IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS TUESDAY, THE 26TH DAY OF JANUARY 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

PETITION NO: GWD/PET/8/19
MOTION NO: M/102/2020

BETWEEN:

ASSUMPTA KUZANKA ANKUT.....PETITIONER

AND

ZAMANI GIDEON WOJE.....RESPONDENT

RULING

By a process captioned **"Answer under protest"** dated 6th March, 2020, the Respondent challenges the jurisdiction of the Court to entertain the **petition** and praying for the following reliefs:

1. **An order striking out the Petition against the Respondent for lack and want of jurisdiction.**

2. **An Order striking out the Petition filed on the 2nd May, 2019 against the Respondent for being wholly incompetent and without compliance to the Marriage Act and the Matrimonial Causes Rules.**

3. **And for such further order(s) as this Honourable Court may deem fit to make in the circumstances.**

The grounds on which the **"answer under protest"** was made are as follows:

1. **That the verifying Affidavit to the Petition is fundamentally defective and contravenes Order V Rules 10(1) of the Matrimonial Causes Rules.**

2. **That Order V Rules 10(1) of the Matrimonial Causes Rules makes it mandatory for the Petitioner to comply with the following:**

   a) **Verify the facts stated in her Petition of which she has personal knowledge.**
   b) **Depose as to her belief in the truth of every other facts stated in the petition.**

3. **That the Verifying Affidavit is scanty and there is nothing in paragraphs 1, 2 and 3 of the Petition that verifies facts, information and beliefs stated in the Petitioner's Petition.**

4. **That the Notice to the Petition is not signed and sealed by the Court as required the Order V Rules 28 of the Matrimonial Causes Rules and therefore makes the Petition void and incompetent before this court.**

5. **The Petition of the Petitioner herein is incompetent before the Court and that the Honourable Court lacks the requisite jurisdiction to entertain same as church marriage and not marriage under the Marriage Act within the contemplation of Section 21 and 26 of the Marriage Act.**

6. **That the Marriage Certificate in support of the Petition and upon which the Petition is brought before this Honourable Court is fake or forged, as same was never filled nor signed by the Respondent.**

7. **That this Court lacks the competence and jurisdiction to entertain this divorce proceeding as the Petitioner has failed to fulfil mandatory conditions precedent to the exercise of jurisdiction by this court.**

The **"answer under protest"** as supported by a written address in which three issues were raised as arising for determination as follows:

“

1. **Whether the verifying Affidavit of the Petition is in compliance with Order V. Rules 10(1) of the Matrimonial Causes Rules to make this Petition competent before this Court.**

2. **Whether the failure to sign and seal the Notice of Petition by the Petitioner to this suit is not a fundamental defect and same contradict Order V. Rules 28 of the Matrimonial Causes Rules.**

3. **Whether in the circumstance of this case, this court can competently exercise jurisdiction to entertain this Petition considering the fact that there is no valid marriage certificate.”**

Submissions were made on the above issues which forms part of this records of court and I shall refer to the submissions where necessary in the course of this Ruling.

The Petitioner/Respondent in response filed a Reply address to the Respondents **“answer under protest”** and raised four(4) issues as arising for determination to wit:

“1. Whether the verifying affidavit filed by the Petitioner is defective to render the petition in incompetent before this court?

2. Whether the error/omission of the Court’s registry to sign and seal the notice of petition can be visited upon the litigant?

4. Whether the court can competently exercise the jurisdiction to entertain the petition?

4. Whether the answer to the petition filed by the Respondent is competent?”

Submissions were equally made on the above issues which forms part of the records of court. I shall equally refer to the submissions where necessary in the course of this Ruling.

At the hearing, counsel on either side of the aisle relied on the processes filed and adopted the submissions in their written addresses in urging on the part of the

Applicant that the petition be struck out and on the part of the Respondent that the objection be dismissed as lacking in merit.

I have carefully considered the processes filed and submissions made on both sides. The issues raised are in substance in pari materia. I shall accordingly resolve this application on the basis of the three(3) issues raised by the Applicant which in my opinion is succinct and captures or covers conveniently all the issues raised by the Respondent. It is on the basis of these three (3) issues that I would now proceed to consider the objection but before doing so, let us situate the legal basis for the application or objection.

The answer under protest is said to be predicated on the provisions of **Order VII Rules 3 of the Matrimonial Causes Rules (MCR).** It is logical to state immediately that for any application to have traction within the confines of the said provision, it must conclusively denote compliance with the provision.

Order vii Rule 3(2) of MCR no doubt provides or allows for the filing of an answer under protest and for same to streamline grounds situating the objection to the jurisdiction of the court. The provisions of **Rules 3(4) to 3(6)** delineates clearly was steps that must be taken for the determination of the answer under protest. Let me here reproduce the provisions as follows:

"3. (3) Where an answer under protest has been duly served, the party filing the answer may, within fourteen days after the day on which the answer is filed, file an application to the court for directions as to the time and place at which the objection is to be determined by the court.

(4) It shall not be necessary for an application referred to in sub-rule (3) of this rule to be supported by an affidavit.

(5) Upon the hearing of an application referred to in sub-rule (3) of this rule, the court may also give directions as to whether disputed questions of fact are to be determined upon evidence given orally or upon evidence given by affidavit.

(6) Where the party filing an answer under protest does not file the application referred to in sub-rule (3) of this rule within the time limited by that sub-rule, the party shall be deemed to have waived the objection."

The above provisions are clear and unambiguous and therefore the task of engaging in any exercise in interpretation hardly arises. There is no doubt that in the present situation, after the filing the answer under protest, no application for direction was filed within 14 days and where this was not done as in this case, under **Rule 3(6) (supra)** the party shall be deemed to have waived the objection. The word used under **Rule 3(6)** is shall which is a word of command. The implication is that the extant application itself was not brought in compliance with the applicable Rules and compromised abinitio.

To avoid accusations of been unduly pedantic, since no party made an issue of compliance with the provisions of **Order vii Rule 3(3) – (6),** let me now ventilate the merit of the answer under protest.

Issue 1 deals with the remit of the application of the provision of **Order V Rule 10(1) of the MCR** on the filing of a verifying affidavit. The applicant contends that the verifying affidavit filed in this case by the petitioner is defective and does not comply with the provision of **Order V Rule 10(1)** thereby rendering the petition defective and robbing the court of requisite jurisdiction to determine the petition. The cases of **Unaigbu V. Unaigbu (2004)11 N.W.L.R (pt.884) 32; Umeakenana V Umeakenana (2009) 3 NWLR (pt.1129) 598** were cited.

On the part of the Respondent, it was contended that there is nothing in the MCR situating the form of a verifying affidavit and that the affidavit filed in this case has substantially complied with the provision of the Rules with respect to its correct import. The case of **Odusote V. Odusote (2012)3 N.W.L.R (pt.1228)478** was cited.

It was further contended that even if the verifying affidavit was not in strict compliance with the MCR, the provision of **Order xxi Rules 2 & 3 of the MCR** provides that non-compliance with any provision of the Rules would not render the proceeding void and as such if there is any defect at all, it does affect the competence of the verifying affidavit.

Now let us take our bearing from the provision situating the making of a verifying affidavit. **Order v Rule 10 (1) (a) and (b)** provides as follows:

"10. (1) A petitioner shall, by an 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 as to his belief in the truth of every other fact stated in his petition."

The above provision is again clear and unambiguous. On the authorities, the filing of a verifying affidavit with a petition for dissolution of marriage is a condition precedent to the filing of the petition, in the sence that the affidavit must be sworn to by a petitioner before the petition is filed. The petition must contain the affidavit sworn to by the Petitioner before it is or can be properly filed. See **Odusote V. Odusote (2012)3 N.W.L.R (pt. 1288)478.** The rule situates that an affidavit be written on the petition sworn to by the petitioner to verify the facts and to depose to the belief of the Petitioner on the truth of every other fact stated in the petition.

It must be stated immediately that there is nothing in the rules denoting the precise form or the delineation of what constitutes the proper form of a verifying affidavit. The contention therefore by the Applicant that the verifying affidavit in this case as "scanty", whatever this means, lacks legal or factual traction. The key elements of **Order v Rule 10(1)** is to 1) verify the facts stated in the petition to which he has personal knowledge and 2)depose to the belief as to the truth of every other fact stated in the petition.

The question now is does the extant verifying affidavit comply with these provision? Again let us take our bearing from the verifying affidavit. I here reproduce the entire affidavit thus:

"VERIFYING AFFIDAVIT OF THE PETITIONER

1. **That I am the petitioner on record.**

2. **That I have filed a petition for the dissolution of my marriage to the Respondent ZAMANI GIDEON WOJE conducted on 27th December, 2008.**

3. **That I verify that all facts contained in the said petition are within my personal knowledge.**

4. **That I depose to this Affidavit in good faith and that every fact in my petition are true to my knowledge, information and belief."**

The above averments are indeed also clear. Paragraph 3 above situates the verification of facts within her personal knowledge required under **Rule 10(1) (a)** above. Paragraph (4) above donates her deposition as to the belief of every fact in her petition fulfilling the requirements of **Rule 10(1)(b) (supra).**

The above verifying affidavit was then properly sworn before the Commissioner for Oath. As much as I have sought to be persuaded, I am not persuaded that the extant verifying affidavit violates the relevant provision of **Order V Rule 10(1)(a)-(b)** as demonstrated above. The affidavit may not have been detailed, but that is of no consequence to the clear extant that there is substantial compliance with the tenor and requirements of the provision.

In **Odusote V. Odusote (supra),** the Superior Court of Appeal instructively stated that the primary object of filing a verifying affidavit with a petition for dissolution of marriage is that a Petitioner should make a solemn oath that all the facts set out in the petition are to his knowledge and belief true and correct. That once an affidavit was sworn to before the petition was filed and it accompanied the petition, the requirement would have been substantially complied with. So be it in this extant case.

Indeed even if there was none compliance with the provision of **Order V Rule 10(1),** (and I have not as found), this is a situation where the court would apply or invoke the provisions of 1) **Order XXI Rule 2** to the effect that non-compliance with the rules shall not render the proceedings void unless the court so directs but the proceedings may be set aside, either wholly or in part as irregular, or may be amended or otherwise dealt with in such a manner and upon such terms as the court thinks fit and 2) under **Order XXI Rule 3(a) & (b), a court may at any time, upon such terms as the court thinks fit, relieve a party from the consequences of non-compliance with these Rules, with a rule of practice and procedure of the court applicable to the proceedings or with an order made by the court;**

(b) a court may, upon such terms as the court thinks fit, dispense with the need for compliance by a party with any provision of these Rules.

On the whole, issue 1 is resolved against Applicant/Objector.

On the second issue or contention that the petition is not signed and sealed as required by **Order V Rule 28 of the MCR,** I don't think it is an issue we should allow ourselves to be detained with. The complaint itself or ground 4 states that **"the Notice to the Petition is not signed and sealed by the court as required..." (Underlining supplied)**

The fulcrum of the complaint here is directed not at any act(s) of the Petitioner but at the **"Court"** which has the duty to process the petition. There is no complaint here that the Petitioner did anything wrong in the circumstances. From the face of the petition, it is clear that all necessary assessments were made on the filing of the petition and a file No even given indicating all the necessary fees were paid.

By the provision of **Order V Rule 28 (2),** the form of notice of petition once properly presented and filed as done here by the Petitioner, the Registrar is then expected to sign and seal the form of the notice. It is clear here that the Registrar, perhaps due to inadvertence did not sign and seal the process.

The Petitioner has no control or say on how the Registrar discharges this duty, so if there is a failing or failure to comply with the provision of **Order V Rule 28,** a responsibility solely that of the Registrar of Court. There is no basis to attribute the failure to the Petitioner. The contention of incompetence of the petition on the basis of failure or dereliction of duty of a Registrar of Court lacks legal traction and must fail.

The final issue borders on whether this court can entertain the petition on the ground that there is no valid marriage under the Act. The case made out here is that there was no marriage under the Act as what Respondent had with Petitioner was only a church wedding and that the marriage certificate attached by Petitioner was forged.

On the other side of the aisle, the case of Respondent is simply that there is a valid marriage between parties and they have frontloaded a copy of the marriage certificate issued from the appropriate authority and that it has not been challenged

in any manner. On the contention that the certificate was forged, it was submitted that the allegation of forgery is a criminal offence which has to be proved beyond reasonable doubt and that there is nothing on the materials supplied by Applicant to prove the allegation.

I have carefully again considered the submissions on both sides and it appears to me that the Applicant here has proceeded on clearly faulty assumptions. First, this is an interlocutory application and there is no jurisdiction in court to determine substantive issues at the interlocutory stage.

The Petitioner in paragraph 1 of the petition which provides template to determine whether the court has jurisdiction or not stated as follows:

"The Petitioner, then a spinster lawfully married the Respondent at Marriage Registry at Kaduna on the 27th December, 2008 according to the rites of the Marriage Registry."

The above is clear with respect to where the marriage was conducted. The Respondent has as yet not filed any answer or joined issues with this averment. One then wonders at the basis of the contention that the wedding was a church wedding as distinct from a marriage under the Act. Where did Applicant get this information from as a basis for the submissions made when the objection is not even situated or supported with any affidavit in support? If no issue is joined with respect to the averment in paragraph 1 of the Petition above or where issue(s) are even joined, subsequently, then that will now be a matter of proof at the hearing. It is not a matter for address or submissions of counsel prior to or before the hearing.

Secondly, the frontloaded marriage certificate attached to the petition is not yet evidence before the court and so the extensive submissions made in paragraph 3.3.7 of Applicant's address is with respect of little utilitarian value if any or at all, at this state. The frontloaded certificate is not yet evidence to be evaluated until it is tendered and admitted in evidence. That is fundamental and critical. The admission and marking of same as an exhibit then alters the character of the document and provides basis for its proper evaluation at the end of the trial. Without this process being followed, it is simply, for now, a bare piece of paper.

Finally and flowing from the above, the contention that the **certificate** was not signed by Respondent and forged is simply speculative posturing of the extreme

kind. It is difficult to fathom how the allegation and proof of forgery that has to be established on the threshold of proof beyond reasonable doubt vide **Section 135 of the Evidence Act** can be made and addressed in a written address in support of an interlocutory application. It is difficult to factually and legally situate how bare and empty submission as done here by Applicant translate to proof beyond reasonable doubt of the criminal allegations made. It also important to again underscore the point at the risk of prolixity that the Applicant is yet to file an answer joining issues with petitioner on any aspect of her petition and then this begs the question-what is the situational or factual basis showing or projecting the allegation of fraud? Absolutely nothing.

This contextual misunderstanding of the trial process then explains the curious conclusion in paragraph 3.3.8 of Applicant's address as follows:

"We humbly pray the Court to so reject the purported Marriage Certificate and order the forgery of same to be investigated by relevant law enforcement agencies against the Petitioner."

It is clear that from the above, that the Applicant is not even sure of the case been made out on the alleged forgery of the marriage certificate. In one breath, it is contended that the marriage certificate was forged and in another breadth it is contended that the court should **"order"** for the investigation of the forgery by relevant law enforcement Agencies. If a call for investigation is been made now and it is no duty of court to order for such investigation, what then is the basis for the conclusion that the certificate was forged. I just wonder.

It is clear that all the issues raised have been resolved against Applicant. Before I round up, the Respondent is now called to act poste-haste and file his answer to the petition so that it can be resolved on the merit. The mantra of courts nowadays is to hear cases on the merit affording each side on opportunity to present their grievances in order to do substantial justice. I leave it at that.

On the whole, the application however fails and it is dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

1. **I.A. Aliyu, Esq., with I.E.O Rabo Esq., for the Petitioner/Respondent**

2. **Sekpe A. Joseph, Esq., for the Respondent/Applicant**