



**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF**



PETITION NO:PET/161/17

BETWEEN:

MRS. ONYEKA RITA JOHN MCSUNNY.....PETITIONER

AND

MR. JOHN AMAECHI MCSUNNY.....RESPONDENT

RULING

This is a transferred matter from the late Hon. Justice C.U. Ndukwe's Court. The Respondent/Objector is challenging the jurisdiction of the Court to hear and determine this petition. In specific terms the Respondent is seeking the following reliefs:

- 1. An Order of this Honourable Court dismissing the Petition filed by the Petitioner for lack of jurisdiction to entertain same, the said being incompetent.**
- 2. An Order of this Honourable Court dismissing the petition filed by the Petitioner/Respondent for failing to verify the facts contained in the petition immediately after the petition and at the foot of the petition.**

3. And for such order or further orders as this Honourable Court may deem fit to make in the circumstances.

Five grounds were listed in support of the preliminary objection. There is also a written address in support where the learned counsel to the Respondent/Objector formulated and argued a lone issue which is whether the petition is incompetent due to non-compliance with the provision of Order V Rule 10(1)(a) and (b) of the Matrimonial Causes Rules on the ground that the verifying affidavit filed by the Petitioner was on a different page instead of forming a continuous page on the foot of the petition.

In opposing this preliminary objection the Petitioner through her Counsel filed a written address on points of law where she contended that the requirement of the Law is simply that the Petitioner file a verifying affidavit in support of her petition. That the Respondent/Objector in his processes conceded that the Petitioner indeed filed a verifying affidavit alongside her petition. Learned counsel submitted that whether the verifying affidavit is on the same page with the petition or on a different page is of no moment. That the provision of Order 6(3) of the English Matrimonial Causes Rules referred to by the learned counsel to the Objector is not applicable to this proceeding as Order 1(2) of our Matrimonial Causes Rules clearly excluded same.

Now I have read and digested the conflicting submission of learned counsel for parties and I must say that parties are ad idem that the Petitioner indeed filed a verifying affidavit in line with Order V Rule 10(1) (a) and (b) of the Matrimonial Causes Rules. What is in contention is whether the verifying affidavit which was filed on a different page outside the foot of the petition is valid or rendered the entire petition incompetent. Learned Counsel to the Objector cited the case of **UNEGBU V. UNEGBU (2004) 11 NWLR (PT.884) 354** where the Court of Appeal held that:

“The requirement of the rule in Order 6(3) of the English Matrimonial Causes Rules (applicable in Nigeria) and similar to Order V Rule 10(1) of the Matrimonial Cause Rules, Cap. 220 Laws of the Federation of Nigeria is that the affidavit in support shall follow at the foot or end thereof.”

See also the case of **OYEDU V. OYEDU (1972) 2 ECSR 730** and **OMODON V. OMODON & ANOR (1966) NMLR 288** cited by the learned counsel to the objector.

Learned Counsel to the Petitioner disagreed with the Objector’s counsel and submitted that the law does not make it mandatory for the verifying affidavit to be on the same page with the petition. He referred the Court to the case of **OLABIWONNU V. OLABIWONNU**

(2014) LPELR – 24065 (CA) to support his submission. I have read the case and I find it quite useful in the resolution of this preliminary objection. As a matter of fact one of the issues formulated by the Appellant in that case is the same with the issue in this objection, to wit:

“Whether the writing of affidavit verifying the facts of the divorce petition on a separate document other than on the petition complied with Order V rule 10(1) of the Matrimonial Causes Rules 1983 to make the divorce petition of the respondent competent for the court to entertain. Ground 2, 3.”

In the resolution of the above issue the Court of Appeal (per Abiriyi, JCA) held extensively as reproduced below:

“Order V Rule 10(1) of the Matrimonial Causes Rules provides as follows:

“A petitioner shall, by affidavit written on his petition and sworn to before his petition is filed-

- a) Verify the facts stated in his petition of which he has personal knowledge; and**
- b) Depose to as to his belief in the truth of every other fact stated in the petition.”**

In the case of Unegbu v. Unegbu (2004) 11 NWLR (Pt. 884) 332 this Court per Mahmud Mohammed JCA (as he then

was) held that failure to do exactly what is required by the above rule could be fatal to a petition. In that case which is very similar to this in the sense that the above rule has not been complied with the petition was struck out. In that case objection was raised to the non compliance by the Respondent immediately he was served with the petition. However, the Respondent in this case raised no objection to the process served on him, participated in the trial and conceded in part to the petition in that he did not object to the dissolution of the marriage. It was after hearing, addresses of counsel and judgment that the Appellant now seeks to have the petition struck out for failure to comply with the above rules.”

His Lordship held further as follows:

“When an irregular procedure is adopted with the acquiescence of a party to a civil action such irregular procedure cannot be a ground of appeal. Also where a wrong procedure has been followed in filing a process and no objection was raised by the party who should have objected, the Court is entitled to proceed with the hearing despite the wrong procedure followed. See Sonuga & 1 OR v. The Minister of the Federal Capital Territory & 1 OR (2010) LPELR 19798. The Appellant having maintained his

silence on the wrong procure in filing the petition after he had been served with the process and participated in the trial to the end should therefore hold his peace.”

In the instant case I agree with the learned Counsel for the Objector that the verifying affidavit filed by the Petitioner offend the provision of Order V Rule 10 of the Matrimonial Causes Rule. The Petitioner’s Counsel tends to ignore the express provision of the said Rule when he submitted that the manner in which the verifying affidavit was presented doesn’t matter. He got it wrong on this point because the Court of Appeal in **UNEGBU V. UNEGBU (supra)** held that failure to do exactly what is required by the above rule could be fatal to the petition. The case of **OLANBIWONNU V. OLANBIWONNU (supra)** heavily relied upon by the Petitioner which deals with waiver is distinguishable from the instant case in the sense that the Respondent in that case participated in the trial until judgment stage and even conceded in part to the petition.

In this case although the Respondent filed an answer to the Petition and also presented a Cross Petition while the late Hon. Justice Ndukwe was seized of the matter the record of the Court revealed that the matter did not proceed to hearing until it was transferred to this Court. It was at that point that learned Counsel to the Objector filed the instant preliminary objection which in my view is in order.

Unlike the case of **OLANBIWONNU V. OLANBIWONNU (supra)** the Objector herein cannot be said to have participated in the trial of this case as trial is yet to commence let alone concede in part to the claims of the Petitioner. The authority is not helpful as it does not support the case of the Petitioner.

At the end of the day and having agreed with the learned counsel to the Respondent/Objector that the verifying affidavit of the Petitioner was not filed in compliance with Order V Rule 10 of the Matrimonial Causes Rule, I am bound to uphold the merit of this preliminary objection. In essence the petition of the Respondent has been rendered incompetent by the incurably defective verifying affidavit in support. Accordingly this objection is upheld and the incompetent petition filed by the Petitioner/Respondent is hereby struck out of the record.

Signed
Hon. Justice H. B. Yusuf
(Presiding Judge)
31/03/2021