The Dissolution of Customary Law Marriage in Nigeria and Intestate Inheritance: A Review of the Supreme Court Decision in *Okonkwo v Ezeaku*

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Abstract

Marriage in Nigeria, can either be statutory or customary (including Islamic) and the incidences as well as the dissolution, of any of these marriages, is regulated by the applicable system of law. The failure to abide by the applicable system of law, would obviate anything purportedly done for or against the marriage including its dissolution. Also, subject to applicable customs and customary laws, everyone has testamentary capacity and once exercised, subject to fundamental irregularities, the court and everyone is bound by it. However, where a person dies without a testament, he/she is said to have died intestate and his personal law, subject to established restraints, regulates his estate. This paper, adopts the doctrinal methodology in examining the impacts of the Supreme Court of Nigeria decision in *Okonkwo v Ezeaku* on the mode of dissolving customary law marriage, inheritance and administration of the estate of a person who dies intestate. It also examines the proprietary of using an affidavit to sequestrate an estranged customary marriage wife from being entitled to share in the estate of her husband. It founds that failure to abide by the prevailing custom and customary law in dissolving a customary marriage is fatal and such an estranged wife, is entitle to inherit her late husband estate upon dying intestate. The judgment, heightens the need for persons to write wills to ensure that their wishes are complied with upon their demise. It recommends that for a divorce under customary law to be valid, it must comply with the recognised customary law. The judgment is a welcomed development and note of warning against untidiness.

Keywords: Customary Law, Marriage, Estate, Nigeria, The Supreme Court of Nigeria.

1.0 Introduction

Under Nigerian law, a person who has attained the age of majority, depending on the type of marriage involved, is legally permissible to contract a marriage.[2] Thus, a marriage could either be statutory or

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customary (by customary, this includes Islamic marriage since Islamic law, is a form of customary law in Nigeria).[3] This right of marriage, is recognised by regional human rights instrument such as the African Charter on Human and Peoples Rights.[4] While no one who ever gets into a marriage does so with the intention of getting out, however, certain factors, may make the dissolution of a marriage imminent.[5] Thus, where dissolution of a marriage has become unavoidable, the spouse desirous of same, must mandatorily, comply with the requirements of the system of law regulating the marriage.[6] The reason is that since the creation of the marriage is by the governing law, its 'termination' must be in accordance with the same law. Failure to comply with the requirements or procedure specified by the regulating law, would render void or voidable, any purported dissolution of the marriage and any other action consequent on same.

Everyone that owns property, has the right, to bequeath same to any person of his/her choice. The law, accords every adult, the right of making a will, subject to the prevailing personal law of the maker, which becomes effective upon the demise of the testator.[7] Thus, where a person makes a will, he/she is said to have died testate but otherwise, he/she is said to have died intestate.[8] Where a person dies testate, the devolution of his estate shall be in accordance with his wishes as encapsulated in the will subject to same being successfully challenged, if there are vitiating factors.[9] However, where there is not testament, the estate of the deceased shall be shared in accordance with his personal law at the time of his/her death.[10] The question however, is whether aside a will, an owner of property, can bequeath same to another or deprive another, from an inheritance.

Recently, the Nigerian Supreme Court in *Okonkwo v Ezeaku*[11] held that a customary law marriage validly contracted under customary law, cannot be dissolve by means other than the one recognised by the Customary law

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2 *See* the Marriage Act (Cap. M1 LFN 2004), s 4.

3 E. I. Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers Plc 2014) 9.

4 *See* art 18.

5 The Marriage Act 2004, s 15.

6 Babatunde A. Oni, *The Law of Succession in Nigeria: Principles, Cases and Practice* (Unilag Press and Bookshop Ltd 2019) 98.

7 By this nature, a will is said to be testamentary and ambulatory.

8 Oni (n 6) 240.

9 A will can be challenged on several grounds some of which are that the testator was unduly influenced by a beneficiary, was of unsound mind as at the time of making the will, wrongful witnessing of the will, etc.

10 *Olowu v Olowu* [1985] 3 NWLR (Pt. 13) 372.

11 [2020] 5 NWLR (Pt. 1718) 477.

under which the marriage contracted. While a customary law marriage is potentially polygamous,[12] the estrangement of a wife, does not tantamount to the death of the marriage but the keeping at abeyance of same due to cessation of conjugal rights.[13] Hence, an affidavit, allegedly dissolving a customary law marriage and acknowledging another woman as the lawful wife, of the deponent, at the death of the deponent, has no legal sustenance to sequestrate the estranged customary wife of the deceased from partaking from his estate.[14] This is because such an affidavit, is not an order of the relevant court having jurisdiction to dissolve the marriage.

This paper, reviews this decision by considering its impacts with regards to dissolution of customary law marriages in Nigeria and the proprietary of using an affidavit to sequestrate an estranged customary law marriage wife from the estate of her deceased husband. It also examines the need to make wills in order to prevent unintended consequences with regards to the distribution of a person's estate. The paper is divided into seven sections. Section one contains the introduction. Section two examines the meaning, types of marriages and their essential validities under Nigerian law. Section three examines the dissolution of customary law marriage in Nigeria. Section four discusses the decision in *Okonkwo v Ezeaku*[15] and section five examines the legal imperative of making a will. Sections six and seven respectively contain the imperative of making a will in Nigeria and conclusion with recommendations.

2.0 Types of Marriages and the Validity Requirements in Nigeria

According to Fatula[16] marriage is one of the oldest universal institutions which is recognized and respected all over the world. A marriage is an interpersonal relationship usually intimate and sexual, often created as a contract with government, social, or religious recognition. Lord Penzance in the case of *Hyde v Hyde*[17] defined a statutory marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others'.[18]

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12 By this, it means a customary law husband, may choose to marry two or more wives at the same time or marry one and more subsequently. However, under Islamic law, he can only have the maximum of four wives at a time.

13 *Eze v Omeke* (1977) 1 ANSLR 136.

14 *Ezeaku v Okonkwo* [2012] 4 NWLR (Pt. 1291) 529.

15 [2020] 5 NWLR (Pt. 1718) 477.

16 Olugbemi Fatula, *Feminism, Women, Family and Children's Law* (Afribic Law Centre 2015) 208.

17 (1866) L.R. 1 & D 130. See also *Jabre v Jabre* [1999] 3 NWLR (Pt. 596) 606.

18 This definition is a true reflection of the Biblical concept of marriage as contain in the Holy Bible particularly the book of Matthew chapter 19:5-6. *See also* Nasiru Tijani, *Matrimonial Causes in*

This is what is regarded as the traditional meaning of marriage which supports the ordinary course of nature. Black's Law Dictionary defined marriage in the following manner: 'legal union of one man and one woman as husband and wife',[19] marriage as distinguished from the agreement to marry and from the act of becoming married, is the legal status, condition, or relation of one man and one woman united in law for life[20] or until divorced, for the discharge to each other and the community of the discharge incumbent on those whose association is founded on the distinction of sex. Customary law marriage may be defined as the union for life of one man and one or several women.[21]

Noteworthy is the fact that recent developments have impacted the definition of marriage particularly the rise of Lesbian, Gay, Bisexual and Transgender (LGBT) movement. Most African countries, including Nigeria, have rightly enacted laws, prohibiting these practices in their jurisdictions and punishing same despite their recognition in some other jurisdictions. Thus, taken into cognisance the provisions of the Same Sex Marriage (Prohibition) Act 2014, the only legally recognised marriage in Nigeria, is that between an adult male and female (s). Thus, the discussion or reference to marriage in this paper is limited to the confines of the Nigerian law.

There are basically, two types of marriages under Nigerian Law.[22] These are, marriage under the Act and customary law marriage. The marriage under the Act is also known as monogamous marriage while the customary law marriage is potentially polygamous. A polygamous marriage is as defined by Penzance in the case of *Hyde v Hyde.*[23] The notable features of this marriage are: it is between an adult male and female to the exclusion of all others and not between two males or female or even between a human and an animal.[24] It is voluntary, meaning that both parties, mutually

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Nigeria: Law and Practice (Renaissance Law Publishers Ltd 2007) 4. Section 18 of the Interpretation Act 1964 (Cap. 123, LFN 2010) defined monogamous marriage thus 'means a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage'; Mick Woodley, *Osborne's Concise Law Dictionary* (11 edn, Sweet and Maxwell 2009) 256, state that 'marriage is essentially the voluntary union for life of one man and one woman to the exclusion of all others, subject to the rules as to consanguinity or affinity and capacity to perform the duties of matrimony prevailing in the place of domicile of the parties and subject to the formalities required either by the law of England or the place where the marriage takes place'.

19 See *Corbett v Corbett* (1970) 2 All E.R. 33.

20 See *Meribe v Egwu* [1976] 1 All N.L.R., 266 at 275.

21 Nwogugu (n 3) 9.

22 Babatunde A. Oni, 'Dissolution of Marriage Contracted under Customary Law in Nigeria: Comments on *Ezeaku v Okonkwo*' (2013) 12 US-CHINA Law Review 629.

23 (1866) L.R. 1 & D 130. See also *Jabre v Jabre* [1999] 3 NWLR (Pt. 596) 606.

24 *Corbett v Corbett* (1971) P. 83.

consented to the constitution of the marriage and their consent was not gotten due to deceit or coercion. Also, it is meant for life. By meant for life, it requires that the parties from the time of entering into the marriage, must have the intention, that all things being equal, the marriage is a lifetime commitment. Thus, the modern trend of the charade, or what is best described as 'convenient' or 'contract' marriage, is unrecognised under Nigeria law. The 'for life' nature of marriage, is amenable to the vicissitudes of human relations such as death and divorce so, a marriage could be prematurely terminated through divorce or death of either parties. The Marriage Act is the principal legislation that regulates the contract of statutory/polygamous marriages in Nigeria.

Customary law marriage, is a marriage between a man with one or more wives. It could be celebrated in accordance with the native law and custom of a particular community or under Islamic law as same is regarded as part of the customary law prevailing in Nigeria. These two marriages, are polygamous in nature.

The details of the essential and formal requirement for a customary marriage with the exception of Islamic marriage, differs from one locality to another but has underlying similarities. As a general rule, for anyone to validly contract a customary law marriage, the parties must have the requisite capacity under the prevailing customary law system to marry each other; there must be payment of dowry or bride price which could be in the form of money, gift item, or any other kind of item acceptable.[25] The dowry/bride price is usually paid by the grooms to the bride's family.[26] There must also be a ceremony of marriage and the handover of the woman to the man's family by her father or the eldest male of her family in his absence.[27]

The essential and formal requirements for a valid statutory marriage are as provided under the Marriage Act. Section 33 (1) and (2) thereof provides that 'no marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary to any person other than the person with whom such marriage is had'. Such a marriage, where either of the parties has contracted a customary marriage and is now contracting a statutory one with another person, shall be null and void if both parties knowingly and wrongfully acquiesced to it. The parties must have the capacity to contract a marriage as provided under section 3(1) (e) of the Matrimonial Causes Act 1970.

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25 *Nwangwa v Ubani* (1972) ECSLR 561.

26 *Lawal Osula v Lawal Osula* [1993] 2 NWLR (Pt. 274) 158.

27 *Agbaja v Agbaja* [1985] 3NWLR (Pt. 1) 11.

None of them must also be within the prohibited consanguinity and affinity.

It is apposite to note that it has become an acceptable practice, for persons who have validly contracted a customary law marriage, to proceed to deck it with a statutory marriage as a 'double decker' marriage. In fact, it is extremely difficult, to come across any marriage celebrated under the statute that does not have beneath it, an already celebrated customary law marriage. Whether, statutory or customary law marriage, it creates a status that has universal recognition.[28] There is a difference between cohabitation and marriage.

3.0 Dissolution of Customary Law Marriage In Nigeria

It is germane to note that customary law rules relating to dissolution of marriage are not as well developed and stringent as in the case of statutory marriage. Despite this, customary law still contains certain basic rules in respect of dissolution of marriage. There are two modes through which a customary law marriage may be dissolved. It could be through non-judicial divorce or by an order of a competent customary court. Customary law marriage maybe dissolved without recourse to the court and this is a significant aspect of customary law which has no counterpart in a statutory marriage.

In non-judicial divorce, it could be done by the mutual agreement of the couple and their family or by one of the couple unilaterally. In the former, where as it is the case, there is a problem, the family members, would always intervene with a view to settling same. However, if it has become obvious that the parties are irreconcilable, the two families, would meet and decide to bring the union to an end due to irretrievable breakdown of same. Once this is done, the families will then reach an agreement on the quantum of bride price to be refunded. If they fail to agree on the quantum of bride-price to be refunded, the husband may resort to a customary court of competent jurisdiction to determine same which shall be binding on the parties.[29] Alternatively, either of the spouses may unilaterally bring the marriage to an end by abandonment of the marriage or forceful estrangement by the other spouse. For instance, a wife who is being maltreated by the husband, may runaway to her father's house with the intention of never returning thereby bring to an end, the marriage. Once this happens, her father or most elder male member of her family, may go

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28 *Onwudinko v Onwudinjo* (1957) 11 ERNLR 1.

29 ibid 232.

to the husband, and refund the bride price thereby dissolving the marriage without recourse to court.

Where a man separates from his wife, equity would ordinarily expect that he forfeits the recovery of the bride price as he was the one who drove her from the marriage. However, it seems, that refund of bride price, is an integral element for non-judicial dissolution of customary marriage. So, where the husband sends away his wife, unless and until the bride price is refunded, they remain married although, living apart. The refund of bride price for the perfection of non-judicial customary marriage divorce, just like the payment of same for the validity of a customary marriage, cannot be overemphasised. The problem of non-availability of record of proceedings, is one of the shortcomings of non-judicial customary divorce.

A customary law marriage could also be dissolved through judicial means. Where intervention by the families or respectable elders to quell a dispute between the couple has failed, either of them, may request, depending on the locality, the Customary or Area court[30] to dissolve the marriage. The court, in dissolving the marriage, would determine the quantum of refundable bride price to be paid by the wife's family to the husband's. It would also determine the custody of the children where they are involved. It is worthy to note that the customary or Area court, are required, at every stage of the proceedings, to attempt to reconcile the parties.[31] On the grounds for dissolution of marriage, customary law puts more emphasis on the fact that a marriage has broken down irretrievably than on the individual responsibility of a spouse for that failure.

4.0 *Okonkwo v Ezealu* in Perspective

This section of the paper discusses the decision of the Supreme Court in *Okonkwo v Ezeaku*[32] by highlighting the impacts of the decision on dissolution of customary law marriage, testate succession, expropriation of an estrange customary wife from inheritance right, and the imperativeness of writing a will as a means of avoiding undesirable distribution one's estate upon death. The brief facts of the case are: the first respondent was married to one Mr. Johnny Okonkwo, a Senior Advocate of Nigeria under native law and custom in 1976. They had one child, female from the union. In 1988, due to irreconcilable differences, the couple separated and remained so till the demised of Mr. Okonkwo in 2005. During the period

30 *See* section 2 Customary Court Law, Cap. C2, Laws of Cross River State 2004.

31 Nwogugu (n 21) 233.

32 [2020] 5 NWLR (Pt. 1718) 477.

of separation, precisely in 1992, Mr. Johnny Okonkwo got married to the Appellant under the native law and custom of Nibo Community. The marriage was blessed with two children, a male and a female. Sometime in 2008, Mr. Okonkwo swore to an affidavit wherein he deposed *inter alia* that the appellant was his only lawful wife under the native law and custom of Nibo town and that, aside her, he has no other wife.

Upon his death without a will, in 2005, his estate was placed under the management and control of the 2nd Respondent, the General/Public Trustee of the Ministry of Justice, Enugu State. The 1st Respondent standing on her marriage to the deceased which was not formally dissolved and haven participated, unhindered in the burial rites of the deceased, sought to partake in the distribution of the estate being managed by the 2nd Respondent. The Appellant was angered by this move of the 1st Respondent.

On the strength of the affidavit, deposed to by the deceased, the appellant commenced proceeding via writ of summons but withdrew same and substituted it with an originating summons at the High Court of Enugu State. She claimed that on the strength an apparentness of the affidavit, she remained the only wife of the deceased and that the 2nd Respondent handover its management/control to her. The 1st Respondent and 2nd Respondent filed counter affidavit averring to the contrary. The Court, after hearing the parties, delivered judgment in favour of the Appellant/Claimant granting all her reliefs. The 1st Respondent was aggrieved by the judgment, particularly the fact that despite the controversies in the facts, as contain in the counter affidavit, the trial court, proceeded to determine the suit as constituted via originating summons instead transferring the matter to writ of summons and ordering parties to file pleadings. The parties filed and exchanged their respective briefs and the appeal was heard. The Appellant as Respondent, neither cross appealed nor filed a Respondent Notice but formulated issues for determination beyond the circumference of the Notice of Appeal filed by the Appellant. The Court of Appeal, in its wisdom and in exercise of its appellate powers, merged the issues formulated by the parties in determining the appeal. The Court of Appeal in a well-considered judgment, held that the 1st Respondent as Appellant, was entitled to partake from the distribution of the estate of the deceased as her separation from the Mr. Johnny Okonkwo, seventeen years prior to his death, without a formal dissolution of the customary marriage, left same intact.

The Appellant as Respondent, being dissatisfied with the decision of the Court of Appeal, appealed to the Supreme Court vide a Notice of Appeal dated 27th day of June 2011 but filed on the 28th day of June 2011. The

Appellant contended that the Court of Appeal in mis-merged the issues for determination raised by the parties and therefore, did not pronounce on all the issues raised by her and this failure, occasioned injustice. The parties filed and exchanged briefs and the appeal was heard. The Supreme Court in its unanimous decision, dismissed the appeal and affirmed the decision of the Court of Appeal.

This decision has far reaching and fundamental impacts on Nigeria's customary matrimonial practice with regards to divorce and succession jurisprudence. These impacts of the judgment, forms the substratum of the succeeding section of this paper.

5.0 Matters Arising from the Decision in *Okonkwo v Ezealu*

It has been noted in the preceding section that, the decision of the Supreme Court in the case under review, has impacted the customary matrimonial and succession practices in Nigeria and explicating the imperative of expressly expropriating a person from inheritance where it is desired and the inevitability of making a will. This section of the paper, examines these impacts of the judgment on Nigeria's jurisprudence.

The matter arising from this decision is the dissolution of customary marriage. We have alluded to the fact that customary law marriage can be dissolved through judicial and non-judicial means. For the non-judicial dissolution to be effective and valid, the bride price or an agreed quantum of it, must be refunded to the husband by the wife's family whether the husband was the one who forced the wife to leave or she left on her own volition. The refund of bride price, is so fundamental that staying apart for decades, would not extinguish the marriage. The Appellant, had contended that the desertion of the Respondent in 1988 from the matrimonial home, dissolved the marriage and thereby barring her as a beneficiary of the estate of Mr. Johnny Okonkwo. However, both the Court of Appeal and Supreme Court found to the contrary. The Court of Appeal per Oseji, JCA held that:

> I need add here that marriage, whether statutory or customary is not dissolved by effluxion of time. So the 17 years of living apart cannot be a ground to hold that the marriage between the appellant and the deceased Senior Advocate had been dissolved… in this instant case, the bottom line is that there is no proof of dissolution of marriage between the appellant and J.C. Okonkwo (deceased), the fact of living apart for 17 years and the content of the affidavit (Exhibit 'A') does not provide

> sufficient moral or legal justification to hold that the said marriage had ceased to subsist prior to the death of the deceased.[33]

The Supreme Court in its unanimous decision, approved this position of the Court of Appeal, as it dismissed the appeal lodged by the appellant which plank was the contention above. The implication of this is that there is no dissolution of marriage by conduct in Nigeria whether statutory or customary marriage. This goes to show the venerable position and premium placed on the institution of marriage in Nigeria. Estrangement, of spouses, no matter how long, is not legally potent, to dissolve a marriage, at best, it only keeps at abeyance, those marital obligation, rights and benefits, which cannot be rendered in the absence of cohabitation. Unless and until, there is refund of bride price or an agreed quantum thereof, separated customarily married couples, remain married. While refund is a *sine qua non* for dissolution, particularly non-judicial, where there are attempts to refund, but the husband fails and or refuses to collect, it will be inequitable and illogical, to argue that the marriage subsists because marriage, being a contract, it would be against conscience, to compel an unwilling spouse, to continue in marriage with a willing spouse.

Another issue that arises from this decision is the need to expropriate persons who ordinarily are entitled to inherent from inheritance where the benefactor does not want them to share in his or her estate. The Appellant, had heavily relied on the affidavit, exhibit 'A' allegedly deposed to by the deceased Johnny Okonkwo acknowledging her as his only wife. This acknowledgement, she contended, makes her the exclusive beneficiary of the estate of the deceased. This was so despite the fact that the affidavit was unarguably suspicious as same had no heading, given the status and stature of the deponent, a Senior Advocate of Nigeria.

While both the Court of Appeal and the Supreme Court agreed with the contention of the appellant that she was named as the only wife of the deceased, but that was all that could be ascertained from the affidavit on its face value. Acknowledgement as the only wife does not concretise to the only beneficiary without more. The deceased, in acknowledging the appellant as his only wife, failed or refused to expropriate the Respondent, or any other person, from being entitled to partake from his estate. The Court found and held that:

> The appellant's desire to inherit the properties of the deceased was based solely on the fact that she was his wife. Exhibit 'A' merely acknowledged that the appellant was the only wife of the deceased, but did not allocate

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33 *Ezeaku v Okonkwo* [2012] 4 NWLR (Pt.1291) 558 [G-H] - 559 [A-B].

> any property to her… there is nothing in this affidavit that expropriated the properties of the deceased, senior lawyer to the appellant.[34]

The salient point here is the need for expropriation where there is no will willing a property to supposed beneficiary intended to benefit. The only conclusion, to be drawn from the contents of the affidavit, is the unequivocal acknowledgement of the appellant as the only wife of the deceased and nothing more. Although, this acknowledgement, is itself preposterous giving the fact that separation of couple does not equal dissolution of the marriage. The deceased ought to have specifically mentioned the particular properties he wishes to become that of the appellant for the court to consider granting it to her. In the absence of a will, expropriation, is the pillar for claiming exclusive entitlement to a property. It is also worthy to reiterate that customary law marriage, is potentially polygamous and as such, a claim of 'only wife' is demonstrative of a cover up under the circumstance.

6.0 The Imperative of Making a Will in Nigeria

It has been stated above that everyone, who has attained the age of majority, is permitted to make a will. According to the Wills Act of 1837, a will is a testamentary document voluntarily made and executed according to law by a testator of sound mind, where he disposes his properties (real or personal) to beneficiaries to take effect after his death. It can also be described as a legal document whereby a testator distributes his/her properties/estate while alive to beneficiaries who shall be entitled to claim same upon the demise of the testator. In Nigeria, a will could be written or oral. The former is a will made under statute while the latter is made under customary law which by nature, is unwritten.[35] Generally, Nigerians, are reluctant to make wills. According to a recent survey, eight out every ten Nigerians over the age of forty-five years do not have a will and seven out of ten, will not make a will before death.[36]

What is the nature of a will? There are a number of fundamental characteristics of a will. A will is ambulatory in nature. What this means is that a will takes effect from the death of the testator and not from the date of its making. The implication of this is that any property dealt with by a will but disposed of by the testator before his demise cannot be regulated

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34 *Okonkwo v Ezeaku* [2020] 5 NWLR (Pt. 1718) 477 at 489 Paras. D and E,, P. 890 Para. A.

35 Mani Ojeah, 'Wills Act and the Requirements under the Nigerian Law' *Manifield Solicitors* <www.manifieldsolicitors.com/2019/01/15/wills-act-and-the-requirements-under-the-nigerian-law/> accessed 18 June 2020.

36 ibid

by the will. The making of a will does not prevent the testator from dealing with the property dealt with in the will contrary to the position in the will. Consequently, properties acquired by the testator after the making of the will may be disposed of under its terms.[37] As a result of this characteristic of a will, the testator, remains free until death to revoke, amend or otherwise, alter his will at his pleasure during his lifetime.[38] A will is also testamentary, i.e. the subject matter. The gift must be identifiable. A vague gift or uncertainable gift may not be enforced.[39] An obligation created by the will must as well be certain, mere intention, may not suffice.[40]

In making a will, for it to be valid and thereby effectuating the wishes of the testator, the testator must ensure that he or she has attained the age of eighteen years as at the time of making the will.[41] Hence, an infant lacks testamentary capacity. The testator must also be of sound mind as at the time of making the will. Abayomi[42] has posited that:

> The testator must understand the nature of the act he is performing and its effect. No disorder of mind shall poison his affection, pervert his essence of right or prevent the exercise of his natural faculties. No insane delusion shall influence his will in disposing of his property and bring about a disposal of which if the mind had been sound would not have been made.

The mental capacity of the testator is only relevant as at the time of making the will and not before or after.[43] As a result, a will, executed during the lucid interval of the testator, remains valid and enforceable even though he subsequently becomes mentally unfit.[44] Blindness or illiteracy does not sequestrate a person's testamentary capacity but there is need to take precaution to avoid fraud. Where there is evidence of undue influence or duress, a will be null and void and of no effect whatsoever. Hence, a will must be a mirror of the testator's free wishes.[45] Generally, a will must be in writing although the law does not specify the form the writing should take, whether electronic or convention writing on paper.[46] The will must be signed by the testator on someone on his behalf in his presence and by

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37 *Okelola v Boyle* (1998) SCNJ 63.

38 Nwogugu (n 3) 395.

39 *Wakeham v Mackenzie* (1968) 2 All ER 783.

40 Wills Law of Lagos State, s 3.

41 ibid, s 6.

42 Kole Abayomi, *Wills Law and Practice* (Mbeyi and Associate Nig Ltd 2004) 73.

43 *Kwentoh v Kwentoh* [2009] 16 NWLR (Pt. 1188) 543.

44 *Sutton v Sadler* (1857) 3 CBNS 57, 140ER 671.

45 Nwogugu (n 3) 396.

46 Wills Law of Lagos State, s 4(1) (a).

his direction.[47] A will maybe revoked at any time before the death of the testator, either expressly or by necessary implication.[48]

It is apposite to note that in *Okonkwo v Ezeaku*[49] the court refused to countenance the affidavit as vesting any property of the deceased in the appellant. However, if the deceased, had executed a will, giving his entire estate to the appellant, subject to applicable customary practices which limits the right of the testator, the controversy that ensued from the affidavit, would have been prevented. The imperative of making a will cannot be overemphasised. The belief that only men should make their wills is erroneous and fallacious. Anyone who has attained the age of majority, he/she, can validly make a will and a will is not a death sentences to be feared.

7.0 Conclusion and Recommendations

From the discussions above, it is crystal clear that under Nigeria law, basically two types of marriages, the statutory and customary law marriage. While the former is monogamous in nature, the latter is polygamous. Everyone, of full capacity, is at liberty, to contract any of this marriage. Both marriages, when contracted, the parties do so with an intention of permanence subject to death or divorce. For a statutory marriage, only a formal dissolution by a competent court of law, can bring same to an end. However, a customary law marriage, can be brought to an end through judicial and non-judicial means. Whatever, means adopted, particularly the non-judicial, the refund of the bride price, is an indispensable requirement notwithstanding the length of time of living apart of the couple.

The decision in the case reviewed above, is watershed and has seriously impacted, in diverse ways, the matrimonial and inheritance jurisprudence of Nigeria. The decision has established the position that while a marriage is a contract and contracts can be terminated constructively, marriage, is not amenable to this. Whoever wishes to bring a customary marriage to an end, must as of matter of legal necessity, comply with the applicable customary practices. In addition to this, unless and until a deceased person, in the absence of making a will, expropriate in favour of an intended beneficiary, the beneficiary cannot lay claim of exclusive entitlement to his/her deceased spouse's estate.

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47 ibid

48 Nwogugu (n 3) 397.

49 [2020] 5 NWLR (Pt. 1718)477.

Given the matters arising above, it is recommended that enlightenment on the need for people to make wills to avoid undesirable consequences, whereby persons other than those they would have wanted to inherit their properties, inherit them. There is serious misconception that once one writes a will, is tantamount to invitation to death. Erroneous beliefs, such as this, must be corrected through enlightenment.

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