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Form of Verifying Affidavit in a Matrimonial Cause: Substantial or Strict Compliance?

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Abstract

A petition in a matrimonial cause is to be verified by an affidavit at the time of filing the petition. However, the Matrimonial Causes Rules do not provide the format for the verifying affidavit. The courts have held in several cases, relying on Order V Rule 10 of the Rules that the verifying affidavit 'shall be written **on** the petition' before the petition is filed otherwise the petition shall be incompetent, null and void. This article argued that the verifying affidavit need not be '**on**' the petition but may be in a separate process duly sworn and filed along with the petition. It is argued that the recent case of *Oduote v Oduote* which supports this position is to be preferred to earlier authorities.

1.0 Introduction

In every Matrimonial Cause¹, the Petitioner is expected to verify the petition by an affidavit to confirm the facts stated in the petition of which he has personal knowledge. This is the requirement of Order V Rule 10(1) Matrimonial Cause Rules². It is important to state at the outset, that there is no form of this "verifying affidavit" in the Matrimonial Causes Act or Rules. What is the format of this verifying affidavit? What should be the effect of non-compliance with a "perceived" form?

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Matrimonial Cause is defined in Section 114 of the Matrimonial Cause Act Cap. M7 Laws of the Federation of Nigeria, 2004 as including proceedings for decree of dissolution of marriage, nullity of marriage, judicial separations, restitution of conjugal rights, activation of marriage, proceedings with respect to maintenance of a party to the marriage, settlement, custody, damages in respect of adultery etc.

² Cap. M7 Laws of the Federation of Nigeria, 2004

The purpose of this article is to consider some decisions of our courts on the interpretation of Order V Rule 10(1), Matrimonial Causes Rules and state that strict interpretation of the Rule will not result in substantial but technical justice. Decisions of our courts which emphasize substantial compliance rather than strict compliance with the provisions of the Rules will be recommended.

2.0 Why 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.³ A verifying affidavit therefore, is to confirm or establish the truthfulness of statements made in a document or pleading.⁴ Order V Rule 10 Matrimonial Causes Rules provides:

- "(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".

It is clear from the provision of the Rules with the use of the word "shall" that it is mandatory for every petition to be verified by an affidavit. Failure to file a verifying affidavit is fatal to the petition⁵. It is also settled that all pleadings in a matrimonial cause shall include a verifying affidavit.⁶

Must the verifying affidavit be on the end of the petition or can it be headed 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

³ B. Garner: Black's Law Dictionary (9th Edition) West Group, USA Page 1698

⁴ Ibid. at Page 1698 on definition of "verification".

⁵ *Anyaso v. Anyaso* (1998) 9 NWLR (Pt. 564) 150; *Ogbuka v. Ogbuka* (1972) 2 ECSR (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
In the case of *Abbah v. Abbah* (1973) 3 ECSR 214, it was held that a purported "Answer" to a petition for dissolution of marriage without a verifying affidavit was void and no amendment could be made in the matter. See also: *Akparanta v. Akparanta* (1972) 2 ECSR 779, *Anyaso v. Anyaso* (1998) 9 NWLR (Pt. 564) 150; Order VI, Order VII Rule 2(8) Matrimonial Causes Rules.

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

In the case of *Anyanso v. Anyanso*, the Respondent's Amended Answer to the petition did not include a verifying affidavit. The non-compliance with the Matrimonial Causes Rules 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 Matrimonial Causes Rules as to the verifying affidavit to the Amended Answer was taken up on appeal. It was argued that the Amended Answer was void *ab initio* for not inserting the verifying affidavit at its foot. 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).

In the case of *Unegbe v. Unegbe*, 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 cited the High Court cases of *Oyedu v. Oyedu*, *Omodon v. Omodon*¹⁵ 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

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

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

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

¹⁰ (1973) 3 ECCLR 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.

¹² (1998) 9 NWLR (Pt. 564) 150

¹³ (2004) 11 NWLR (Pt. 884) 332

¹⁴ (2009) 3 NWLR (Pt. 1129) 598

¹⁵ See *op. cit.* footnotes (7) and (9).

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. ----- 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.¹⁶

One of the Justices was of the opinion that the petition could not be saved by Order XXI Rule 2 of the Matrimonial Causes Rules.¹⁷ It is remarkable that although Honourable Justice Olagunju agreed with the conclusion in the leading judgment, he had what he called "nagging doubts". To put the doubt in proper context, it is quoted *in extenso*:

However, my agreement with the conclusion that writing down on the petition cannot be satisfied by filing separate affidavit leaves unsettled some nagging doubts about the efficacy of writing an affidavit which is a separate document on a petition. I have matched sub-rule 10(1) of Order V with sub-section 90(a) of the Evidence Act but I am unable to see any rhyme or order in welding together two documents that are quite distinct, an affidavit and a petition, to produce by sheer synthesis a hybrid for verification of the contents of a petition which can be done in a less cumbersome way by keeping the two documents separate as in an interlocutory motion. In this regard, I find the craftsmanship of sub-rule 10(1) of Order V of the Matrimonial Causes Rules to be clumsy.

The misgivings about the clarity of that rule are worse confounded by failure of Form 6, the format of petition for Decree of Dissolution of Marriage, etc., to include any guideline about how to endorse an affidavit on a petition to concretize or illustrate directives in sub-rule 10(1) of Order V. The omission is a desideratum which has left a petitioner to his own device, making in appropriate cases, the invocation of Rule 3 of Order XXI of the rules imperative in case of avowed and genuine misapprehension about interpretation of sub-rule 10(1) of Order V of the rules.

In the face of the cryptic textual mix-up to which sub-rule 10(1) is susceptible more puzzling is the prospect of throwing out a petition

¹⁶ Ibid at Pages 358 - 359 Per Mohammed, J.C.A.

¹⁷ See the decision of Pats Acholonu, J.C.A. at Page 364. The Rule provides that non compliance with Rules shall not render proceedings void unless the court so directs.

because of failure to write the verifying affidavit on this which calls into question the time-honoured platitude that the court will not punish a litigant for the error of his counsel.¹⁸

It is surprising that the learned Justice after a brilliant exposition of his "doubts" had to do a *volte face* and hold that the petition was incompetent for non-compliance with the mandatory provisions of Order V Rule 10(1) Matrimonial Causes Rules. It is submitted that the reasons for concurring with the leading judgment in this case are unjustifiable.

Umeakuana v. Umeakunana 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 has broken down irretrievably. The trial 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* held that the requirement of the Rule is mandatory and that the duties imposed on the Petitioner are:

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.

In relation to the petition, the court held *inter alia*:

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.²⁰

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

¹⁸ Ibid at Page 366 Paragraphs A - C.

¹⁹ Ibid at Page 612 Paragraphs F - H

²⁰ Ibid at Page 612 Paragraphs F - H

affidavit was not written on the same page with the petition, it is contained in the same continuous document with the petition and therefore it complied with Order V Rule 10(1).²¹ It is our contention that this is a correct interpretation of Order V Rule 10(1) Matrimonial Causes Rules. It is also in line with the "nagging doubts" of Honourable Justice Olagunju in *Unegbe v. Unegbe*.²²

The progressive position of the Court in *Umeakuana v. Umeakuana* had earlier been adopted by the Court of Appeal Enugu Division in the case of *Igwe v. Igwe*.²³ In that case, I. L. Kutigi, J.C.A. (as he then was) while interpreting the application of Order V Rule 10(1) Matrimonial Causes Rules stated as follows:

It is common ground here that the affidavit although contained in another sheet of paper was sworn to on 23/10/86 before the paper was filed on the same date as the petition on 23/10/86. I would in the circumstance therefore prefer to regard the error as a mere irregularity not strong enough to vitiate the process. I will therefore not strike out the petition simply because the verifying affidavit herein was contained in a different sheet of paper from the petition itself. A Court of Law should endeavour to do substantial justice between the parties without undue regard to technicalities.

Oguntade, J.C.A. (as he then was) in his concurring judgment stated explicitly that even if a verifying affidavit is on a separate sheet and is therefore not forming a continuous part of the petition, the noncompliance does not vitiate the petition.

It is submitted that this shift to substantial compliance rather than strict adherence to technicality is to be commended. In the recent case of *Oduote v. Oduote*,²⁴ 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. 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.

²¹ The petition ends at page 8 and the verifying affidavit is on page 9.

²² Footnote 18

²³ CA/E/162/90 (Unreported) decided on 16th December, 1991.

²⁴ (2011) LPELR 9056; (2013) 3 NWLR (pt. 1288) 478

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).

It is submitted that this latest decision of the Court of Appeal on the interpretation of Order V Rule 10(1) Matrimonial Causes Rules accords with justice rather than technicality.²⁵ It is our contention that another area which makes Order V Rule 10(1) inelegant and deserving of liberal interpretation is what was alluded to by Olagunju, J.C.A. in the case of *Unegbu v. Unegbu*.²⁶

A "verifying affidavit" is an affidavit to confirm or substantiate on oath²⁷. This means that such an affidavit must comply with the provisions of the Evidence Act on affidavits. Section 117(1) of the Evidence Act²⁸ provides:

Every affidavit taken in a cause or matter shall –

- (a) be headed in the Court and in the cause or matter;
- (b) state the full name, trade or profession residence and nationality of the deponent; and
- (c) be in the first person, and divided into convenient paragraphs numbered consecutively.

It is our view that if Order V Rule 10(1) Matrimonial Causes Rules is interpreted literally, an affidavit merely endorsed 'on' a petition without the heading of the Court or the cause or matter (Suit No.) will be contrary to Section 117(1) of the Evidence Act and to that effect, invalid. We therefore submit that decisions of the

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) at 52.

²⁶ See footnote 18.

²⁷ Bryam Garner; Blacks Law Dictionary (Op. cit.) page 1698.

²⁸ 2011.

Courts without reference to the provisions of the Evidence Act on "Form of an Affidavit" were decided *per incuriam*.

If the various Courts had taken into consideration the provisions of the Evidence Act, it would have arrived at a different conclusion. It should be further emphasized that the Matrimonial Causes Rules being rules of practice and procedure cannot override express statutory provision of the Evidence Act.²⁹

This contention is strengthened by the fact that earlier High Court decisions which some of the Court of Appeal Justices relied upon were decided on abstract interpretation of the Rules bordering on strict adherence to technicalities.

3.0 Conclusion

There is no doubt that a "verifying affidavit" is mandatory and a condition precedent to the validity of a petition or pleadings in a Matrimonial Cause in Nigeria. A petition without a verifying affidavit is null and void. However, where a party deposes to a verifying affidavit although in a different paper but a continuous part of the petition, this should qualify as substantial compliance with Order V Rule 10(1) Matrimonial Causes Rules. Dismissing a petition merely because a verifying petition is not "on" the petition itself is sacrificing substantial justice on the altar of technicality. This is more so as there is no form of a verifying affidavit in the schedule to the Matrimonial Causes Act or Rules.³⁰ The case of *Oduote v. Oduote* is recommended to the lower courts and the Court of Appeal.³¹

²⁹ See: *Auto Imports v. Adebayo* (2002) 18 NWLR (Pt. 799) 554; *Afribank (Nig.) Ltd. v. Akwara* (2006) 5 NWLR (Pt. 974) 619 at 654.

³⁰ There is no provision for a Verifying Affidavit in the Family Procedure Rules, 2010 (UK).

³¹ By the doctrine of *stare decisis*, the Court of Appeal is bound by its previous decision. However, there are circumstances in which the Court may decline to follow such decision. The Court may decide to follow one of two of its conflicting decisions in preference to the other. Secondly, it may also decline to follow its decision, which though not expressly overruled, cannot in its opinion, co-exist with a decision of the Supreme Court. Thirdly, it may decline to follow its earlier decision if satisfied that it had been reached *per incuriam*; See: *Usman v. Umaru* (1992) 7 NWLR (Pt. 254) 377 at 398; *Ebere v. Onyenge* (2000) 2 NWLR (Pt. 643) 62 at 80; On the other hand, where there are conflicting decisions of the Court of Appeal on a similar point, the High Court should follow and apply the latter or latest one. See: *Osakue v. F.C.E Asaba* (2010) 10 NWLR (Pt. 1201) 1 at 34 contrast: *Shell Petroleum Co. Nig. Ltd. v. Maxon* (2001) 9 NWLR (Pt. 719) 541 at 566 A – C; *Tunji Braithwaite v. Maritime Spani Africa Limited* (2001) 15 NWLR (Pt. 707) 596 at 610 D – E.