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PLEADINGS IN MATRIMONIAL CAUSES AND VERIFYING AFFIDAVIT: A REVIEW OF THE CASE OF *OMOGIATE V OMOGIATE* (2021) LPELR 56018 (CA) *

ABSTRACT

The Matrimonial Causes Rules require that all pleadings should be verified by an affidavit by the party settling the pleadings-the petitioner, respondent, and cross-petitioner and cross- respondent. What is the nature of the verifying affidavit that will ensure compliance with the provisions of the law and what is the effect of non-compliance? This article examines the nature of a verifying affidavit and effect of non-compliance in view of recent pronouncements by the courts on the issue of noncompliance. A further confusion is introduced by the recent decision of the Court of Appeal in the case of Omogiate v Omogiate on dispensing with verifying affidavit in a cross petition. This article analyses the case and states that the decision was arrived at per incuriam. While the shift from strict technicality is welcomed on the position of a verifying affidavit on the petition within the meaning of Order V Rule 10 of the Matrimonial Causes Rules, all pleadings in a matrimonial cause must be verified by affidavit.

Keywords: Verifying Affidavit, Petition, Cross petition, Pleadings

1. Introduction

Pleadings in a matrimonial cause¹ includes a Petition, Answer, Cross petition, Answer under protest, Reply, Reply under protest, Rejoinder, Further Rejoinder, Supplementary petition, Supplementary Answer.² All pleadings must be verified by an affidavit by the petitioner or the respondent or the co-respondent.

Although there is no form of this “verifying affidavit” in the Matrimonial Causes Act (MCA) or Matrimonial Causes Rules (MCR), the authorities are to the effect that the endorsement of the verifying affidavit is mandatory. Are there limitations on the type of pleading that must be accompanied by a verifying affidavit? Must a verifying affidavit be limited to a petition alone or extends to others such as answer and cross petition?

* Nasiru Tijani, PhD, FCI Arb, FICMC, Notary Public, Deputy Director-General, Nigerian Law School Lagos. tijani.nasiru@nigerianlawschool.edu.ng, nasirutijani2005@gmail.com

¹ Matrimonial Cause is defined in section 114(1) Matrimonial Cause Act (MCA) to include proceedings for a decree of dissolution of marriage; nullity of marriage; judicial separation; restitution of conjugal rights; or jactitation of marriage.

² Order 1 Rule 4, Order V Rule 1, Order VII, Rule 8 Matrimonial Causes Rules (MCR) 1983

The purpose of this paper is to consider some decisions of our Courts on the interpretation of Rules that makes it mandatory for the pleadings in a matrimonial cause to be verified by an affidavit and present attitude of the court. We shall also consider whether there is any pleading that is excluded from being verified by affidavit. This is important in view of the decision of the Court of Appeal in *Omogiate v Omogiate*.³ We shall show that the decision in *Omogiate* was arrived at *per incuriam* and does not represent the law on pleadings in a matrimonial cause.

2. Relevance of verifying affidavit:

To “verify” means to prove to be true; to confirm or establish the truth or truthfulness of; to authenticate; to confirm or substantiate by oath or affidavit; to swear to the truth of.⁴

A verifying affidavit, therefore, is to confirm or establish the truthfulness of statement made in a document or pleading.⁵ The MCR makes provision for verifying a petition and pleadings generally in a matrimonial cause.

Order V Rule 10 provides in relation to a petition that:

- (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) *depone as to his belief in the truth of every other fact stated in his petition”.*

On pleadings generally, Order VII Rule 11 provides:

- (1) *The party filing a pleading shall, by an affidavit written on his pleading and sworn to within 21 days before his pleading is filed*
 - (a) *verify the facts stated in his pleading of which he has personal knowledge; and*
 - (b) *depone as to his belief in the truth of every other fact stated in his pleading.*
- (2) *Sub-rules (2) and (3) of Rule 10 of Order V of these Rules shall apply in relation to affidavits verifying a pleading as if references*

³ [2021] LPELR 56018 (CA)

⁴ Bryan A. Garner, *Black’s Law Dictionary* (11th Edition) (Thomson Reuters 2014) 1793

⁵ *ibid.* at 1793 on definition of “verification”. *Imoh v Imoh* [2021] LPELR 52459 (CA)

to a petition and a petitioner were references to a pleading and a party filing a pleading, respectively.

- (3) *Where the party filing a pleading state in the pleading that he does not know and cannot admit the truth of a particular fact, the party shall, in his affidavit verifying the pleading, state that he does not know and cannot admit the truth of the fact.*

3. Effect of failure to verify a pleading.

It is clear from the provision of the Rules with the use of the word "shall", that it is mandatory for every petition or pleading to be verified by an affidavit. Failure to file a verifying affidavit is fatal to the petition.⁶ However, the affidavit must be written on the pleadings.

Must the verifying affidavit be on the end of the petition, or can it have a head on a separate document and filed along with the petition?

The answer to this question is pertinent because there is no form of the verifying affidavit in the schedule to either the Matrimonial Causes Act or Rules which could serve as precedent or guide in the drafting of the verifying affidavit.

Two Schools of thought are discernible from the authorities. Those that insist on strict compliance with the Rules, and those in favour of substantial justice rather than technicalities.

In the High Court cases of *Omodon v Omodon*,⁷ *Adibuah v Adibuah*,⁸ *Oyedu v Oyedu*,⁹ *Abbah v Abbah*,¹⁰ it was held that the verifying affidavit should appear at the foot of the petition and that both the petition and the affidavit must be contained in the same document in the sense that the affidavit must be a continuous document with the Petition.¹¹ These decisions have been adopted with approval by the Nigerian Court of

⁶ *Ogbuka v Ogbuka* [1972] 2 ECSLR (Pt 2) 558; *Omodon v Omodon* [1966] NMLR 238; *Adibuah v Adibuah* 1 ECLR 127; On the use of "shall" in a statute, see: *Ifezue v Mbadugha* [1984] 1SCNLR 427

⁷ (1966) 1 NMLR 238, Per Idigbe, C.J. (as he then was) at the High Court of Western Nigeria

⁸ (1970) 1 ECSLR 127, Per Agbakoba, J. at the Enugu High Court

⁹ (1972) 2 ECSLR 730, Per Aniagolu, J. at the Umuahia High Court

¹⁰ (1973) 3 ECSLR 214, Per Ikwechegh, J. at the Nsukka High Court

¹¹ Although these were High Court judgments, they were delivered by eminent jurists, most of them later rose to the highest bench in the land

Appeal in the cases of *Anyanso v Anyanso*,¹² *Unegbe v Unegbe*¹³ and *Umeakuana v Umeakunana*.¹⁴

In the case of *Unegbe v Unegbe*,¹⁵ the Respondent upon being served with the Petition and accompanying processes filed a motion seeking for an order to strike out the Petition as being incompetent for non-compliance with Order V Rule 10(1) Matrimonial Causes Rules. After due arguments, the learned trial Judge in his Ruling, dismissed the application and held that the irregularity observed on the affidavit filed with the petition was not enough to affect the validity of the petition. The Respondent appealed to the Court of Appeal. The Court in allowing the appeal, relied with approval, on the High Court cases of *Oyedu v Oyedu*,¹⁶ *Omodon v Omodon*¹⁷ and stated *inter alia* as follows:

*As I have already concluded earlier in this judgment that compliance with Rule 10(1) of Order V of the Matrimonial Causes Rules, 1983 is mandatory, the failure by the respondent to write his affidavit on his petition and to verify the facts stated in his petition of which he has personal knowledge as required by the rule, is fatal to his petition. The language of the new rule being imperative is quite clear and the plain words of the statute must be given their ordinary meaning. It is indeed trite that where the words of the provisions of a statute are plain, clear, and unambiguous, they should be given their plain, ordinary, grammatical meaning, without any qualification See: Owena Bank Nigeria Plc. v NSE Ltd. (1997) 8 NWLR (Pt 515) 1 and Amadi v N.N.P.C. (2000) 10 NWLR (Pt 674) 76 at 109. The words "an affidavit written on his petition" are quite clear in my view. Taking into consideration that the affidavit in question is to verify the facts stated in the Petitioner's petition, it is obvious that to perform that function of verification the affidavit must be written on the petition itself, the contents of which are being verified by the affidavit.*¹⁸

*Umeakuana v Umeakunana*¹⁹ was decided by the Enugu Division of the Court of Appeal on 10th April 2008. In that case, the petition was for a decree of dissolution of the marriage on the ground that the marriage had broken down irretrievably. The trial

¹² (1998) 9 NWLR (Pt 564) 150

¹³ (2004) 11 NWLR (Pt 884) 332

¹⁴ (2009) 3 NWLR (Pt 1129) 598

¹⁵ (2004) 11 NWLR (Pt 884) 332

¹⁶ (1972) 2 ECSLR 730, Per Aniagolu J. at the Umuahia High Court

¹⁷ (1966) NMLR 238

¹⁸ *ibid* at 358-359 per Mohammed, JCA. See however the comments of Olagunji JCA at 366 A-C

¹⁹ (2009) 3 NWLR (Pt 1129) 598

Judge granted the Petition. On appeal to the Court of Appeal, the Respondent raised *inter alia* the issue of non-compliance with Order V Rule 10(1) Matrimonial Causes Rules by the Petitioner at the trial Court. The Court relying on *Unegbe v Unegbe*²⁰ held that the requirement of the Rule is mandatory.

In relation to the petition, the Court held:

*"Now a cursory glance at exhibit 'A' otherwise the record of this appeal shows that the respondent's notice of petition at pages 6 - 8 thereof, does not contain any affidavit written on it with a view to verifying its contents. Similarly, the respondent's affidavit, so headed and deposed is contained at page 9 of the record while the actual petition is at pages 6 - 8 of the record. By the requirement of the rule, the affidavit must be one written on the petition of the petitioner. In other words, the affidavit and the petition must be contained in the same continuous document without being separated by another document. In the present case, the petition and the affidavit in my view are contained in the same continuous document and not separated by any other document. Although the respondent's affidavit was not written on same page with his petition, it is contained in the same continuous document with the petition. The first requirement of the rule in my view had certainly been met".*²¹

What can be inferred from the above pronouncement by the Court is that the verifying affidavit may be on a separate sheet but must be a "continuous document", with the petition. The Court emphasized that although verifying affidavit was not written on the same page with the petition, it is contained in the same continuous document with the petition and therefore a compliance with Order V Rule 10(1).²²

It is our contention that this is a correct interpretation of Order V Rule 10(1) Matrimonial Causes Rules.

It is submitted that this shift to substantial compliance rather than strict adherence to technicality is to be commended. In the case of *Oduote v Oduote*,²³ the Court of Appeal, Abuja Division, confirmed that a verifying affidavit is mandatory and is a condition precedent to the filing of the petition. It made a far-reaching pronouncement as follows:

"The petition must as a requirement of the provisions, contain the affidavit sworn to by the petitioner before it is or can be properly filed.

²⁰ (2004) 11 NWLR (Pt 884) 332

²¹ *Ibid* at 612 Paragraphs F-H

²² The petition ends at page 8 and the verifying affidavit is on page 9

²³ (2011) LPELR 9056; (2012) 3 NWLR (Pt 1288) 478

This is the position established and affirmed by judicial authorities including the ones cited above by the learned Counsel for the Appellant on the issue. However, because the affidavit is required to be sworn to before the petition is filed to verify the facts on the petition, the provisions clearly contemplate that the affidavit would accompany the petition by being annexed to and forming part of the processes of the petition to be filed. The provisions do not certainly require that the affidavit shall be endorsed on the petition itself but that it should be sworn on the facts that are set out in the petition. The primary object of the provisions 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 and as long as the affidavit was sworn to before the petition was filed and it accompanied the petition, the provisions would have been substantially complied with.

.....
The affidavit is not in a separate document or outside the petition itself, but forms part of it. For that reason, the submission by the learned counsel for the Appellant are grossly misconceived and I have no difficulty in finding that the Respondent's further amended petition has complied with the provisions of Order V Rule 10(1)".²⁴

It is submitted that this decision of the Court of Appeal on the interpretation of Order V Rule 10(1) Matrimonial Causes Rules accords with justice rather than strict technicality.²⁵ Subsequent decisions of the Court of Appeal have tended to follow the line of doing real and substantial justice rather than abstract and technical justice.²⁶

A consideration of the cases show that a majority were objections to the competence of a petition by virtue of Order V Rule 10(1). It is our submission that the same argument will succeed in case of an answer or cross petition especially in view of the arguments above.²⁷ Hence the need to consider the recent case of *Omogiate v Omogiate*²⁸ which arrived at a contrary decision.

²⁴ *Oduote v Oduote* (2011) LPELR 9056 (CA); (2012) 3 NWLR (Pt 1288) 478 at 498-499 per Garba, JCA

²⁵ The Court further relied on Order XXI Rules 2 and 3 Matrimonial Causes Rules to dismiss the appeal on the question of non-compliance with Order V Rule 10(1). See also: *Abubakar v Yar'Adua* (2008) 4 NWLR (Pt 1038) 465 at 512; *Odua Investment Co. Ltd. v Talabi* (1997) 10 NWLR (Pt 523) 52

²⁶ See *Imoh v Imoh* (2021) LPELR 52459, *Omogiate v Omogiate* (2021) LPELR 56018

²⁷ Section 114 (1) MCA defines a petition to include a cross-petition and answer is a pleading by Order 1 Rule 4 MCR

²⁸ *ibid*

4. Omogiate v Omogiate (2021) LPELR 56018 (CA)

The appellant filed a petition for a decree of dissolution of the marriage on the ground that the marriage has broken down irretrievably. The facts to support the ground was that since the marriage, the respondent has behaved in such a way that the appellant cannot reasonably be expected to live with the respondent; the respondent has deserted the appellant for a period of at least one year immediately preceding the presentation of the petition and that the respondent does not object to the petition. The respondent filed an answer and cross -petition on the ground that the marriage has broken down irretrievably. The fact to support the ground was that the petitioner had constructively deserted her for a period of at least one year immediately preceding the petition and the appellant had meted out acts of cruelty and humiliation on the respondent during their 2 ½ years of marriage.

The trial judge struck out the petition of the appellant for being incompetent while the cross-petition was allowed. The petitioner appealed to the court of appeal. One of the issues raised by the Petitioner/Appellant was whether the learned trial Judge was right to hold that the Respondent/Cross-Petitioner was not obliged to comply with the strict terms of Order 5 Rule 10(1)(a) and (b) of the MCR as to the writing of verifying affidavit in her cross-petition and was also correct in his refusal to strike out the Respondent/Cross-Petitioner's cross petition for want of competence. The appellant submitted on this that the provisions of Order 5 Rule 10(1)(a) and (b) MCR was not complied with in that the verifying affidavit was not endorsed on the cross -petition. It was his contention that reference to a petition in the rules will by reference include a cross petitioner. The cross petition must comply with the mandatory provision of Order V Rule 10 of the MCR. The respondent on the other hand submitted on this issue that the MCR specifically provides for what a valid answer and cross-petition of a Respondent in a divorce proceeding should contain. There is no mention of a verifying affidavit in respect of answer and cross-petition as in the case of a Petitioner where the inclusion was specifically provided in Order V Rule 10(1) of MCR.

On the issue of failure to verify a cross petition, the learned Justice of the Court of Appeal held:

Furthermore, Order VII Rule 2(6) stipulates what an answer shall contain and if it institutes proceeding of dissolution of marriage or judicial separation not in any of these specifications of clauses to be inserted did it mention a verifying affidavit.

The rules of MCR regulates the procedure of petitions filed and specifically stipulates the form in petitions and answer but omitted the cross-petition while the MCA regulates the Law. In Section 114 it deals with ground for dissolution of marriage and in that respect says in its interpretation column says where a petition is mentioned then it

also refers to cross petition. Where the MCR provides for the procedure specifically no other interpretation can be imputed. It even goes further in the MCR Rule 2(9) states an answer/cross petition shall be in accordance with Form 15A which is in clear terms and does not mention the verifying affidavit, therefore it was the deliberate intention of the rules to exclude the answer/cross-petition from mandatory compliance imposed on the petition.

We submit that the court arrived at the decision on this issue *per incuriam*. Pleadings under the MCR are governed by Order VII of the MCR. Order 1 Rule 4 MCR defines 'pleading' to mean petition, supplementary petition, answer, supplementary answer, reply or rejoinder.²⁹ This means that where reference is made to pleading it will include a cross petition or answer. Order V11 Rule 11 is instructive because it provides for 'affidavit verifying pleading'. Every pleading is expected to be verified by affidavit written on it. Order VII Rule 11 (2) expressly provides that 'Sub-rules (2) and (3) of Rule 10 of Order V of these Rules shall apply in relation to affidavits verifying a pleading as if references to a petition and a petitioner were references to a pleading and a party filing a pleading, respectively'³⁰ It is therefore the position that a verifying affidavit is mandatory to an answer and cross petition. For the learned Justice of the Court of Appeal to state that an answer/ cross petition need not be verified by affidavit, with respect, ignores the clear provisions of the MCR and the rationale for verifying a pleading.

It would seem that counsel rather than rely on Order V11 of the MCR, only referred to Order V Rule 10 (1) which refers only to a petition.

In the case of *Anyanso v Anyanso*,³¹ the Respondent's Amended Answer to the petition did not include a verifying affidavit. The non-compliance with the MCR was not taken at the trial Court. Although the petition was granted, the Petitioner appealed against the order of custody, order of maintenance etc. The issue of non-compliance with the MCR as to the verifying affidavit to the Amended Answer was taken up on appeal. It

²⁹ See also Order VII Rule 8 MCR

³⁰ Order V Rule 10 (2) & (3) provides: (2) Where, for the purpose of complying with sub-rule (1) of this rule it is necessary for a petitioner to verify the doing of, or the failure to do, an act within, throughout or for a period ending on the day immediately preceding the date of his petition, it shall be a sufficient compliance with that sub-rule if the petitioner verifies the doing of, or the failure to do, the act within, throughout or for, as the case may be, a period ending on the day immediately before the swearing of his affidavit.

(3) Where, for the purpose of complying with sub-rule (1) of this rule, it is necessary for a petitioner to verify that a certain circumstance existed at the date of his petition, it shall be a sufficient compliance with that sub-rule if the petitioner verifies the existence of the circumstance at the date of swearing his affidavit.

³¹ (1998) 9 NWLR (Pt 564) 150

was argued that the Amended Answer was void *ab initio* for not inserting the verifying affidavit at the foot of the Answer. The Court of Appeal while approving that Order V Rule 10(1) requires a Petitioner to verify by affidavit the facts stated in the petition, held that since the Respondent did not qualify as a Petitioner, she was not required to comply with Order V Rule 10(1). We submit, with respect, that this cannot be right in view of the provisions of Order V11 Rule 8. This case again represents the wrong view of courts on the extent of pleadings in a matrimonial cause and necessity for a verifying affidavit.

5. CONCLUSION

All pleadings in a matrimonial cause must be verified by affidavit as required under Order VII Rule 11 MCR. To that extent, it is our conclusion that the case of *Omogiate* was decided *per incuriam* and if another opportunity arises, the decision will not, with respect, be followed. It is for the courts to appreciate the extent of pleadings in a matrimonial cause and give effect to the mandatoriness of a verifying affidavit.