Cap M6 LFN 2004.