IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON WEDNESDAY, THE 30TH DAY OF NOVEMBER, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.:FCT/HC/PET/044//2021
MOTION NO.: FCT/HC/GWD/M/288/2021

BETWEEN:

MRS OGECHUKWU EDITH OJINERE **PETITIONER/RESPONDENT**

AND

MR CHINEDU PAUL OJINERE **RESPONDENT/ APPLICANT**

RULING

This Ruling is in respect of an application by the Respondent/Cross-Petitioner/Applicant for leave to lead evidence at trial of the Petition and Cross-Petition by affidavit.

By way of motion on notice with the Motion No FCT/HC/GWD/M/288/2021, dated the 18th day of October 2021 but filed on the 27th of October, 2021, the Applicant prayed this Honourable Court for the following reliefs:

1) *AN ORDER of this Honourable Court granting leave to the parties and specifically, the Respondent/Cross-Petitioner to lead evidence at the trial of the Petition and Cross-Petition by Affidavit, to wit, Witness Statement on Oath.*

2) *AND for such further or other orders as this Honourable Court may deem fit to make in the circumstance of this case.*

The grounds upon which the application is brought are that the application will ensure the maximization of judicial time; and the application is consistent with the rules of evidence applicable to civil proceedings in this Court while not being inconsistent with the Matrimonial Causes Act as well as the Matrimonial Causes Rules.

The application is supported by a 7-paragraph affidavit deposed to by the Applicant himself. Also accompanying the application is a written address in support of the application which embodies the legal submission of the Applicant in support of the application.

In the affidavit in support of the application, the deponent, after deposing to the status of the Petition, averred that the application was necessary because of the need to optimize the time of the Court as well as the necessity of preserve the dignity of the parties before the Court.

In the Written Address in support of the application, learned Counsel formulated a sole issue for determination, to wit: "*Whether this Honourable Court has the vires to grant the application to take evidence at the trial of the Petition and Cross-Petition by affidavit?*" Arguing this sole issue, learned Counsel referred this Court to the provisions of Order XV Rule 5(2) and Order

XV Rule 3(a) of the Matrimonial Causes Rules and submitted that this Court has the powers to grant the reliefs sought in the application. He therefore urged the Court to grant same.

The Respondent responded to the application vide her Counter-Affidavit and Written Address both dated and filed on the 17th of November, 2022. In the 10-paragraph affidavit deposed to by the Respondent herself, she swore that the prayer sought in the application will limit her ability to express herself as she would in respect of the facts in the Petition. She further stated that there was no dignity to be preserved between the parties to justify the grant of the relief sought in the application.

Further to this, the deponent asserted that an affidavit is not the same as a Witness Statement on Oath, adding that hearing by the Court is not restricted to either affidavit or witness statement on oath. She averred that the Applicant had not placed sufficient material particulars before the Court to justify the grant of this application, adding that the application was a strategy by the Applicant to waste the time of the Court.

In the Written Address in support of the application, learned Counsel for the Respondent adopted the issue formulated by the Counsel for the Applicant, and further formulated another Issue for determination. In his argument on Issue 1, learned Counsel for the Respondent submitted that though the Court

has the discretion to grant the relief sought, this discretionary power is not unlimited; but must be exercised judiciously and judicially. He maintained that the Applicant had not adduced compelling reasons why the Court should grant the relief he is seeking; adding that it is not enough for the Applicant to claim that hearing the Petition in the manner sought by the Applicant would save the time of the Court.

Counsel challenged the claim of the Applicant that the Rules of this Court allows for the taking of evidence through written deposition, adding that Order 34 Rule 1 of the Rules of this Court provides that hearing shall be by both written deposition and oral examination of the witnesses in the Court. Counsel also referred to Order 36(1) of the Rules of this Court as well as Order XV Rule 5(2) of the Matrimonial Causes Rules which provides that evidence could be led in matrimonial matters by way of affidavit subject to an application for same being made and the exercise of the discretion of the Court in that regard. He urged the Court to discountenance the misleading evidence and legal arguments of the Applicant on this point. For all his arguments on this issue, learned Counsel relied on the cases of ***Yandy v. Alhaji Lawan & Sons Ltd (2017) LPELR-43123 (CA)***; and ***Ajani & Others v. President & Members of Olorunda Grade Ocycoco Customary Court & Anor (2011) LPELR-4581 (CA)***.

In his argument on the second issue, which is, "*Whether it will be in the interest of justice for the Honourable Court to grant the application*", learned Counsel submitted that the purpose of taking oral evidence in Court is to enable the Court to observe the demeanour of the witnesses before it. He contended that hearing the Petition by way of affidavit evidence would rob the Court of the opportunity to observe the witnesses and study their demeanour. It is the case of the Respondent that this fundamental deprivation is inimical to the interest of justice. He therefore urged the Court not to grant the application. For his argument on this issue, learned Counsel cited and relied on the case of ***Nyawen v. Badon & Ors (2016) LPELR-40825 (CA)***.

Those are the arguments of the parties in respect of this application. Before I delve into the crux of this application, I must make one observation. Counsel for the Respondent in the written address in support of the Counter-Affidavit contended, in paragraph 2.0, lines 4 – 10 as follows:

> "*The matter last came up on the 5th of October, 2021 based on an application of the applicant which the Court had adjourned to the 18th of October, 2021 for ruling. While we are still awaiting the Court's ruling, the applicant brought this application seeking for a leave to lead evidence by affidavit to wit statement on oath and pursuant upon same, we filed this counter in opposition to same.*"

I have gone through my record and I could not find any substance to support the above assertion of learned Counsel. This Petition has come up in this Court on the following dates: **29/06/2021, 21/09/2021, 14/10/2021, 18/11/2021, 02/02/2022, 17/03/2022, 10/05/2022,** and **26/10/2022** when this particular application was argued. I wonder where learned Counsel manufactured 5th of October, 2021 as a date this Court sat and heard arguments in respect of an application or for that matter when this Court adjourned a particular application to the 18th of October, 2021 for Ruling. This Court heard arguments on the application for ancillary reliefs brought *vide* the Motion on Notice with Motion Number GWD/M/226/2021 on the 14th of October, 2021 and delivered its Ruling in respect of same on the 18th of November, 2021. It is either learned Counsel is inflicted by the bug of overreliance on drafting precedents, or he deliberately set out to mislead this Court. Whatever the case is, Counsel should be meticulous in their draftsmen and be patient enough to sanitise their processes before filing same in Court.

Having said that, I return to the application before me. The issue before me is "***Whether this Court does not have the power to grant the relief being sought in this application?***" To resolve this Issue, it is appropriate I consider the provisions of Order XV Rule 5(2) of the Matrimonial Causes Rules. The sub-rule provides that,

"***Subject to sub-rule (3) of this rule, the Court may, by order, grant leave to a party to proceedings to which this Rule applies to furnish at the trial evidence of a particular fact by the affidavit of a person, whether a party to the proceedings or not, who has, of his own knowledge, deposed to the fact.***"

Sub-rule (3), to which sub-rule (2) is subject, provides as follows:-

"***An order referred to in sub-rule (2) of this rule may be made by a Court –***

(a) Before the trial of the proceedings – upon application made by a party to the proceedings; or

(b) ***At the trial of the proceedings – upon oral application made during that trial.***"

The contention of the learned Counsel for the Respondent is that an affidavit is not the same as a witness statement on oath. Technically, he is correct. Though an affidavit and a witness statement on oath are both written depositions on oath, they are not the same. A hearing that is determined solely on the basis of affidavit evidence is done without the need to call oral evidence. It inherently excludes the cross-examination of the witnesses and their re-examination. In fact, the Court can evaluate the evidence contained in an affidavit and act on same even where the deponent is not in Court.

Not so a witness statement on oath. A witness statement on oath must be adopted by the deponent before it can be used by the Court as evidence. A witness statement on oath that is not adopted in the course of hearing is deemed abandoned.

In ***Elder Biodun Majekodunmi & Ors v. Mr. Akanbi Nofiu Ogunseye (2017) LPELR-42547(CA)***, the Court held *inter alia* **at Pp. 40-45, paras. D-C** that,

> "***To determine this issue, I find it necessary to state the legal status of a Written Statement on Oath. It should be noted that, unlike an affidavit per se, a Written Statement on Oath filed in Court is not evidence, unless it has been duly adopted by the witness at the trial. In other words, a Written Statement on Oath will only be evidence to be used by the Court in the determination of the Plaintiff's Claim, if it has been adopted by the person who deposed to it as his testimony during the trial. If it is not so adopted, it is deemed abandoned and therefore cannot be examined by the trial Judge. An Affidavit on the other hand is the evidence of the witness made in writing. Thus, whether or not the deponent appears in Court, such***

depositions are capable of being evaluated by the Court as evidence…"

A hearing that is conducted *via* the medium of written depositions are not, strictly speaking, hearing by affidavit evidence; they are, actually, hearing by oral evidence since the deponent must be present in Court to adopt their written deposition as their evidence, be cross-examined by the adverse party and, if need be, re-examined by his Counsel where they are represented by a legal practitioner. In the case of ***Hon. Fabian Okpa v. Chief Alex Irek & Anor (2012) LPELR - 8033 (CA)***, Ndukwe - Anyanwu, JCA, relying on the case of ***Akpokemovo v. Aga (2004) 10 NWLR (Pt.881) 394*** said:

"***This Court has consistently held that a witness Statement on Oath is different from an Affidavit evidence. An affidavit is a statement of fact which the maker or deponent swears to be true to the best of his knowledge. It is a Court process in writing deposing to facts within the knowledge of the deponent. It is documentary evidence which the Court can admit in the absence of any unchallenged evidence.... On the contrary, a witness statement is not evidence. It only becomes evidence after the witness is sworn in Court and adopts his statement. At this stage at best it becomes evidence in Chief. It is therefore***

subjected to Cross-Examination after which it becomes evidence to be used by the Court. If the opponent fails to Cross-Examine the witness, it is taken as the true situation of facts contained therein."

Though the Applicant titled his application "Motion on Notice for Leave to Lead Evidence at Trial of the Petition and Cross-Petition by Affidavit", the relief being sought is "*an Order of this Honourable Court granting leave to the parties and specifically, the Respondent/Cross-Petitioner to lead evidence at the trial of the Petition and Cross-Petition by Affidavit, to wit, Witness Statement on Oath*."

Considering the nature of this suit, which in the main is a Petition for a Decree of Judicial Separation and, in the minor, a Cross-Petition for a Decree of Dissolution of Marriage, the Respondent is understandably alarmed that the Applicant would ask this Court to hear the Petition by way of affidavit evidence. I however believe that the angst and disquietude of the Respondent proceed from a position of misapprehension of the distinction between the two processes, more so, as the Applicant defined the nature of the proposed affidavit in his relief when he said: "*…to wit, Witness Statement on Oath*." The Respondent's deposition in paragraph 4 of her Counter-Affidavit that granting the application "*…will curtail my freedom to express myself in this matter*

before this Honourable Court" is, therefore, misconceived. The Respondent will have the opportunity to express herself to her satisfaction within the bounds of the rules of evidence when she will be cross-examined, and re-examined. She will also have the opportunity to subject the Applicant to rigorous and intensive cross-examination – again, within the bounds of the rules of evidence – when he takes the stand to give evidence.

It is not in doubt that the Matrimonial Causes Act and the Matrimonial Causes Rules do not make provision for the filing of a witness statements on oath. The practice since the advent of the frontloading system, however, is for parties to file their witness statements on oath along with their pleadings in matrimonial matters. I am not unaware, though, that some legal practitioners apply for the prior leave of the Court to file the witness statement on oath for their parties. I agree with learned Counsel for the Applicant that filing a witness statement on oath is not inconsistent with the provisions of the Matrimonial Causes Act and the Matrimonial Causes Rules. I also agree with learned Counsel for the Respondent that the grant of applications of this nature is subject to the discretion of the Court. That is correct. Order 1 Rule 10 provides that,

"***(1) Where a Court is satisfied-***

(a) The provisions of the Act relating to practice and procedure and the rules made under the Act do not make provision with respect to the practice and procedure applicable in the circumstances of a particular case; or

(b) Difficulty arises or doubt exists as to the practice or procedure applicable in the circumstances of a particular case,

The Court may give such directions with respect to the practices and procedure to be followed in the case as the court considers necessary."

I do not see how allowing parties to file their witness statements on oaths will circumvent the rule of law, or truncate justice, or in any way prejudice the right of any party in this Petition to ventilate their grievances to their satisfaction.

In view of the foregoing, therefore, I believe, and I so hold, that it will be expedient for this Court to allow the parties herein to file their witness statements on oath as well as the witness statements on oath of persons they intend to call as witnesses. Judicial time is a premium commodity that must be managed prudently. The witnesses statements on oath will help this Court to achieve the desired optimization of its time. I hereby resolve the sole Issue

I have formulated herein in favour of the Applicant and therefore hold that this Court has the power to grant the reliefs sought in this application.

Accordingly, the principal relief sought in this application with Motion Number GWD/M/288/2021 is hereby granted on the following terms:-

1. **Both the Applicant and the Respondent are hereby ordered to file their witness statements on oath. The witness statements on oath shall be headed as such and not as an affidavit.**

2. **The Respondent in this application, that is, the Petitioner/Respondent to the Cross-Petition in the substantive Petition shall file and serve her witness statement on oath on the Applicant in this application, that is, the Respondent/ Cross-Petitioner in the substantive Petition within eight days from the date of this Order. The Applicant in this application, upon being served with the Respondent's witness statement on oath, shall file and serve his witness statement on oath on the Respondent within eight days from the date of service of the Respondent's witness statement on oath on him. If the Respondent intends to respond to any averment in the Applicant's witness statement on oath, she shall file and serve on the Applicant a further witness statement on**

oath within four days after the service of the Applicant's witness statement on oath on her.

This is the Ruling of this Court delivered today, the 30th day of November 2022.

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HON. JUSTICE A. H. MUSA
JUDGE
30/11/2022