IN THE SUPREME COURT OF NIGERIA

Suit No: SC112/1975

Petitioner: Joseph O. Falobi
And
Respondent: Elizabeth O. Falobi

Date Delivered: 1976-09-23

Judge(s): Atanda Fatayi-Williams, Ayo Gabriel Irikefe, Chukwunweike Idigbe

Judgment Delivered

In an application filed in the High Court of the former Western State sitting in Ibadan, the plaintiff, now respondent, complained that the defendant, now appellant, had wilfully neglected to provide reasonable maintenance for her and for their four children. The parties were married on the 9th day of September, 1964, in the Magistrate\'s Court Marriage Registry at Ibadan. At the time of the application, there were four children of the marriage namely, Kikelomo, aged eight years, Olufunlola aged six years, Kolawole aged four years, and Bolarinwa aged three years.

The heading of the application reads:' -

"Section 6 of the Matrimonial Proceedings and Property Act, 1970, Rule 98 of the Matrimonial Causes Rules, 1968. Originating Application on Grounds of Wilful Neglect to maintain.

In the matter of an application under section 6 of the Matrimonial Proceedings and Property Act, 1970. \"

After setting out the particulars on which the application was predicated, the plaintiff asked the court for the following orders:-

\"I apply for an order that the Respondent do make provision by way of secured periodical payment from his salary for me and the four children of the Marriage who are of tender ages.

I ask that I may be granted cus'tody of the said Kikelomo, Olufunlola, Kolawole, and Bolarinwa Falobi.\"

Some of the particulars relied upon and which were verified by an affidavit sworn to by the plaintiff read:'

5 (a). Respondent deserted me and the said children of the marriage on/or about 27th August, 1970.
(b) That by the aforementioned respondent's desertion in (a) above, I had to assume responsibility for rent '12.10.0d, feeding of myself, the children of the family monthly at the rate of '40 and also clothe myself and the said children of the family at an estimated cost of '8o and '130 per annum respectively.
.....
(g) The respondent has formed a settled intention of permanently staying away from the matrimonial home and the family.
(h) The respondent spends all his salary of over '1,500 on himself and his girl friends only.
(i) That my salary of '1,422 is not adequate to cope with my family commitments unless the respondent augments it by maintaining me and the four children of the marriage"""
6. The respondent has not made any payments to me by way of maintenance for myself or the said children of the marriage.
7. My means is as follows:-
(a) Annual salary of '1,422 as Research Officer in the Western State Minis-try of Agriculture and Natural Resources Ibadan
8. To the best of my knowledge and belief, the respondent\'s means are follows : -

(i) Annual salary of over '11500.

(ii) Research grant from the Federal Government of Nigeria at the University of Ibadan the amount of which is unknown to me.\"

The defendant filed a counter-affidavit in reply to the plaintiff\'s affidavit. In it, he denied that he derived 3n income of over '1 500 from his employment and stated further that his gross Income for each of the last three years was '792 in 1969 '80 in 1970, and '924 in 1971. He also stated that his expenditure per month is '88.2.6d. He swore with respect to the plaintiff\'s income as follows:

\"13. That the applicant to the best of my knowledge, information and belief, owns a motor car and derives a monthly income of '133 10.04 from her employment as a Research Officer with the Western State Ministry of Agriculture and Natural Resources Ibadan. I put her to strict proof of here income and assets from all sources.\"

We think we should point out at this stage that there was no matrimonial cause or proceedings concerning the parties pending before any court at the tine the application was made. Moreover, the Matrimonial Proceedings and property Act, 1970, under which it was brought, is an English Statute, some sections of which came into force on 1st August,1970, while the other provisions came into force on 1stJanuary,1971. Both dates, it will be recalled7 are subsequent to 17th March,1970, the date on which our Matrimonial Causes Decree came into force.

After hearing the arguments put forward by learned counsel for both parties, the learned trial judge, in a reserved ruling, granted the plaintiff the custody of the four children. On the question of maintenance, the judge, after reviewing the facts sworn to in the affidavit and counter-affidavit, rejected the facts in the affidavit sworn to by the defendant. He then found as follows:-

\" The applicant gives her annual salary as Research Officer in the Western State Ministry of Agriculture and Natural Resources as '1,422e I prefer this to the respondent\'s allegation that the applicant earns '133.1O.Od per month without giving the source of his information.

The respondent has not been sufficiently honest about the disclosure of his incomes and it is difficult to believe him. I accept the applicant\'s averments that the respondent\'s annual income is over '1,500. One would have liked to give consideration to the respondent\'s expenditures, but here again his story is difficult to believe as I have earlier observed.

In my view, the circumstances surrounding the respondent\'s motor accident and the attendant expenses, though unfortunate, have nothing to do with the respondent\'s obligation to his children.

The applicant claims that she spends '40 per 3nonth for the feeding of herself and the children. This does not appear reasonable and I think she should be spending about '50 of this on the four children, i.e. about '7.10.0d per child per month. She claims she spends '130 per annum for the children\'s clothes, this works out at '32.10.0d per child, i.e. about '3 per child per month. She pays '3 per month for a maid and '3 per month for a house-boy. She needs the services of these servants for herself and her children and the respondent should be made to make a contribution of about '3 per month in this respect.

In all the circumstances of this case, I consider the sum of '10 per month as reasonable maintenance for each of the four children. I hereby order that commencing from the 1st of April, 1973, the respondent shall pay to the applicant for the benefit of each of the four children of the marriage the sum of '10 per month for as long as they remain in the custody of the applicant. This amounts to '40 per month. This does not include the school fees which I also order the respondent to pay regularly from his own income.

I make no order for maintenance for the applicant.\" At the hearing of the appeal to the now defunct Western State Court of Appeal against the ruling, learned counsel who appeared for the appellant (e.g. the husband) contended that the Matrimonial Proceedings and Property Act, 1970 is not applicable to an application which is not an application in a matrimonial proceedings, and that even if it is applicable, it ceased to apply by virtue of the provisions of sections 1, 8, and 115(4) of the Matrimonial Causes Decree, 1970. In reply, learned counsel for the wife (that is, the respondent) said:-

\"I agree that the application was brought under English Law. I agree that English Law does not apply to Matrimonial Causes but this is not a Matrimonial Cause. The High Court by virtue of the Infants Law Cap. 49 W .N.L '.See sections 12 and 13.\"

In the judgement of the Western State Court of Appeal dismissing the appeal, the court, when dealing with the arguments as to which law is applicable, observed: -

\"In reply, Mr. Afe Babalola, learned counsel for the respondent agreed that the application was brought under the English Act and that English Law does not apply to Matrimonial Causes1 He however submitted that the application is not a matrimonial cause or matter. He referred to sections 12 and I3 of Infant S Law under which he submitted, the Court had jurisdiction.

The Court of Appeal then went on to hold, rightly in our view that the application is not a matrimonial cause under the Matrimonial Causes Decree, 1970, and is therefore not one that is prohibited by virtue of section 1(1) of the said Decree from being instituted other than under the said Decree. The court then observed that the trial judge entertained the application under the English Act of 1970, under which it was brought.\"

On the concession made by learned counsel for the respondent that the application had been brought under the wrong law and that the Infants Law of the former Western State of Nigeria is the law applicable, the Court of Appeal observed:-

\"With all respect to the learned counsel, we think he is in error. While the sections refer to custody of a child, and maintenance of the child, nothing is said about maintenance of a party to the marriage. They therefore do not cover such proceedings as that for the maintenance of a wife.

But the present application included one for the maintenance of a wife and to that extent therefore, it could not have been entertained under sections 12 and 13 of the Infants Law.\"

In the course of his argument before the Court of Appeal, learned counsel for the appellant also submitted that the trial judge was in error in acting oil conflicting affidavits without inviting the parties to call oral evidence either by themselves and/or by witnesses to resolve the conflicts on the facts before the court. With respect to this submission, the Court of Appeal said:-

\"Mr. Fawehinmi asked us to consider his submissions on the grounds on the assumption that the Matrimonial Causes Decree, 1970, applies. Since he did not make any submission in the alternative, if the said Decree does not aprly the submissions are irrelevant. In view of our conclusion on Ground 1 that the Matrirnonial Causes Decree, 1970 does not apply, we have nothing more to say than that these grounds do not succeed.\"

In the further appeal to this court against 25 the ruling of the trial judge and its confirmation by the Court of Appeal, the points canvassed before us would require answers to the following questions. Does the English Matrimonial Proceedings and Property Act, 1970 apply' If it does not, what law is applicable and has the High Court jurisdiction to apply that law' Irrespective of what law is applicable, was the learned trial judge in error in granting the plaintiff/respondent\'s application for the custody of the children and for their maintenance as he did without asking the parties to call oral evidence, notwithstanding the apparent conflicts in the affidavit and counter affidavit'

In our view, both the learned trial judge and the learned justices of the former Western State Court of Appeal were in error in holding that the Matrimonial Proceedings and Property Act, 1970 - an English Statute which came into force after our Matrimonial Causes Decree had come into force - is applicable to the plaintiff/respondent\'s application for the custody of the children and for their maintenance. Before the revised edition of the Laws of the former Western Region of Nigeria came into force in 1959, the only English Statutes in force in the Region, part of which later became known as the western State, arc the statutes of general application in force in England before 1900. The provisions in the High Court Law and in the Magistrates\' Courts Law which make such statutes applicable were del ted from the Revised Laws and consequently those statutes were no longer in force in the Region. Furthermore, we are not aware of any Statute Law in the Western State ,and our attention was not called to any such law, which makes any English Statutes, (which1 in effect, is a statute of another country), passed either before or after 1900 applicable in the State. As a matter of fact, the words \"regional law\" is defined in the Revised Edition of the Laws Law of the then Yestern Region (No. 6 of 1959) as -

\"(a) any law enacted by the Legislature of the Western Region on or before the pointed date except in so far as it relates to a matter included in the Exclusive Legislative List or applies only to Lagos;

(b) any Ordinance enacted by theLegis1ature of Nigeria or the Federal Legislature that has effect on the appointed date in relation to the Western Region, by virtue of the provisions of section 57 of the Constitution Order, as if it were a Law enacted by the Legislature of that Region.\'

Suffice it to say that we have not been able to discover since the \"appointed date\" (which is 31st January, 1959), any legislation, whether30 Federal or State, which Make any English Statute passed after 1900, and in particular the Matrimonial Proceedings and Property Act, 1970, applicable in the Former Western State.

If any law is applicable at all to the case in hand, particularly with respect to the custody and maintenance of the children of the marriage, it is, we think, the Infants Law (Cap. 49 of the Laws of the Western State). Section 12 of the said Law reads:-

\"12 (1). The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this

Law; and in every case may make such order respecting costs as it may think just.

(2) The power of the Court under sub-section (1) of this section to make an order as to the custody of a child and the right or access there-to way be exercised notwithstanding that the mother of the child is then residing with the father or the child.

(3) Here the Court under subsection (1) of this section snakes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father, the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable.

(4) No such order, whether for custody or maintenance shall be enforceable, and no liability there-under shall accrue, while the mother resides with the father, and any such order shall cease to have effect if for & period of three months after it is made the mother of the child continues to reside with the father.

(5) Any order so made, may, on the application either of the father or mother of the child, be varied or discharged by a subsequent order.\"(The underlining is ours).

The next question is this. Can a court make an order under the Infants Law notwithstanding the fact that the application to it was made under another statute which is clearly in-applicable' In our view, if a relief or remedy is provided for by any written law (or by the common law or in equity for that matter), that relief or remedy, if properly claimed by the party seeking it, cannot be denied to the applicant simply because he has applied for it under the wrong law1 To do so would be patently unjust. Moreover, the objection to the application of the provisions of section 12 of the Infants Law in the particular circumstances of the case in hand, while it appears to be correct, is of a purely technical nature, and the Western State Court of Appeal should not have refused to do substantial justice between the parties upon a pure technicality. (See G. B. Ollivant V. Vanderpuye (1935) 2 N.A.C.A. 369 at p. 370).

Unfortunately for the applicant, the matter does not rest there. There can be no doubt that at the time he was considering the application, the learned trial judge had two conflicting affidavits before him, one sworn to by the wife and the other by the respondent husband. It is clear that the principal issues in conflict deal with the means of the parties; and these are issues which the court must consider in coining to a decision as to whether it should make an order for maintenance under section 12(3) of the Infants Law.

We have pointed out on numerous occasions that when a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call. It does not matter whether none of the parties asked to be allowed to cross-examine any of the deponents or to call any witness. Such omission by the parties should not be taken to amount to consent that affidavit evidence should be used in such circumstances. (See Akinsete V. Akindutere (1966) 1 All N.L.R. 147 at p. 148; Eboh & ors v. Oki & orse (1974) 1 SC'179 at pp. 189-190; Olu-Ibukun & anor. v. Oku- Ibukun (1974) 2 sc.41 at p. 48; and Uku & ors. V. Okumagba & 3 ors. (1974) 3 SC.35 at pp. 56, 64-65).

Since the decision of both the High Court and the former Western State Court of Appeal were based on these conflicting affidavits, we do not think they should be allowed to stand. The appeal is reluctantly allowed. It is accordingly ordered that the ruling of the High Court in Suit No. MI 49/71 delivered on 14th March, 1973, and the decision of the Western State Court of Appeal in Appeal No. CAW/22/74 delivered on 14th November, 1974, confirming the said ruling, including all orders as to costs in both decisions1 be and are hereby set aside. It is further ordered that the application of Elisabeth O. Falobi (the plaintiff respondent) be reheard by another judge.

The respondent/appellant is awarded costs of the appeal which we assess in the Western State Court of Appeal at N 60.00 and in this Court at N140.00. The costs of the hearing in the High Court will abide the result of the rehearing.