

A REVIEW OF THE EFFECT AND THE APPROPRIATE LOCATION OF VERIFYING AFFIDAVIT IN MATRIMONIAL PROCEEDINGS IN NIGERIA

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Abstract

The decision of Court of Appeal in *UNEGBU v. UNEGBU*(2004) 11 NWLR (884) 332 that a verifying-affidavit MUST be a continuum of matrimonial pleadings has been considered a technical justice by same Court in *ODUSOTE v. ODUSOTE*(2011) JELR 41244 (CA);thereby reversing its earlier position on the interpretation of Order V Rule (10)1 and Order VII Rule 11(1) of the Matrimonial Causes Rules,1983. Verifying-Affidavit is the life wire of pleadings in matrimonial proceedings which must be written in particular format. Prior to the decision of the Court of Appeal in *Odusote v. Odusote*, the location of verifying-affidavit in matrimonial pleadings was a great deal as same used to be a booby trap for many lawyers and judges of trial courts. Drafting of verifying-affidavit was a bit more technical as it must be carefully drafted and written on the pleading to be accepted appropriate by the trial Court. The article sought to expound and review the positions of Court of Appeal on the appropriate location of verifying-affidavit in matrimonial pleadings. The article is segmented into five parts, namely: Introduction, Strict interpretation of Order V Rule 10(1) of MCR, Liberal interpretation of Order V Rule 10(1) of MCR, the Balance between technical justice and substantial justice and Conclusion.

Keywords: verifying-affidavit, technicality, justice, pleadings, matrimonial.

1.0 INTRODUCTION

It is obvious that Courts in Nigeria are moving away from technical justice or from the interpretation of the law in a way or manner that does not serve the interest of justice to embrace substantial justice. The position of Court of Appeal in *ODUSOTE v. ODUSOTE*¹ exemplifies one of the instances where the Superior Courts in Nigeria depart from their positions on a particular subject matter of law that tends to favour technicalities over substantial justice and pitched their tents with the substantial justice. The Court of Appeal in *UNEGBU v. UNEGBU*² set the standard of the format of verifying-affidavit in matrimonial proceedings. The Court interpreted Order V Rule 10(1) of Matrimonial Causes Rules³ which states 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)depose as to his belief in the truth of every other fact stated in his petition.’to mean that a verifying-affidavit must, as

¹(2011) JELR 41244 (CA).

²(2004) 11 NWLR (884) 332

³ See: Order VII Rule 11 for the verifying-affidavit of an Answer to Petition.

matter of command, be written on a matrimonial pleadings⁴ to activate the jurisdiction of Court in matrimonial proceedings.

The Court of Appeal, relying on the authority of *Unegbu v. Unegbu (supra)* in the case of *UMEAKUNA v. UMEAKUNA*⁵ pointed out the obligations on the parties to matrimonial proceedings when the Court stated that: ‘A careful perusal of the above rule will reveal that the duties imposed on a petitioner are as follows: A petitioner shall write an affidavit on his petition for divorce; The affidavit shall be sworn to before his petition is filed; In that affidavit, the petitioner shall verify the facts stated in his affidavit of which he has personal knowledge; and In that affidavit, the petitioner shall depose as to his personal belief in the truth of every other fact stated in the petition.’ As settled in *Unegbu v. Unegbu (supra)* the affidavit-verifying the facts of the petition must not be a separate document with a distinct heading of the Court rather it must be a continuum of the petition without a separate heading. Any affidavit-verifying facts in a Petitioner Answer that is written on a separate document and headed accordingly with title and suit number of the Petition or Answer, is considered void and incompetent and liable to be struck out.⁶

This position of Court of Appeal in the case of *Unegbu v. Unegbu (supra)* and many other cases that followed the decision were rather considered a technical justice in the cases of *Oduote v. Oduote (supra)* and *IMOH v. IMOH*⁷. This article therefore seeks to offer the correct position of the law as at the 28th June 2011 when the Court of Appeal delivered its judgement in *Oduote v. Oduote (supra)* in respect of appropriate location of verifying-affidavit in matrimonial pleadings as against the positions offered by Ituma, Chibueze Calistus⁸ and Ikechukwu D. Uzo⁹. This article will also expound the resolve of the Nigerian Courts to embrace substantial justice as against technical justice. The article will be segmented into five parts, namely: Introduction, Strict interpretation of Order V, Rule 10(1) of MCR, Liberal interpretation of Order V Rule 10(1) of MCR, Balance between technical justice and substantial justice and Conclusion.

1.1 Strict interpretation of order v, rule 10(1) of Matrimonial Causes Rules

Prior to the decision of the Court of Appeal in the case of *Oduote v. Oduote (supra)* the superior courts of record in Nigeria have in a plethora of cases struck out Matrimonial Causes Petitions for being grossly incompetent on the ground that the petitioner failed to make verifying-affidavit a continuum of the Petition or Answer simply because of the use of the word “shall” in Order V, Rule 10 (1) of the Matrimonial Causes Rule. The Courts have always construed the word “shall” in a statute as a command

⁴Petition for dissolution of marriage, Answer to petition and Reply.

⁵(2009) 3 NWLR (Part 1129) @ 598.

⁶O. G. Ogbom, Esq., “Verifying Affidavit Must Be Endorsed On Petition To Activate The Jurisdiction Of Court In Divorce Proceedings” (2019) <https://thenigerialawyer.com/verifying-affidavit-must-be-endorsed-on-petition-to-activate-the-jurisdiction-of-court-in-divorce-proceedings-by-o-g-ogbom-esq/> accessed on the 17 November, 2023.

⁷(2021) JELR 108770

⁸“The Proper Location of Verifying Affidavit, Effects and Reasons in Matrimonial Proceedings in Nigeria” (2018) ABUAD Private and Business Law Journal, Vol. 2. No1, 24-40.

⁹Ikechukwu D. Uzo, *Guide to Matrimonial Proceedings* (2nd Ed, Law Digest Publishing Co. Surulere, Lagos, 2012).

which must be strictly complied with. The Supreme Court in the case of *ECOBANK v. HONEYWELL FLOUR MILLS PLC*¹⁰ held inter alia thus: ‘It is trite that where the word "shall" is used in a statute, there is no room for adjustment. It must be done and obeyed.’¹¹

By virtue of the above cited case law, it is not in dispute that the Courts have always adopted the ordinary or literal meaning of the word “shall” in the strict sense as held in the case of *Unegbu V. Unegbu (supra)* in the interpretation of the provision of Order V, Rule 10(1) of the MCR. Strict interpretation of Order V, Rule 10(1) of the MCR made it mandatory for the Petitioner or the Respondent to write his or her verifying-affidavit on the Petition or Answer, as the case may be. Strict interpretation of the provision of Order V, Rule 10(1) of the MCR required the Verifying-Affidavit to be written on the petition or Answer as a continuous document before the Petition or Answer is filed and not attached as a separate document to the petition or Answer with the heading of court, suit number and parties. The consequence of failure of a party to write the verifying-affidavit on his pleading under the strict interpretation of the Order V, Rule 10 (1) of the MCR is that the Petition or the Answer, as the case be, would be struck out for being incompetent.

In *Unegbu v. Unegbu (supra)*, the Court of Appeal in interpreting the provision of Order V, Rule 10(1) of MCR struck out the petition on the ground that it was mandatory for the petitioner to comply with the provision of Order V, Rule 10(1) by writing an affidavit on his petition. His Lordship, Mohammed, J.C.A held in the case *inter alia* thus:

The requirement of the rule in Order 6(3) of the English Matrimonial Causes Rules (applicable in Nigeria) and similar to Order 5 Rule (10)(1) of the Matrimonial Causes Rules, Cap 220, Laws of the Federation that a Verifying-Affidavit shall be contained in the same document as the Petition and shall follow at the foot of or end thereof is mandatory. The operative word are “shall be contained in the same document and shall follows at the foot or end thereof.” The intendment of the rules is that the affidavit must follow immediately at the foot of the petition and that both the petition and the said affidavit must be contained in the same document in the sense that the affidavit document must be continuous document to the Petition. This is also the requirement contained in Order V Rule 10(1) of the Matrimonial Causes Rules, 1983. Thus where, as in the instant case, the verifying-affidavit in support of the Petition is contained in a separate document, clearly headed with the suit number inserted, the fact of its having been sworn to on the same date of filing of the Petition notwithstanding, the Petition will be incompetent for non-compliance with the mandatory provisions of the Rules...

¹⁰(2018) JELR 50550 (SC)

¹¹See also: TABIK INVESTMENT LTD. & ANOR v. GTB PLC (2011) JELR 47719 (SC); BAMAIYI V. AG OF THE FEDERATION & ORS. (2001) JELR 33795 (SC).

The Court of Appeal in the case of *Umeakuana vs Umeakuana (supra)* also laid down the duties the said rule imposes on a petitioner or the Respondent as follows:

(1) A Petitioner shall write an affidavit on his petition for divorce; (2) The affidavit shall be sworn to before his petition is filed, (3) In that affidavit, the Petitioner shall verify the facts stated in his affidavit of which he has personal knowledge; and (4) In that affidavit, the Petitioner shall depose as to his belief in the truth of every other fact stated in the petition.

The duties imposed on a party to matrimonial proceedings in the strict sense of the interpretation of Order V, Rule 10(1) were mandatory. Strict interpretation of the rule does not give room for exercise of discretion. Interpretation of the rule in the strict sense required the the verifying-affidavit to be written on the petition of the petitioner or Answer to the Petition and nothing more. However, this position of the law had ceased to be the correct position of the law on the 28th June 2011 when the Court of Appeal delivered its judgement in the case *Oduote V. Oduote(supra)*.

Without doubt, the position held by the Court of Appeal in *Unegbu v. Unegbu (supra)* and host of other cases that followed the decision on the strict interpretation of Order V, Rule 10(1) of MCR portends technical justice as against substantial justice and thereby caused untold hardship on both the litigants and Legal Practitioners. Strict adherence to technicality in the administration justice automatically shuts out justice as the case of *Unegbu v. Unegbu (supra)* has led to miscarriage of justice on the altar of technicalities; no wonder the Court of Appeal reversed itself on this position in the case of *Oduote v. Oduote(supra)* and *Imoh v. Imoh (supra)*.

2.0 Liberal interpretation of order v, rule 10(1) of Matrimonial Causes Cules

In reversing its position in the case of *Unegbu v. Unegbu (supra)*, the Court of Appeal in *Oduote v. Oduote(supra)* adopted the liberal interpretation of Order V, Rule 10(1) of MCR to elevate substantial justice over and above technical justice. The case of *Imoh v Imoh (supra)* followed the decision of Court of in *Oduote v. Oduote(supra)* on the interpretation of Order V Rule 10(1) of MCR.

Niki Tobi JSC (as he then was) in the case of *YUSUF v. ADEGOKE*¹² enjoined courts to embrace liberal interpretation of law and rules of Court as against strict interpretation of law and rules of Court to achieve substantial justice rather than technical justice when he held thus: ‘we seem to be over overstretching the technicality concept. We should try to narrow down the already onerous and amorphous concept in our judicial process. A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case.’

¹²(2007) JELR 48745 (SC)

In compliance with to the admonition of the Supreme Court in the case of *Yusuf v. Adegoke (supra)*, the Court of Appeal towed the part of substantial justice by adopting the liberal interpretation of the provision of Order V, Rule 10(1) of the Matrimonial Causes Rules when His Lordship Mohammed Lawal Garba, JCA held in the case of *Oduote v. oduote (supra)* that:

‘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 accompany the petition, the provisions would have been substantially complied with.’

Similarly, the Court of Appeal reaffirming its position in the case of *Oduote v. Oduote (supra)* held in the case of *Imoh v. Imoh (supra)* on whether a verifying-affidavit must be written on the petition as follow:

‘In this respect, what is important is that the verifying affidavit is filed along with the petition and not later than the petition. It is my view that the purpose of the verifying affidavit will be served if the said affidavit is filed along with the petition and it is of no moment that it was not written on the petition. Insisting that it should be written on the petition otherwise the petition will be incompetent will be insisting on technicality over substantial justice. The current trend is that the Court exists to do justice and in so doing what is important is that the Court must do real and substantial justice and not abstract and technical justice. See *Alioke v. Oye & Ors (2018) LPELR-45153 (SC)*; *Owuru & Anor v. Adigwu & Anor (2017) 1 NWLR (Pt. 1599) 1*. In a contest between technical and substantial justice, substantial justice will prevail. The question is, what will substantially go wrong if the verifying-affidavit is not written on the petition but rather filed along with the petition separately? I do not see any damage or miscarriage of justice if that happens.’

It is clear from these judicial authorities that verifying-affidavit need not necessary be written on the petition or answer. Put differently, verifying-affidavit need not be a continuum of the matrimonial pleadings to constitute a competent pleading in matrimonial causes. What is important is that the verifying-affidavit must be filed and sworn to before the filing of the divorce pleadings. Filing a verifying-affidavit separately with a distinct heading no long vitiate matrimonial petition. The provision of Order V, Rule 10(1) has been interpreted to only contemplates that the Verifying-Affidavit would accompany the petition by being annexed to and forming part of the petition to be filed. Therefore, the important thing is that the petitioner or the

Respondent, as the case may be, swears to the truth of the facts set out in the Petition or Answer, to his knowledge and belief. As long as the affidavit is sworn to before the Petition or Answer was filed and it accompanied the Petition or Answer, the requirement under Order V, Rule 10(1) or Order VII, Rule 11(1) would be said to have been met.

2.1 The balance between Technical Justice and Substantial Justice

There is an abundance of dicta by Nigerian judges pitching their tent and solidarity with the spirit of the law as opposed to its form. The astute English legal luminary, Lord Denning, has expressed this position in the following words: ‘My root believe is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule-or even to change it so as to do justice in the instant case before him’.¹³

As an addendum to this position of Lord Denning, there are various dicta similar to these that have been pronounced in the Supreme Court. In the recent pronouncement of the Supreme Court on the non-compliance with the provision of Order V, Rule 10(1) of the Matrimonial Causes Rules, Mary Ukaego Peter-Odili, JSC in *UMEAKUANA v. UMUAKUANA*¹⁴ reversing the decision of Court of Appeal in *Umeakuana v. Umeakuana (supra)* stated thus: ‘On what the Court should do when faced with the apparently mandatory "shall" developed in a statute, which is what the respondent is holding onto to rest her case on the non-compliance with Order V Rule 10 (1) of the Matrimonial Causes Rules. I cite *Katto v CBN (1991) 2 NWLR (Pt.214) 126 at 147 Per Akpata JSC in aid thus:- "The use of the word "shall" tends to give the impression that it is mandatory or imperative to specify the exact name of the relief sought. Generally the term "shall" is a word of command and denotes obligation and gives no room to discretion. It imposes a duty. The term is however sometimes construed as merely permissive or directory to carry out the legislative intention. Particularly in case where its being construed in mandatory sense will bestow no right or benefit to anyone. When construed as being permissive or directory it carries the same meaning as the word ‘may’.*’

It is now settled law that Courts should not decide cases or resolve issues on mere legal technicalities.¹⁵ The Supreme Court has variously held that the heydays of technical justice are over. The courts have shifted from undue reliance on technicality to doing substantial justice as technical justice is no justice at all. Justice can only be done in substance and not employing technicalities that clog the wheel of justice and occasion miscarriage of justice.¹⁶

¹³ *Liverpool CC v Livine (1976) QB, p. 311.*

¹⁴ (2019) LPELR-48904 (SC)

¹⁵ *Egolum v Obasanjo (1999) 7NWLR (Pt. 511) 255, 413*

¹⁶ *MUFUTAU BAMIDELE AKANDE V. PROF. OLUGBEMIRO JEGEDE & ORS (2022) JELR 109969 (SC)*

Taking a clue from the various decisions of the Supreme Court on what constitute substantial justice on one hand and technical justice on the other hand largely depend on the circumstance of each case; therefore, the need for balance between substantial justice and technicalities cannot be overemphasized. For example, in *OKAFOR v. NWEKE*¹⁷ the applicant filed a motion in court and signed the processes in the name of a law firm, “J.H.C. OKOLO SAN AND CO.”, as opposed to the name of a legal practitioner. The respondents quickly cashed in on the supposed lacuna and filed a counter motion on the basis that a conjoined interpretation of section 2 and section 24 of the Legal Practitioners Act (LPA) makes it mandatory for a legal practitioner to sign the processes, thus rendering the processes null and void for failure to comply. The Supreme Court accepted the position of the respondents, holding that the signature was invalid, and expressed the need to uphold the sanctity of the high standards of the noble profession and save it from unusual irregularities. The pain of many who have criticized this judgment is the fact that the Supreme Court in the case had given credence to the document emanating from the hallowed chambers of a legal practitioner. Would it not have been reasonable to examine the merits of the case rather than dwell on a mistake that could be rectified?

Meanwhile, in a similar case before the Supreme Court, *UNITY BANK PLC v. DENCLAG LTD & ANOR*¹⁸, Peter-Odilli, JSC held that a litigant should not be made to suffer from the inadvertence of a counsel, as it was against the tenets of substantial justice. However, this decision was short lived, as the case of *FBN PLC. & ORS. v. MAIWADA & ORS*¹⁹ put rest to the issue with a host of amicus curiae enlisted, and a seven-man panel. The court adopted the reasoning in *Okafor v. Nweke (supra)* and held that there was nothing technical in applying the provision of Section 2(1) and Section 24 of the Legal Practitioners Act as it is drafted by the legislature, and that originating processes signed in the name of a law firm should be found incompetent. The decision sparked many wails among concerned persons and left many unanswered questions. It has been argued that the signing of a document is completely procedural and should not be a determinant in the merits of the case; on the contrary, it has been argued that equity only follows the law and for equity to prevail, the law must be fulfilled in its entirety.

To put this in proper perspective, what is technicality will largely depend on the circumstance of each case. No two cases are the same. For example, filing of verifying-affidavit wrongly or as a separate document has been held to be mere irregularity in *Odusote v. Odusote, Imoh v. Imoh* and *Umeakuana v. Umeakuana*. However, non-filing of verifying-affidavit at all was also distinguished in *Imoh v. Imoh* thus: ‘... it is clear that a petition which does not have a verifying affidavit sworn before a commissioner accompanying it will be incompetent and that will

¹⁷(2007) JELR 55162 (SC)

¹⁸(2012) JELR 34795 (SC)

¹⁹(2012) JELR 35249 (SC)

invariably deprive the Court of jurisdiction. The implication is that a petition for dissolution of marriage is not proper before the Court if it does not have accompanying it a verifying-affidavit to the effect that the facts in the petition are within his personal knowledge.’

The effect of non-filing verifying-affidavit alongside a petition cannot be considered a mere irregularity. It is an irregularity that will substantially affect the very foundation of the case. It is a jurisdictional matter; it cannot be considered a mere irregularity.

In essence, the circumstance of each case will determine the balance of justice in respect of what may be perceived as mere irregularity or substantial irregularity. This was exemplified in the case of *Umeakuana v. Umeakuana*(supra) where per Peter-Odili JSC observed and held that: ‘It is to be said along well settled views of this Court that mandatory Rules are not sacrosanct or cast in iron since situations occur while applying the Rules where the interest of substantial justice would ruling the waves make an otherwise mandatory rule to become directory or permissive as all Rules of Court are made in aid of justice and so the interest of justice will take paramountcy over any Rule where strict compliance of it will lead to outright injustice. . . I see no further point going on with a matter which fact and underlining manoeuvres are clear to the naked eye as the trial Court was right to have heard and determined the divorce petition having no objection to any irregularity before it. A situation in a matrimonial cause where the parties had lived apart for a period of 10 years before the presentation of the petition and the respondent had no cross-petition, clearly what she seeks is to cause delays and see that there are motions without movement. Sadly, the Court of Appeal fell into the trap well laid out by the respondent in this ploy to frustrate the Petition and dissolution of the marriage that had died naturally. We cannot accommodate this luxurious power play of the respondent by indulging the use albeit the abusive use or twisting of Court processes to get her way.’

3.0 Conclusion

It is now notorious and trite law that all rules of court should be obeyed and followed. This is because rules of court are not for fancy or fun or window dressing, since they are helpful in regulating prosecution of cases in court, such that they occupy a place akin to a roadmap for the quick convenience, fair trial and orderly disposal of cases. Rules of court are part of the support system in the administration of justice. However, to achieve the purpose of obeying the Rules of Court in advancement of the course of justice, the rules of court should not be tyrannical and uncompromising masters. This is to avoid a slavish interpretation, defeating the essence and purpose of the rules of court and ultimately the justice system. This is particularly important, as courts have departed from adherence to technical justice. The decisions of Court of Appeal in *Oduotev. Oduote*(supra)and *Imoh v. Imoh*(supra), and that of the Supreme Court in *Umeakuana*

v. Umeakuana (supra) have rendered the opinions and positions offered by Ituma, Chibueze Calistus²⁰ and Ikechukwu D. Uzoobsolete, even before there were rendered. Therefore, the law as at today or the correct interpretation of Order V Rule 10 of the Matrimonial Causes Rules is that verifying-affidavit need not be a continuum of the matrimonial pleadings. In other words, verifying-affidavit need not necessary be written on the petition or Answer as the case may be. Once a verify-affidavit is sworn to, irrespective of its location i.e. whether on the petition or as a separate document and filed alongside the petition, the petition is deemed competent.

Recommendations

1. The National Assembly should amend the Matrimonial Causes Act and Rules, which was enacted in 1983, to reflect the recent realities of practice and procedure in Matrimonial Causes in Nigeria.
2. Continuous legal education for legal practitioners should focus more on these new developments of practice and procedure in Matrimonial Causes.

²⁰“The Proper Location of Verifying Affidavit, Effects and Reasons in Matrimonial Proceedings in Nigeria” (2018) ABUAD Private and Business Law Journal, Vol. 2. No1, 24-40.