IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT HIGH COURT 21 GUDU – ABUJA

DELIVERED ON TUESDAY THE 13TH DAYOF JULY, 2021

BEFORE HIS LORDSHIP; HON. JUSTICE MODUPER. OSHO-ADEBIYI

SUIT NO. PET/513/2020

BETWEEN:

MRS. REBECCA YORCHI AGWAI---------- PETITIONER/RESPONDENT

AND

MR. OLUTOSIN ABIMBOLA ROTIMI------ RESPONDENTAPPLICANT

RULING

By a Notice of Preliminary Objection filed on 22/02/2016, the application contends the jurisdiction of this Honourable Court to hear and determine the present petition and that the Petition should be struck out or set aside on the following grounds:

1. The Petition is not competent as the requisite condition upon which the Notice of Petition was filed is void.

2. The Petition is an abuse of the judicial and court process.

In support of the objection is a five (5) paragraph counter affidavit deposed to by Hollins C. Otti a legal practitioner with EPHRAIM CHAMBERS', (Tale Alabi & co.,) Counsel to the Respondent in this suit and a written address. The deponent averred that the Petition herein was initiated on

20th October 2020 but personal service could not be effected on the Respondent. That this Honourable Court granted an Order on 16th November 2020 to serve the Notice of Petition on the Respondent by a substituted means. That the Respondent briefed their firm on or about 1st February 2021, shortly after the Hearing Notice was delivered to his Lagos address. That they have now studied the processes served on the Respondent and discovered that the marriage sought to be dissolved was not conducted in accordance with the Marriage Act. That the marriage sought to be dissolved is not such that this Honourable Court could adjudicate upon.

Learned Counsel to the Respondent/Applicant adopted the said Written Address. He raised one issue for determination which is;

> "whether the Application is competent to confer jurisdiction on this Honourable court".

Learned counsel submitted that it is trite that there must have been a marriage recognized under the Marriage Act before a proceeding for dissolution of same could commence. He cited **Anioka v. Anioka (2011) LPELR- 3774 (CA); Akinlolu v. Akinlolu (2019) LPELR-47416 (CA); Chinwenze& Anor, v. Masi& Anor (1989) LPELR-851(SC); Obiozora v. Nnamua (2014) LPELR-3774(CA) and Section 49 of the Marriage Act**. Counsel submitted that it is undoubtedly settled that the crux of the present petition is the prayer for the dissolution of a marriage conducted in the United States between the Petitioner and the Applicant/Respondent. That the case at hand borders on the recognition and validity of a foreign marriage in Nigeria. Counsel further submitted

that impliedly from **Section 50 of the Act**, a foreign marriage will only be valid under the Marriage Act if and only if it complies with the provisions of **Sections 49-53 of the Marriage Act**. That it is trite law that when there is a laid down procedure to do a thing under the law, the procedure and no other one must be followed. See **Buhari v. Yusuf [2003] 6 S.C [Pt. Il] 156; [2003] 4 NWLR [Pt. 841] 446 at 492.** He submitted that the above summation found a legal strength in the Supreme Court's decision in **Obiekwe v. Obiekwe (1963) 1 NLR at page 196 per Palmer J**, that if the parties had not been validly married under the Ordinance, then, either they are married under the custom or they are not married at all.Learned counsel submitted that the present marriage sought to be dissolved did not comply with the Marriage Act and thus not a valid marriage under our law to covet the jurisdiction of this Honourable Court. Invariably, the present Petition is not competent and urgedthe court to so hold. He cited**Ogundeji v. State of Lagos (2018) LPELR-46564 (CA); Ogbuanyinya& Ors v. Okudo& Ors. (1990) LPELR-2294 (SC)**.Counsel submitted that a distinction must be drawn between two types of jurisdictions namely: jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. Whilst a litigant can waive the former, no litigant canconfer jurisdiction on the Court where the Constitution or a statute or any provision of the common law says that the court does not have jurisdiction. He cited **Ndayako v. Dantoro (2004) 13 NWLR (Pt. 880) 187; Onyenucheya v. Military Administrator Imo state (1997) 1 NWLR (Pt.482) 429; Multi-purpose Ventures Ltd. V. A-G Rivers State (1997) 9 NWLR (Pt.522) 642; Nkuma V. Odili (2006) 6 NWLR (Pt.977) 587; Lufthansa Airlines v. Odiese (2006) 7 NWLR (Pt.978) 39**.

In addition, counsel submitted that it is settled law that where an action is not competent or properly constituted, it robs the Court of the jurisdiction to entertain same. See **Ofia v. Ejem (2006) 11 NWLR (Pt. 992) 652; Odessa v. FRN (No.2) (2005) 10 NWLR (Pt. 934) 528; Fabs v. Ibiyeye (2008) 14 NWLR (Pt 1107) 375; Riruwai V. Shekarau (2008) 12 NWLR (Pt,1100) 1420**. Learned counsel submitted that abuse of process of court is a term generally applied to a proceeding which is wanting bonafide and is frivolous, vexatious, or oppressive. Abuse of process can also mean abuse of legal procedure or improper use of judicial process. He cited **Amaefule v The State (1998) 2 NWLR (Pt.75) 156 at 177; Arubo v Aiyeleru (1993) 3 NWLR (Pt.280) 126 at 142; NV Scheep v. MV.S. Araz (2000) 15 NWLR (Pt.691) 622; Edet v State (1988) 45 NWLR (Pt.91) 722; African Insurance corp. V J.D.P. Construction Nig. Ltd. (2003) 2-3 SC. 47. and Timothy Adefula v. Secretary, Ikenne Local Government Area & Ors (2002) WRN 68.** Counsel also submitted that whenever a court concludes or notices that its processes are being abused, the consequence thereof is a dismissal of the processes that are considered abusive **See Ibok v Honesty Il (2007) 6 NWLR (Pt. 1029)**and urgedthe court to hold that the present suit filed by the Applicant is abusive in extreme and dismiss same. Finally, counsel urged the Court to hold that the marriage, sought to be dissolved, since it's not valid under the Marriage Act, disrobe this Honourable Court of its Jurisdiction and it will serve the interest of justice to have same dismissed.

The Respondent/Applicant also filed a reply on points of law on 4/03/2021. Counsel submitted that it is beyond cavil that there is a distinct world of difference between substantive and procedural laws. In

the same vein, there is a clear distinction between objection to procedural rules and substantive laws. He cited **Mobil Producing (Nig) Unlimited Vs Lagos State Environmental Protection Agency (2002) 18 NWLR (Pt 798) 1; Gafari vs Johnson (1986) 5 NWLR (Pt 36) 66 at 71; and Atolagbe vs Awuni (1997) 9 NWLR (Pt 552) 536.** Counsel urged this Honourable Court to graciously distinguish between the nature of Petitions under the Matrimonial Causes Act, which are sui generis, and other civil cases where Statement of Claims are filed and the medium through which the Court would determine its jurisdiction. That in the instant petition, the only question this Honourable Court needs to answer is: Whether there was a Marriage under the Marriage Act (that is, conducted in line with Marriage Act) to be dissolved under the Matrimonial Causes Act in the present petition? Counsel submitted that this Honourable Court cannot adjudicate over the foreign laws under whichthe instant marriage was conducted. Learned counsel contended that it is the position of the law that a nullity in law is a void act, an Act which has no legal consequence; an act that is not only bad but as Lord Denning LJ stated in **UAC. Ltd v. Macfoy (1961) 3 All ER 1169**, is incurably bad. Similarly, in **NERC v. Adebiyi & Ors (2017) LPELR 42903 (CA) and Section 33 (2) (a) of the Marriage Act.** Counsel argued thatthe law in force or applicable at the time the cause of action arose is the law applicable for determining the case. See **Utih v. Onoyivwe (1991) LPELR3436(SC); Okonkwo v. Okonkwo (2010) LPELR-9357(SC); and Obiuweubi v. Central Bank of Nigeria (2011) LPELR-2185(SC).** That to date, the Marriage Act is the only law enacted to make provisions for the celebrations of Marriages. Learned counsel further submitted that it is beyond argument that the Matrimonial Causes Act, under which the

present petition was initiated, only came into being to enforce the Marriage Act! It is therefore illogical, with respect, to assume that the provisions of the Matrimonial Causes Act, a procedural law, will supplant or override those of the substantive law (the Marriage Act). Finally, counsel urged this Honourable Court that the present Petition is not competent since there is no valid marriage under the Act set to be dissolved. The conception of the instant marriage, having failed to comply with the Marriage Act, cannot be dissolved through the invocation of the Matrimonial Causes Act and he urgedthe Honourable court to so hold.

In opposition to the Objection, the Petitioner/Respondent on 24thFebruary, 2021 filed an 11 paragraph counter affidavit deposed to byNkem J. Ekwujurua Legal Practitioner and a Counsel in the law firm of Yakubu Ghana & Co, counsel to the Petitioner/Respondent in this petition. The deponent averred that she knows as a fact that her marriage to the Respondent/Applicant was in full compliance with the laws of the State of New York, United States of America where the marriage was contracted.That both the Respondent/Applicant and herself duly indicated their respective places of domicile in the Marriage Certificate as Nigeria having been respectively born in Lagos and Jos Nigeria by Nigerian parents as clearly stated in the Certificate of Marriage Registration issued therein. That she knows as a fact that the Petitioner and Respondent having complied with the matrimonial laws of the State of New York as attested to by Exhibit A, their marriage though contracted outside Nigeria is nevertheless recognized and dissolvable in Nigerian and under the laws

of Nigeria.That she knows as a fact that the Petitioner and Respondent affirmed Nigeria as their place of domicile in Exhibit A which fact confers jurisdiction on this Honourable Court to adjudicate on the Petition.That she knows as a fact that the Respondent/Applicant is a Nigerian citizen, born by Nigerian parents and has his permanent place of abode/domicile in Nigeria, at 4A Olubunmi Rotimi Street, Lekki Phase 1, Lagos State, the same address where the originating andsubsequent processes in this suit was duly served on the Respondent.That she knows as a fact that the Petitioner having founded her petition on the ground of being deserted by the Respondent/Applicant for over 6 years without any means or provision for the welfare, education and medical care and other necessities for the only child of the marriage and the fact that she is permanently domiciled and has been domiciled in Nigeria the Respondent deserted the marriage, vests this Honourable Court with jurisdiction to determine this petition contrary to deposition at paragraph 4( e) of the affidavit in support of the preliminary objection.That it will be in the interest of justice if this application is dismissed with substantial cost for being time wasting and brought mala-fide.

Learned Counsel to the Petitioner/Respondent adopted the said Written Address. He raised one issue for determination which is;

> "'Whether upon a calm consideration of the provisions of sections 2(1) (a), (2) and (3), 7 of the Matrimonial Causes Act, it can be said that this Court lacks the jurisdiction to adjudicate on this petition".

Learned counsel submitted that upon a calm consideration of the provisions of **Sections 2(1) (a), 2(3), 7 of the Matrimonial Causes Act** this

Honourable Court will come to one irresistible conclusion that it is vested with the jurisdiction to hear and determine this petition and there is nothing in the provisions of the Marriage Act or Matrimonial Causes Act that divests this Honourable Court of the jurisdiction in this suit. Counsel submitted that the law is now settled that where the words used in a statute are themselves precise and unambiguous, then their plain and ordinary meaning should be ascribed to the words used. He cited**I.B.W.A v. IMANO (NIG) LTD (1988) NSCC (PT.II) 245, PDP v. INEC (1999) 11 NWLR (PT. 626) 200 AT 261.** Counsel further submitted that the law is settled that in determining whether or not the court is vested with the jurisdiction to adjudicate a suit before it, it would only consider the Plaintiff's Writ of Summons and Statement of Claim (Petitioner's Petition in the instant case). He cited **GOVERNOR OF KWARA STATE v. LAFIAGI (2005) 5 NWLR (PT. 917) 139 at 151, FGN v. OSHOMOLE (2004) 3 NWLR (PT. 860) 305, SKEN CONSULT v. UKEY (1981) 1 SC6.**He submittedthat upon a proper, plain and simple construction of the wordings of **Sections 2(1) (a), 2(3), 7 of the Matrimonial Causes Act** which prescribes the court with jurisdiction in matrimonial matters, this Honourable Court will be in no doubt that it is vested with the full powers to hear and determine this petition.Counsel submitted that flowing from the above clear and precise provisions of the Matrimonial Causes Act, this Court will not have any difficulty in arriving at the conclusion that the import of the above provisions is that it grants unqualified access to and vests jurisdiction on the High Court to adjudicate in all matrimonial proceedings for person who has established that he is domiciled in Nigeria. That the provisionshave in no way limited or restricted matrimonial proceedings under the Act at the High Court to only marriages conducted

in Nigeria as strangely argued by the Respondent/Applicant Preliminary objection.Counsel submitted that it is settled law that domicile is the basis of jurisdiction in matrimonial causes in line with section 2 of the Matrimonial Causes Act. He referred this Honourable Court to **ANI v. ANI (2002) 6 NWLR (PT. 762) 166, UGO v. UGO (2008) 5NWLR (PT 1079) 1; OSIBAMOWOv. OSIBAMOWO (1991) 3 NWLR (PT.177) 85; BHOJWANI v. BHOJWANI (1995) 7 NWLR (PT. 407) 349; KOKU v. KOKU (1999) 8 NWLR (PT. 616) 672 and OMOTUNDE v. OMOTUNDE (2001) 9 NWLR (PT.718) 252.** Counsel submitted that a close examination of Exhibit A will provide answers to the posers raised by the court in **BHOJWANI v. BHOJWANI (supra).**Counsel submitted that nothing was placed before this Court by the Respondent in urging it to decline jurisdiction seeing that the only basis upon which the Court may decline jurisdiction in a matrimonial proceeding is establishing by credible evidence that the Respondent is not domiciled in Nigeria. That there is also nothing placed before this Court that show that the Respondent subsequently acquired another country as his domicile of choice contrary to and which supersedes his Nigerian domicile of origin contained in Exhibit A (the marriage certificate).He submitted that the onus is on the Respondent to prove that he is not domiciled in Nigeria within the meaning of section 2 of the Matrimonial Causes Act to crest the jurisdiction on this Court to determine the Petitioner's suit.That it is settled that the law does not confer nor restrict the jurisdiction of a court by implication. He further submitted that the entire sections relied upon by the Respondent/Applicant in urging this Honourable Court to decline jurisdiction has no purport or bearing with the jurisdiction already expressly donated to this Court by section 2 of the Matrimonial Causes

Act.Counsel submitted that the respondent is clearly at sea with the provision of the Marriage Act cited. That Section 49 of the Marriage Act defined a foreign marriage as that involving two parties one of whom must be a Nigeria citizen. That there is nothing placed before this Honourable court that shows that any of the parties in the marriage between the Petitioner and Respondent is a foreign citizen to bring their marriage within the definition of foreign marriage whose conduct must be in compliance with sections 50-53 of the Marriage Act.

Learned counsel submitted that **Sections 49-53 of the Marriage Act** merely provides the procedure for a marriage between a Nigerian citizen and a non- citizen outside to be deemed as a Marriage under the Act, failure upon which still confers on this Court with the powers to void same under **Section 2 and 3(1)( C) of the Matrimonial Causes Act**. That it does not by any stretch of imagination deprive parties to such marriage the right to have same determined by a Nigeria court insofar as Nigerian domicile is established under section 2 and 7 of the Act.Finally, counsel submitted that upon a calm examination of the pleadings of the Petitioner, it would be crystal clear that this case falls within the special provisions availed the deserted wife under section 7 of the Matrimonial Causes Act for the purposes of assuming her Nigerian domicile to institute matrimonial proceedings.That since cost follows event, he urged this Honourable court to dismiss this preliminary objection with substantial cost for wasting the pressure judicial time of this Court.

I will adopt the issue for determination of Learned Counsel to the Respondent/Applicant which is;

"whether the Application is competent to confer jurisdiction on this Honourable court".

It is trite that only two (2) types of marriages are recognized under the marriage Act i.e. customary marriage or marriage under the Act.Before the court can go ahead and nullify a marriage as provided under the Matrimonial Causes Act the court must first be satisfied that there exists a valid marriage between parties under the Marriage Act. It is the Marriage Act that defines processes and procedures of a valid marriage in Nigeria and not the Matrimonial Causes Acthence I do not agree with learned counsel to the Petitioner that it is the Matrimonial Causes Act (MCA) that defines a marriage in Nigeria on the contrary, the Matrimonial Causes Act (MCA) came into force as a procedural law for the sake of the Marriage Act which is the substantive law. Hence without first fulfilling the conditions of a valid marriage as spelt out in the Marriage Act, it would automatically rob any court of jurisdiction to adjudicate on annulment using the Matrimonial Causes Act.

Parties in this case got married in New York and were issued a marriage certificate in line with the laws of New York City. Parties are legally married under the laws of New York.It is not in doubt that parties are legally married. It is also unchallenged that there is legal and binding marriage between the couple. The question that arises at this point is whether this court has the jurisdiction to hear this matter on the grounds that the marriage is not valid under the Marriage Act in Nigeria.
Counsel to the Applicant relied heavily on **Section 49 of the Marriage Act**; which provides: -

*"Subject to Section 50 to 53 of this Act, a marriage between parties one of whom is a citizen of Nigeria, if it is contracted in a country outside Nigeria before a marriage officer in his office shall be as valid in law as if it had been contracted in Nigeria before a registrar in the registrar's office".*

**Section 50 Marriage Act** defines marriage officers

"for the purpose of this Act, every Nigerian diplomatic or consular officer of the rank of secretary or above shall be regarded as a marriage officer in the country to which he accredited".

**Section 51 Marriage Act** defines marriage officer's office as

"The office used by a marriage officer for the performance of his diplomatic or consular duties shall be regarded as the marriage officer's office for the purpose of this Act.

In essence counsel to the Respondent/Application is contending that marriage between parties is a foreign marriage in the context of the Marriage Act and for the marriage to be valid it must have been conducted by a Nigerian diplomats or consular officer of the rank of secretary or above in the office used for the performance of his diplomatic or consular duties.From Exhibits before me particularly the Certificate of Marriage issued by the City of New York, office of the city clerk, it is indicated in the certificate of marriage that both parties were born in Nigeria which makes both parties citizens of Nigeria by birth in accordance to **Section 25 of the 1999 constitution of the Federal Republic of Nigeria (as amended).** There is nothing before me to prove that either of the parties has denounced their citizenship of Nigeria in line with **Section 29 of the 1999 constitution of the Federal Republic of Nigeria (as amended)** and I therefore hold that

from processes before me, both parties are citizen of Nigeria. It is an undisputed fact that Respondent/Applicant was served Originating Processes in this suit by substituted service at a specified address in Lagos.**Section 49 Marriage Act**envisages a situation where one of the parties is a Nigeria and not the case at hand where both parties are Nigerians.Where one party is Nigerian and the other is a foreigner it is only fair that the procedure as spelt out in **Section 49 Marriage Act** should apply as both parties have different citizenship of two different countries hence the law in Nigeria has to be fair to both parties before assuming jurisdiction in dissolving such marriage.The marriage before me does not fall into the category as defined by **Section 49 Marriage Act** as both parties are Nigerians. Moreover, both learned counsels relied heavily on the case of **BHOJWANI VS BHOJWANI6 NWLR (Pt. 457) 661** for emphasis I will reproduce the facts of this case. In this case a Nigerian was married to a Singaporean and both got married in England under the English law and the High Court of Lagos ruled that it had jurisdiction to hear the petition for the annulment of the marriage, on appeal the appeal court upturned the decision of the high court and the appellant appealed to the Supreme court but the Supreme was unable to deliver its judgment as the court of England had issued a Decree Nisi which would have made the judgment of the Supreme Court of Nigeria an academic exercise in futility.

I reiterate that the case of **BHOJWANI (Supra)** does not apply in this circumstance as only one of the parties is a Nigerian. Hence where one of the parties to a foreign marriage is a Nigerian, the procedure as spelt out in **Section 49 of the Marriage Act** applies in its entirety but in this present circumstance, both parties are Nigerians within the meaning of **Section 25 of the 1999 constitution (as amended)**which relates to citizenship by birth

and nowhere in the Marriage Act does it state that petition for annulment of marriages between Nigerians who got married in a foreign land cannot be heard in any court of competent jurisdiction in Nigeria. It is against this backdrop that I hold that **Section 49, 50, 51, 52, 53of the Marriage Act**does not apply in this case.

Learned counsel to Respondent in his reply on points of law also raised **Section 33 (2) (a) of the Marriage Act** submitted that the marriage between parties is null and void. **Section 33 (2) (a) Marriage Act** provides:

> *"A marriage shall be null and void if both parties knowingly and willfully acquiesce in its celebration: -*
>
> *(a) In any place other than the office of a registrar of marriages or a licensed place of worship (except where authorized by the license issued under Section 13 of this Act)*
>
> *(b) Under a false name or names; or*
>
> *(c) Without a registrar's certificate of notice or license issued under Section 13 of this Act duly issued: or*
>
> *(d) By a person not being a recognized minister of some religious denomination or body or a registrar of marriages.*

The question that comes to fore here is whether the parties knowingly and willfully acquiesce to celebrating their marriage in any place other than the office of a registrar of marriage as set out in the Marriage Act.In **OBIEKWE VS OBIEKWE (1963) 7 ENLR 196**. The wife filed a petition for divorce and contended that she was lawfully married to her husband in a ceremony that took place at the Catholic Church in Enugu. The husband said the marriage was not a valid one because no registrar's certificate of notice was issued to parties. The petitioner replied that she had trusted

her husband and left all the formalities to her husband to handle. The courts held that the marriage ceremony was valid not minding that there was no registrar's certificate issued in accordance with the provisions of the Marriage Act since both parties were ignorant of the necessity to obtain a registrar's certificate. The court further held that parties had gone through the ceremony of marriage with the believe that they had not flouted any requirement of the Marriage Act hence parties did not knowingly and willfully acquiesce to the celebration of a marriage without a registrar's certificate.The Court have stated that where parties intended to marry under the act but failed to comply with the provisions of the act and went through a ceremony with at least one of the parties believing the ceremony was a valid marriage ceremony then the court would clothe the marriage with the garment of legality if to the court is satisfied that at least one of the parties was ignorant of such requirement as laid down in the Act.

The Petitioner in the case before me filed for annulment of her marriage on the grounds that she had a lawful and valid marriage with her husband. Parties got married in 2014 in New York City and the marriage is blessed with a child born on 17/1/2013. Petitioner has since the marriage accepted the fact that she has a valid marriage with the Respondent under the Act hence her reason for seeking annulment of her marriage to the Petitioner in the High Court. If Petitioner knew she was not married, she definitely would not have filed a petition for annulment and this is proof that Petitioner believed she had a valid marriage under the Act.

There is nothing before me that points to the fact that petitioner knowingly and willfully acquiesce to celebrate her marriage with the Respondent in the office of the marriage registrar in New York knowing

same to be null and void. Hence it is my view and I so hold that non-compliance with the rules of procedural formality as stated under **Section 33 (2)(a) of the Marriage Act** will not vitiate nor nullify any marriage purportedly celebrated in accordance with the Marriage Act provided that there is proof that at least one of the parties was ignorant of the non-compliance with the said rules. See **AKPARANTA VS AKPARANTA (1972) 2 ECSLR 779** where the court held that despite the evident procedural defect in the marriage of the parties once there is proof that one of the parties was not aware of the need to fulfill some procedural requirements in order to make the marriage valid then the court would deem the marriage to have taken place under the Act and accord it with full legal status of valid marriage under the Act. On the basis of the above, I thereby hold that this court has jurisdiction to hear this matter.

Consequently, preliminary objection dated 22nd February, 2021 is hereby struck out.Cost of ₦30, 000 is hereby awarded.

**Parties:** Absent

**Appearances:**N. J. Ekwujuru for the Petitioner. Florence F. Aremu for the Respondent.

**HON. JUSTICE MODUPE R. OSHO-ADEBIYI**

**JUDGE**

**13TH JULY, 2021**