IN THE SUPREME COURT OF NIGERIA

Suit No: FSC188/1963

Petitioner: Francis Ibezi Enekebe
And
Respondent: Christina Enekebe & Oduche Ajako

Date Delivered: 1964-03-09

Judge(s): Sir Lionel Brett, John Idowu Conrad Taylor, Sir Vahe Bairamian

Judgment Delivered

In this appeal the husband, who is the petitioner in Suit K/46/61 of the High Court of Northern Nigeria (Kano Division), complains that his petition was wrongly dismissed.

He and his wife married in May, 1938. They lived in Kano, but they did not get on very well. She left in December, 1942; and they have lived apart since. In his amended petition he alleged adultery, cruelty on 12th December, 1950, and persistent nagging. The trial Judge (Bate J.) did not think the adultery was proved; he regarded the assault in December, 1950 as trivial; he found, however, that the wife had been guilty of cruelty before leaving Kano, but he dismissed the petition on the ground of culpable delay.

The learned Judge asked the husband about the delay, and his answers were:

'Cannot say why I have taken so long to bring this Petition except that I gave my wife a long time to repent; i.e., to change her vindictive habit. When she committed adultery, I gave up all hope of her ever repenting; i.e., in 1947 or 1948.\"

After she left in December, 1942, he was not without company: he sent money to his brother in 1943 for another woman, and in 1949 he went home to Nkpor (near Onitsha) and paid for another woman; he lived with them both, and had children from each; he wanted to marry them, he said, by the Ibo native law and custom of Nkpor.

In addressing the Court, his learned Counsel dealt with delay; he mentioned the petitioner\'s evidence, and cited Latey on Divorce (14th ed.) at p.158 (paragraph 283 - Delay must be culpable). There Binney v. Binney [1936] P.178, is the latest of the cases cited. On discretion he cited Latey, p. 163, paragraph 296, which mentions Blunt v. Blunt [1943] A.C. 517. The notes of Counsel\'s argument do not indicate that he asked the Judge to have regard to the principles in Blunt v. Blunt as a counterweight to culpable delay. A petitioner who is guilty of adultery must plead for the exercise of discretion in his favour; presumably it was in this connection that Counsel cited paragraph 296 in Latey.

Dealing with the delay in the presenting of the petition, Bate J. found it was culpable, and dismissed the petition. The grounds of appeal complain that he misapplied the decision in Binney v. Binney, and that in dismissing the petition on the ground of undue delay he failed to direct his mind to the obvious breakdown of the marriage and \'the conditions of the portions [probably a mistake for \'parties\'] at the date of presentation of the appeal [probably a mistake for petition].

The argument is that in this case there were other factors - two women whom the husband would like to marry and make his union with them regular, and although their children would not be legitimised, it would look nicer for them too. The marriage had broken down and there was no prospect of reconciliation; and the balance in the interest of the community was to dissolve it. The principles in Blunt v. Blunt applied in spite of the delay. That was the argument.

The argument for the wife is that the learned Judge had regard to whatever was raised in evidence, and even if he did not mention the breakdown of the marriage, he no doubt had it in mind; that the Judge gave his reasons and his exercise of discretion should not be tampered with.

The judgement notes that for thirteen years or more after the husband had known of his wife\'s adultery and gave up hope of her giving up her vindictive habits, he did not petition for divorce, although he had already taken another woman after his wife left Kano in 1942, and another in 1949, and had children by them; that he could have petitioned for adultery and earlier still for cruelty, but did not till 1961; and the judgement goes on

'Although the petitioner\'s wish to marry the women named in the discretion statement is no doubt laudable, his failure to take any steps for so many years after he claims to have heard of his wife\'s adultery and after the acts of cruelty amounts to acquiescence. His delay is culpable delay. I am not without sympathy for the petitioner but, as was said in Binney v. Binney, personal sympathies are not a proper ground for exercising judicial discretion. I hesitate to debar the petitioner from relief but his delay is unexplained, unexcused and so long that, if I do not exercise my discretion to debar the petitioner in this case, I find it difficult to imagine circumstances where I could fairly and consistently do so.'

The relevant provision in the Matrimonial Causes Act, 1950, is in Section 4(2):

'Provided that the Court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the Court, the petitioner has been guilty

(i) of unreasonable delay in presenting or prosecuting the petition.'

That is intended to make a spouse diligent in presenting his or her petition, for it is in the public interest that he should be diligent; and a husband who is late in petitioning may well give ground for saying that he has acquiesced in the misconduct of his wife or is indifferent to the loss of her company. The present appellant was certainly indifferent: he had other company.

It is true that in spite of unreasonable delay, the court may grant a divorce having regard to the considerations mentioned in Blunt v. Blunt, [1943] A.C. 517, which are, at p.525

'(a) the position and interest of any children of the marriage;

(b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;

(c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband wife; and

(d) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably.'

After giving those considerations (which had been stated in Wilson v. Wilson) (1920) P. 20) Lord Simon went on to say in Blunt v. Blunt

'To these four considerations I would add a fifth of a more general character, which must, indeed, be regarded as of primary importance, namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.'

There was no question of delay in Blunt v. Blunt; there was (a) in Binney v. Binney (above), (b) in Purton v. Purton [1957J 1 W.L.R. 216, and (c) in England v. England [1961] 1 W.L.R. 608. From case (b) (at p. 218) it appears that cases of culpable delay in which a divorce is granted are rare; from cases (b) and (c) it appears that there may be reasons which, the delay notwithstanding, may make it desirable, in the light of Blunt v. Blunt, to exercise the discretion in favour of granting a divorce.

One of the reasons advanced is that the marriage has broken down. So it did in Binney v. Binney and the other two cases; so it does generally in any case of culpable delay; and if that could serve as a good reason to outweigh the delay, then delay would cease to be a bar, and the statutory provision that divorce may be refused on the ground of unreasonable delay would become a dead letter. Although Bate, J. did not mention the breakdown of the marriage specifically when dealing with delay, it was doubtless present to his mind, as appears from perusal of his judgement; and it would be rash to assume that a careful Judge of his experience failed to take it into account because towards the end of a long judgement he did not specifically mention it, particularly as he said he was in sympathy with the petitioner: (cf. Blunt v. Blunt, at bottom of p. 528).

The other reason advanced is that the husband would like to regularise his union with the two women living with him by marriage under native law and custom, and that it would look nice for the children too. The children would derive no advantage; that was conceded and was not pressed. As to the wives, whose interest was pressed, they and the petitioner have been content to live together as they have done for years. Bate, J. was in sympathy with the petitioner\'s wish to marry them, but did not regard it as outweighing the culpable delay in the presenting of his petition for divorce.

The discretion conferred on the trial Judge is unfettered, but there is a right of appeal, and, to quote from Lord Simon\'s speech in Blunt v. Blunt (above, at p. 526)

'If it can be shown that the Court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the Court's discretion will have been exercised on wrong or inadequate materials, but, as was recently pointed in this House in another connexion in Charles Osenton v. Johnston [1942] A.C. 130,138:

'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations ... then the reversal of the order on appeal may be justified.'

Osenton\'s case was one in which the discretion being exercised was that of deciding whether an action should be tried by an official referee, and the material for forming a conclusion was entirely documentary and was thus equally available to the appellate Court. The reason for not interfering, save in the most extreme cases, with the Judge's decision under s. 4 of the Matrimonial Causes Act, 1937, is of a far stronger character, for the proper exercise of the discretion in such a matter largely depends on the observation of witnesses and on a deduction as to matrimonial relations and future prospects which can best be made at the trial. In Holland v. Holland [1918] P. 273, 280, Swinfen Eady M.R. defined the only issue that can be raised in the Court of Appeal in challenge of the exercise of the divorce Judge\'s discretion thus:

'The question for consideration by this Court is whether his judgement is erroneous, and not whether we should have exercised the discretion in the same manner as the Judge below did. There is no appeal from his discretion to our discretion, and the appellant is not entitled to succeed unless the judgement is erroneous.'

The judgement under appeal is not erroneous in my view, and the reasons now advanced were present to the trial Judge's mind. Apparently the argument is that the appeal should be allowed because the judgement, when dealing with delay, does not expressly mention Blunt v. Blunt and its considerations as bearing on the question of delay. That is not a ground of substance, as those now advanced were present to the Judge\'s mind. The petition for divorce was rightly refused in my opinion.

I have to add - and in this I differ with regret from my learned brother Taylor, J.S.C. - that in my view there is no ground for remitting the case to the trial Judge for a reconsideration of the exercise of discretion in the light of further evidence which the petitioner might call on the question of his marrying the two women living with him and of their interest in his having a divorce. Learned Counsel for him has not asked for it to be done. In principle it is the duty of a party to adduce

the evidence he wishes at the trial. If his learned Counsel had wished to bring out more on the interest of those women, he could have done so when the petitioner was testifying on how he had got them to live with him in the course of his evidence, or later; and he had the opportunity of calling any other evidence he wished on that point in the course of the case for the petitioner. In the cases on discretion which I have seen, the trial Court goes by the material presented to it, and the Court of appeal goes by the material in the record. The powers of this Court are large and wide; but it is the practice, briefly put, to refuse an application to adduce more evidence which the applicant could have adduced at the trial. Here there is no application, and I am reluctant to introduce the idea - for which I know of no precedent - of remitting a case for more evidence, particularly where it has not been applied for.

I propose that the appeal of the petitioner from the decision of 4th September 1962 given by Bate J. in the Kano Suit No. K/46/1961, be dismissed.

Judgement delivered by
Sir Lionel Brett. J.S.C

I agree with Bairamian, J.S.C., and the judgement of the Court will be as he proposes. It is true that in matrimonial proceedings the Judge does not sit 'merely as an umpire between conflicting parties'; Noble v. Noble & Ellis [1963] 1 W.L.R. 1395. But his 'inquisitorial' duties are not unlimited and just as, where a contract is not manifestly illegal, an appeal court will not order a retrial merely because the Judge did not inquire into a possible latent illegality which was not pleaded, so I think it would be contrary to accepted practice to allow an appellant in matrimonial proceedings to complain because the Judge did not intervene by calling for further evidence as to the interest of someone who was neither a party nor a child of one of the parties. In a homogeneous society a Judge can draw on his own knowledge in assessing what benefits are likely to accrue to a woman named in a discretion statement if the petitioner is made free to marry her. In the present case the judge could not have done so, and if the appellant had wished to ensure that the judge arrived at a correct assessment of how far the interests of the women named were likely to be affected by his decision, he should have called evidence on the point.

Dissenting Judgement delivered by
John Idowu Conrad Taylor. J.S.C

The appellant, the husband, petitioned the High Court of Kano Judicial Division, for a dissolution of his marriage to the present respondent, the wife, on the grounds of cruelty and adultery. One Oduche Njoku, the co-respondent in the High Court, was cited. The appellant also sought for the exercise of the Court's discretion on his behalf in view of his adultery, the facts of which were set out in a discretion statement filed by him in that Court.

The learned trial Judge at the close of the case dismissed the petition. He found that the charge of adultery was not proved but found that that of cruelty was proved. The reason for dismissing the petition was because of the culpable delay on the part of the petitioner (appellant) in presenting his petition. The learned trial Judge said this on the issue of delay:

'Although the petitioner's wish to marry the woman named in the discretion statement is no doubt laudable, his failure to take any steps for so many years after he claims to have heard of his wife's adultery and after the acts of cruelty amounts to acquiescence. His delay is culpable delay. I am not without sympathy for the petitioner but, as was said in Binney v. Binney, personal sympathies are not a proper ground for exercising judicial discretion. I hesitate to debar the petitioner from relief but his delay is unexplained, unexcused and so long that if I do not exercise my discretion to debar the petitioner in this case, I find it difficult to imagine circumstances where I could fairly and consistently do so. It would be absurd to grant a divorce on the ground of acts of cruelty committed twenty years ago and I must decline to do so.'

At the hearing of the appeal, Chief Moore abandoned the first of his grounds of appeal which related to adultery and put forward arguments the substance of which was that the learned trial Judge failed to give consideration to some of the guiding principles in the exercise of his discretion as enunciated in the case of Blunt v. Blunt [1943] A.C. 517, 522.

Counsel for the respondent on the other hand contended that the trial Judge did consider the said principles and properly exercised his discretion. He however went on to say that the Judge\'s discretion was unfettered and that once the trial Court has exercised its discretion and has given sufficient grounds for its exercise, the appellate Court will not interfere.

The learned trial Judge exercised his discretion under, s.4 of the Matrimonial Causes Act, 1950. It is the first proviso to this section that is important for the purposes of this Appeal, and it reads thus:

'Provided that the Court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the Court, the petitioner has been guilty

(i) of unreasonable delay in presenting or prosecuting the petition...'

The question of undue delay was never raised by the respondent in her answer to the petition but was a matter raised by the Court in the exercise of its discretion. It was raised by the Court putting questions to the petitioner after he had been re-examined, and throughout the record, with the exception of the address of Counsel on the issue of delay, it was the only enquiry made by the Court. It is contained in five lines of the record which read thus:

\"By Court:

Cannot say why I have taken so long to bring this petition except that I gave my wife a long time to repent; i.e., to change her vindictive habit. When she committed adultery, I gave up all hope of her ever repenting, i.e., in 1947 or 1948.'

It is my view that when the Court invokes s.4 of the Matrimonial Causes Act to dismiss a petition because of culpable delay, not raised in the pleadings, more enquiry is required of it than was made in the case on appeal. I am not saying that it is the duty of the Judge to call for further evidence. In this I would agree with the learned Author of Rayden on Divorce, 8th edition, when he says at page 223 that:

'It is submitted that if a respondent seeks to rely on any matter which is a bar to relief, whether absolute or discretionary, it should be pleaded specifically in the answer. But the fact that the matter is not pleaded does not relieve the Court of the duty of taking notice of, investigating, and if proved, acting on it; and in such a case, the Judge should intimate to Counsel the nature of the issues which appear to be arising and, if necessary, adjourn the case to allow the pleadings to be amended so as to raise those issues'

At the stage when the trial Judge began his enquiry, he should in my judgement have made it clear to Counsel that the additional issue of culpable delay appears to arise and that the additional burden of satisfying the Court on this issue was placed on the Petitioner. Counsel would then have been in a position to request an adjournment if necessary to amend his pleadings or call additional evidence. As it was, the case proceeded and no further mention was made of, nor any question put to any other witness testifying at the trial on the issue of delay in presenting the petition.

Now, quite apart from that, what are the matters to be borne in mind by a trial Judge in the exercise of his judicial discretion under this proviso to s.4 of the Matrimonial Causes Act 1950. As I have said before, they are contained in Blunt v. Blunt where Viscount Simon L.C. said at page 525 that:'

'In Wilson v. Wilson, Duke P., in dealing with the particular case before him, mentioned four circumstances which, in his view, warranted the exercise of the judicial discretion in the petitioner\'s favour, and these four considerations were referred to with approval by Lord Birkenhead, L.C., when he was sitting in the divorce Court and deciding Wilkinson v. Wilkinson. These four points are:

(a) the position and interest of any children of the marriage;

(b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;

(c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and

(d) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably.

To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, namely the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.'

There was no consideration given by the learned trial Judge to the second or the fifth points to which I have drawn attention above. To assume that the learned trial Judge must have considered these matters is an assumption which cannot be borne out by the silence of the record on the matters, and the fact that the only authority to which reference was made by the trial Judge was that of Binney v. Binney [1936] P. 178 at 181 which, though decided after Wilson v. Wilson [1920] P. 20 where the first four circumstances warranting the exercise of judicial discretion in the petitioner's favour were laid down, was nevertheless decided some seven years before the last circumstance was laid down in Blunt v. Blunt. This last consideration Viscount Simon described as 'of primary importance.'

With respect to the trial Judge, his considerations were centred wholly on the interests of the petitioner without giving any consideration to the interests of the two ladies with whom the petitioner was living, who may very well have been unaware of the fact that the petitioner had contracted a marriage according to the ordinance with anyone before they came to live with him put at its lowest, and at its highest before they came to marry him in accordance with native law and custom. It should be borne in mind that the petitioner was married in and domiciled in Northern Nigeria and in the absence of evidence it would be wrong to ascribe knowledge of the previous marriage according to the ordinance to the two ladies to whom I have already made reference.

It was Lord Merrivale P. who said in the case of Apted v. Apted and Bliss [1930] P. 246 at pages 255 and 256 that:

'....a judicial discretion cannot be rightly exercised except upon due ascertainment of the relevant facts, and every interest involved is a proper matter for consideration.'

I am not going to speculate as to what the interests of the two ladies involved may be, nor do I think it is our duty so to do in the absence of any evidence on the point. All I will say at this stage is that their interests after being ascertained must be weighed against that of a respondent who has been found guilty of legal cruelty and whose marriage has utterly broken down. The fact that there are two ladies concerned need create no difficulty in view of the legality of a marriage under Native Law and Custom to more than one lady. Blunt v. Blunt therefore must be applied, having regard to recognised local custom on marriage.

When I consider the fifth consideration laid down in Blunt v. Blunt, I find it extremely hard to persuade myself into the belief that had the trial Judge had this authority before him, he would have come to the same conclusion he did. Here was a petitioner married according to the Marriage Ordinance in 1938 to a lady on whom he had previously paid bride price, for he himself said in his evidence that:

'In 1938 I sent bride price to my brother at home to marry me a wife and he did so.'

After marrying according to the Ordinance, he later sent or paid 'bride price' on two other ladies. This is what he said in his evidence:

'In 1943, I sent money to my brother for another woman with whom I am now living. In 1949 I visited relations at home

and paid for another girl; she was from Nkpor.'

At the time the other two ladies came to live with him, the evidence shows that the respondent was no longer in the matrimonial home. If in fact the payment of bride price on the two ladies concerned constituted a marriage in accordance with the Native Law and Custom of Nkpor, then I find it hard to see how a perpetuation of the relationship between the four persons concerned, a relationship which put at its highest - is a bigamous one, can be in keeping with the fifth consideration mentioned in Blunt v. Blunt. I am aware of the fact that the petitioner later on said that:

'I want to marry these girls by Ibo native law and custom previously prevailing at Nkpor.'

This evidence is of course in conflict with his earlier statement about marrying a wife in 1938 by merely sending the bride price.

It was said in Charles Osenton v. Johnston [1942] A.C. 130 at 138 that:

'But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then, the reversal of the order on appeal may be justified.

In this case on appeal, it is not a matter of insufficient weight not having been given, but a matter of no weight in the sense that the points above dealt with were not considered. There was another point mentioned by Chief Moore in his argument, the substance of which was that in view of the acceptance by the trial Judge of the evidence of the petitioner that the respondent fought with him in 1950, and tore his clothes, this latter act revived the acts of 1942 which the trial Judge found constituted cruelty, and therefore the period of delay began to run from 1950, and not 1942. Our attention was drawn to Bertram v. Bertram [1944] P. 59 at 60 where Scott L.J. said that:

'In a case... of cruelty, very slight fresh evidence is needed to show a resumption of the cruelty, for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out.'

This was never put before the learned trial Judge for consideration and I am not sure in the absence of authority whether Rutter v. Rutter 123 L.T. 585 dealing with subsequent adultery is an answer on this issue to a case dealing with subsequent acts of cruelty.

For the reasons already mentioned I am of the view that a retrial ought to be ordered but since this is a minority judgement, there is no need for me to say more than has been said.