



Neutral Citation Number: [2024] EWHC 3193 (Fam)

Case No: FD24F00062
BV24N00312

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2024

Before :

Sir Jonathan Cohen

Between :

NNEKA MERCY OGBEDO

Applicant

- and -

MOSES OGHENERUME-TAIGA

Respondent

Mr D Brooks KC (instructed by **Lodders Solicitors LLP**) for the **Applicant wife**
Mr A Aderemi (instructed by **K&S @ LAW SOLICITORS**) for the **Respondent husband**

Hearing dates: 2 December 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 December 2024 by circulation to the parties or their representatives by e-mail.

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SIR JONATHAN COHEN

This judgment was delivered in public and may be published.

SIR JONATHAN COHEN :

1. For the purposes of this judgment and for reasons that will be obvious, I shall call Mr Taiga “F” (the father) and Ms Ogedo “M” (the mother).
2. I am dealing with the application of F to strike out M’s application for nullity pursuant to the provisions of FPR 4.4 on the basis that it is an abuse of the court’s process.
3. The history of this case is as extraordinary as one can imagine. If, which is hotly in dispute, the parties went through a ceremony of customary marriage on 16 March 2002, they had separated by no later than February 2003 when M lodged her first divorce petition. Ever since then there has been litigation in England and Nigeria over 21 years. This litigation has taken place under the Matrimonial Causes Act 1973, Schedule 1 Children Act 1989 and Part III of the 1984 Matrimonial and Family Proceedings Act 1984.
4. It is convenient first to deal with the background, then the proceedings in England and Nigeria.

Background

5. F is aged 77 and M aged 56.
6. In 1974 F married Grace in Nigeria. It is accepted that this was a valid statutory marriage.
7. Under the law of Nigeria a person who has been through a statutory marriage cannot, while still married, take another spouse by way of customary marriage. The same restriction does not apply to someone who has not been through a statutory marriage.
8. The parties met in Nigeria in 1992. They had a brief relationship which broke down but then, according to the chronology, reconciled in December 1997.
9. In June 2001, W gave birth to twin girls, of whom F is the father. Notwithstanding that they are now aged 23 and doing what appears to be a second or third degree of tertiary education, F is still maintaining them under orders made pursuant to Schedule 1 Children Act 1989.
10. On 19 February 2003 M filed a divorce petition in England claiming that the parties had been married pursuant to native law and custom in Nigeria on 22 December 1993. On the same day she issued a Form A.
11. On 29 June 2004 she filed an amended petition stating that in the alternative they were married on 22 December 1993 by virtue of cohabitation and repute. In addition, she claimed in the alternative a decree of nullity if F should prove that he was already married at the time.
12. On the same day, 29 June 2004, M filed a further petition alleging that the parties were married by native law and custom on 16 March 2002.

13. On 26 June 2012 M amended her divorce petition in respect of the March 2002 ceremony to seek a decree of nullity of the alleged March 2002 marriage on the basis that F was already married.
14. In relation to all petitions, F's case has been that he has never been married to M nor undergone any relevant ceremony.
15. The chronology reveals an enormous number of financial applications and orders made by virtually every judge of the Family Division. From early 2005, the relevant orders which I had to consider before I took over this case were made by Charles J.
16. On 9 March 2005 following an 8 day hearing, Charles J stayed the petitions pursuant to DMPA 1973 Schedule 1 to allow the Nigerian courts to determine inter alia the personal status and/or the dissolution or annulment of any marriage or purported marriage between the parties. When the judge made his order, I doubt very much that he could have imagined that it would take 19 years for the courts in Nigeria to resolve matters, so far as it has.
17. On 11 April 2008 the High Court of Lagos delivered a judgment finding that:
 - i) There was no marriage ceremony on 22 December 1993.
 - ii) There was no marriage by repute and cohabitation.
 - iii) There was a customary marriage ceremony on 16 March 2002 but because of F's subsisting statutory marriage, that was of no legal effect.
18. Both parties sought to appeal the order and it took 4 years until the judgment of the Court of Appeal in Lagos in 2012 on the parties' cross appeals. It allowed F's appeal and dismissed M's cross appeal so that the effect was:
 - i) The decision that there was no marriage ceremony on 22 December 1993 was upheld.
 - ii) The decision that there was no marriage by repute and cohabitation was upheld.
 - iii) The decision that there was a customary marriage on 16 March 2002 was set aside.
19. There has been no further challenge to the decision about 1993 and the area of dispute is what was the subject of the celebration that took place in March 2002. It was F's case that it was a party to mark the birth of the girls.
20. M's case was more complicated. Her primary case was that they were married in 1993 and her only witness at the High Court trial, her father, robustly rejected the idea that they were married in 2002, saying that they had been married since 1993.
21. The Court of Appeal overturned the judge's finding on the basis that it was not open to her to find that there was a customary marriage in 2002 when that was not the way that M put the case.

22. The matter went back before Charles J in November 2012 and on 15 October 2013 he delivered his judgment. Neither party had indicated at the hearing, although the court was made aware prior to the handing down of judgment, that M had filed a notice of appeal seeking permission to appeal out of time the decision of the Nigerian Court of Appeal to the Supreme Court. By his order, the judge dismissed the following petitions of M:
 - i) Her petition dated 19 February 2003 [1993 marriage]
 - ii) Her amended petition dated 29 June 2004 [1993 marriage]
 - iii) Petition dated 29 June 2004 [2002 marriage]
 - iv) Amended petition dated 26 June 2012 [2002 marriage]
23. I shall refer later on in much more detail to the judgment of Charles J.
24. The last order made by Charles J was on 9 July 2016 and thereafter substantive proceedings have taken place in front of me.
25. On 12 March 2024, some 12 years after the ruling of the Court of Appeal, M's appeal came before the Nigerian Supreme Court. About the only matter that is agreed between the parties is that it concluded with M withdrawing her appeal and it being dismissed. There is no transcript but I have seen notes of what transpired prepared by each side's Nigerian lawyers. Given the history of this case it is no surprise they do not begin to agree about what transpired at court. It is however, obvious, that M's counsel was given a difficult time by the Justices. She was put under great pressure to withdraw, and eventually succumbed.
26. On 7 May 2024 M applied in England for a nullity order.
27. The matter came before me on 11 October 2024. The main application was that of M to extend the Schedule 1 order which had expired. To his great credit, and notwithstanding an indication from me that M's application was optimistic, F agreed to pay a further sum for the girls' continuing education and maintenance.
28. At the hearing I was told that F was making an application to dismiss the nullity application. As far as the court was told, that application had not been filed and I was not prepared to deal with it in its absence, although it is a mystery why Mr Aderemi was not told by his solicitors that the application had in fact been filed that day. The application was only referred to me a few days later. I had at the hearing been minded to list the application to strike out together with the substantive application but when the application was finally presented to me by way of box work with not only a statement but a large number of exhibits that I had not previously seen, it seemed to me clear that the better course was to hold a separate one day hearing to deal with the application. Both sides sensibly agreed that this was the appropriate way forward.

The cases of the parties

F's case

29. F argues that Charles J put over to the Nigerian courts the determination about the parties' status and the effect of any ceremony that was found to have taken place.
30. Nigerian law is clear; a customary marriage cannot take place when one party is party to a statutory marriage. The ceremony is not a void ceremony but a non-marriage and Mr Aderemi referred me particularly to this passage in the Nigerian Court of Appeal judgment:

The pleadings and admissible evidence at trial shows that the parties agreed that at the material time the Appellant's statutory marriage to Grace Taiga which was entered into in 1972 subsisting that the Appellant could not possibly contract a valid Customary Marriage with the Respondent. If any ceremony of marriage which the parties intended to create a marriage took place, that ceremony would amount to no marriage between the parties. This is a fact admitted by both the Appellant and the Respondent...
31. M has had every chance to prove her case in Nigeria. She has failed to establish any marriage there.
32. It was M's case throughout that she was married in 1993. The only witness she called at trial gave evidence to that effect. It self-evidently follows that there was no intention of the parties to be married in 2002 as that event had long ago occurred.
33. Charles J, following the decision of the Nigerian Court of Appeal, dismissed M's petitions for nullity. It is an abuse of the process for her to be allowed another go.

M's case

34. She says that despite her best endeavours, she is left in limbo. The Court of Appeal did not find that there was no customary marriage ceremony in 2002 but rather that the judge should not have come to such a finding in the absence of it being pleaded.
35. The nullity application should go to a trial. There is no limitation period in respect of which M is in breach and it is not her fault that everything has taken so long. The issue is one of great importance, going as to whether she was married, the legitimacy of children and claims that might be brought on death.
36. Broad justice requires that the application should proceed and that there is a special reason not to strike out the claim see HMRC v Kishore [2021] EWCA Civ 1565 at paragraph 27 (ii).
37. In any event the law has moved on from 2013 and I was referred particularly to the case of Tousi v Gaydukova [2024] EWCA Civ 203.

Discussion

38. I now go back to the decision of Charles J of November 2013. At paragraph 64 the judge sets out that there is no extant finding or declaration in Nigeria that there was any such celebration of customary marriage in 2002. At paragraph 58 he said this:

Rather, in my judgment, the Court of Appeal in Nigeria was proceeding on the bases that (a) it was common ground that in 2002 (and indeed in 1993) a statutory marriage between the Respondent and GT was subsisting, and (b) this had the effect that any customary marriage between the Petitioner and Respondent was “no marriage between the parties” or “non-existing”.

39. His reasoning is summarised at paragraphs 95-101:

The Respondent's application to dismiss and/or strike out the 2004 Amended Petition. The Petitioner's application for orders, directions and interim payments in her application made by the 2004 Amended Petition.

95. *On the basis that her proceedings under the 1984 Act did not continue the Petitioner sought to pursue the 2004 Amended Petition either by inviting me to adopt the conclusion of the first instance judge in Nigeria and so find that the parties celebrated a customary marriage in March 2002, or by permitting the Petitioner to seek to prove that they celebrated such a ceremony in these proceedings.*

96. *First, in my judgment it is not possible or appropriate for me to adopt the finding of the first instance judge in Nigeria, essentially on the basis of her interpretation of a video of the event and, on that basis, grant a decree of nullity and entertain an application for financial relief. This is not a finding that is binding between the parties in Nigeria, let alone here, and understandably the Respondent asserts that it is wrong.*

97. *Further, in my judgment I should not permit the Petitioner to pursue these proceedings further because:*

i) this would fly in the face of the stay and the reasons for it, and comity and further and, in any event,

ii) I should dismiss these proceedings pursuant to the court's inherent power to control its own procedure so as to prevent it being used to achieve injustice (see Taylor v Lawrence [2003] QB 52 at paragraphs 52 to 54).

98. *In my judgment, the Petitioner was given a full, fair and appropriate opportunity to establish in the Nigerian courts that she and the Respondent entered into a customary marriage. This she has failed to do and to lift the stay now to allow her to pursue the 2004 Amended Petition in England (with or without orders for maintenance pending suit) would be unfair to the Respondent. As I have already mentioned there was no suggestion that the Petitioner could or would now seek to establish the existence of the Disputed 2002 Marriage in the Nigerian courts.*

99. *In short, she has had her full, fair and appropriate chance to establish the existence of this customary marriage and has failed to do so and she should not be given another chance to do so in England.*

100. *However, in my judgment I should go further and dismiss this petition under the inherent power referred to in paragraph 97(ii) above. To my mind, on the assumption in favour of the Petitioner that the Disputed 2002 Marriage could found a decree of nullity or a claim under the 1984 Act, the factors listed below alone or together with*

the points made in the last two paragraphs mean that a continuation of this petition would be an abuse of the court's process. The factors are:

i) The Petitioner embarked on and pursued her campaign to obtain ancillary relief in England knowing that she had no claim as a customary law wife in Nigeria (see paragraph 84 above).

ii) In doing so, she lied about a number of relevant matters (see paragraph 83 above).

iii) In doing so, she focused on the Disputed 1993 Marriage and it has been found in Nigeria that no such marriage ceremony took place. This was a finding to the civil standard and, although it was in part expressed by reference to the burden of proof, the Nigerian court had to weigh the competing evidence on this stark issue of fact between the parties. Further, on the binary approach to such findings this court has to proceed on the basis that no such marriage ceremony took place and so by asserting that it did the Petitioner was advancing a false case and so it was Petitioner who was advancing "the big lie" (see paragraphs 4 and 85 above).

iv) The evidence in the English proceedings provides strong support for the conclusion reached by the first instance judge in Nigeria that she could not find that the parties cohabited, which is effectively a finding that they did not. So, if the Petitioner had to rely on the Disputed 2002 Marriage (rather than the Disputed 1993 Marriage) she would be basing her claim on a short marriage which, in any event as she knew, gave her no entitlement to financial relief in Nigeria.

v) The Petitioner both in her English proceedings and in Nigeria has failed to set out a clear case in support of the Disputed 2002 Marriage as a free standing ceremony of marriage and has asserted here and in Nigeria that it was a celebration of the customary marriage she asserted took place in 1993. (And in that context she did not raise the point in Nigeria whether such a celebration and intention could constitute an effective customary marriage). In my view she took this approach to the event in 2002 as part of her campaign to obtain ancillary relief in England based on a 10 year marriage.

vi) Although there are two children of the relationship, in my view the combination of points (i) to (v) above mean that an award to the Petitioner based on the Disputed 2002 Marriage would not be fair applying the discretion conferred by the MCA 1983.

vii) Even if, as the Petitioner asserts, the substantial sums paid to her as maintenance pending suit in the 2003 Amended Petition are irrecoverable, save by a new action, in my view this would not prevent them being taken into account in the exercise of the MCA 1973 discretion (or indeed the 1984 Act discretion) in respect of a claim based on the Disputed 2002 Marriage and set off against any award made in the 2004 Amended Petition. To my mind, there is no prospect of the Petitioner being awarded a sum that exceeds such maintenance pending suit in the 2004 Amended Petition. So, this is an additional reason for dismissing the 2004 Amended Petition.

101. This alternative approach of the Petitioner depends upon her establishing that (1) there was a ceremony of customary marriage and having done so (2) that the English court can and should grant a decree of nullity in respect of that marriage and thus the platform for an award of financial relief. As I have concluded that the Petitioner has

not and should not now be permitted to seek to establish that the relevant ceremony took place, the second stage of this argument falls away and so there is no need for me to consider, in this context, the point mentioned at the end of paragraph 93 above and the other cases I was referred to on this issue (e.g. Corbett v Corbett [1971] P 83 in particular at 109A to 110B).

40. Faced with contested notes of what happened at the Supreme Court in Lagos, I cannot go any further than the order that was made in the court. For whatever reason, M withdrew her appeal and it was dismissed. I cannot accept her argument that because on her account, one of the Justices said something about the 2002 ceremony in her favour, I can rely on that in circumstances where F's lawyer's note of the hearing differs.
41. I accept the point made by Mr Brooks KC, who generously appears pro bono on behalf of M, that the matter is of very great importance to M and that her potential entitlement to an award should not lightly be set aside. But I do not accept that there has been any meaningful change in the law since the orders of Charles J in 2013. I do not think the case of Tousi takes the matter further.
42. There is no finding that there ever was a customary marriage in 2002 that has survived the Nigerian Court of Appeal determination. Further, as set out in the passage already recited, the parties had accepted before the Nigerian Court of Appeal that analogous to Akhter v Khan [2020] EWCA Civ 122 if the parties went through a ceremony, it could never have produced a valid marriage and would have been a "no marriage".
43. Further, I can take judicial notice, as did Charles J, of the extreme difficulties that factually present(ed) themselves in the way of W's case. It was never her case by way of primary submission that the parties were married or went through a ceremony of marriage in 2002. It was her case, as Charles J pointed out, that they had been married since 1993, which would have the benefit to her of producing a significantly longer marriage than a marriage that only took place 9 years later.
44. Furthermore, it would be completely inconsistent with the orders of Charles J, which were the subject of an unsuccessful application for permission to appeal both on paper and in person before McFarlane LJ (as he then was), if I was to take any other course.
45. M's nullity petitions, one referring to the 1993 event and the other to the 2002 event, have been dismissed. Nothing has changed since then, the appeal to the Nigerian Supreme Court having been dismissed.
46. Mr Brooks accepts that in accordance with HMRC v Kishore that the test that I must apply is well set out at paragraph 22:

[22] Arbuthnot and Securum were both cited in C (A Child) v CPS Fuels Ltd [2001] EWCA Civ 1597, [2002] CP Rep 6 ('C (A Child)'), where the Court of Appeal upheld an order striking out a second claim. In his judgment, Judge LJ said:

'[47] The judge directed himself by asking two questions: (a) "Is it an abuse of process for the claimant to seek to litigate in the present action the same issues which were raised, but not adjudicated upon, in the first action which was struck out?" (b) "If the

answer to (a) is ‘yes’, should I, in the exercise of my discretion, nevertheless allow the action to proceed?”

Having answered the first of those two questions “yes”, he approached the exercise of his discretion in this way:

“In order to exercise my discretion so as not to strike out the present action, some special reason needs to be identified which, having regard to the overriding objective, would mean that it was just to allow the present action to proceed.”

[48] The learned judge was entitled to adopt the approach that he did ...

*[49] I should say a word or two about his reference to “some special reason”. The use of these words is an attractive form of forensic shorthand which encapsulates the broad approach to the decision-making process to be adopted when an action has failed as a result of an abuse of process and the court is considering whether a second action relating to the same issues should be allowed to continue. The words come from authority binding on this court: *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426; but they are not words which derive from the statute, nor from the Civil Procedure Rules, and they should not be treated as if they had. Nor should they be employed as some form of ritual incantation. If the judge in this case had chosen to express the same principle by saying “very good reason”, or “powerful” or “sufficient reason”, he would not, in my judgment, have misdirected himself.’*

47. It is clear to me that this nullity application relates to the same issues that the court was considering in 2013. I can see no special reason which should permit M to proceed with her application and I accordingly strike it out.