VALIDITY OF PRE-NUPTIAL AGREEMENT IN NIGERIA AND THE PUBLIC POLICY TEST*

Abstract

The legal effect of prenuptial agreement is a developing issue in the Nigerian Jurisprudence. The English law background of Nigeria sets the stage to question the enforceability of prenuptial agreement especially with the question of intention to enter into legal relation over such contract. In the absence of express legislation covering the field, this works draws from other relevant legislations and judicial pronouncement in answering the question of whether or not a prenuptial agreement is enforceable in Nigeria despite the position at common law where prenuptial agreements offends the public policy test, and the Courts in England and Wales through the cases are reluctant to alter this position. The research critically analysis prenuptial agreements through the lens of the public policy test to justify the position of the Nigerian Courts on same. This article adopted doctrinal approach and reliance is placed more on case law from Nigeria and the United Kingdom. The research also adopted an analytical approach and utilised both primary and secondary sources of academic materials.

Keywords: Prenuptial Agreement, Ante-nuptial Agreement, Validity, Marriage, Enforceable

1. Introduction

The increase in the incidence of dissolution of marriage in the Nigerian society has necessitated intending couples to consider a prenuptial agreement, especially with regards to what happens to property, third parties such as children as well as other interest arising from the marriage. These considerations have given rise to the development of prenuptial agreement. The term pre-nuptial agreement is defined as an agreement made before marriage to resolve issues such as support and property division in the event that the marriage ends in divorce or by the death of a spouse.[1] It is also termed ante-nuptial Agreement; ante-nuptial contract; premarital agreement, premarital contract; marriage settlement –sometimes shortened to prenup.[2] The sources of the Nigerian law includes Received English Law, comprising Common law of England and Statutes of General application in force in England before October, 1, 1960, the year Nigeria became independent from the British. This being the case, decisions rendered by the English Courts based on statutes predating the Nigerian independence or Nigerian Statutes which are in *pari materia* with statutes in force in England, still enjoy persuasive effect within the ambit of the Nigerian jurisprudence. Thus, in the absence of Nigerian statutory provisions or decisions of the superior Courts of Nigeria on a point, there could still be a resort to opinions expressed by English judges in their judgments.

Based on the traditional English jurisprudence, *pre –nuptial* agreements were ruled unenforceable, being perceived as contrary to public policy for undermining the concept of marriage as a lifelong union.[3] The Hyman v Hyman case in very clear terms laid down the principle that public policy should preclude the enforcement of pre-nuptial agreements which often provided for the eventuality of divorce. However, in that dispensation '…ante-nuptial agreements may have evidential weight when the terms of the agreement are relevant to an issue before the Court in subsequent proceedings for divorce.[4]Thus in an application for ancillary relief, the existence of an ante-nuptial agreement is a factor to be considered in the exercise by the Court, of its discretion to grant ancillary relief'[5].

Therefore, although traditionally the general rule that *ante-nuptial* agreements are contrary to public policy held sway, that concept was substantially whittled down by more recent decisions of the English

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[1] B. Garner and H. Campbell, *Black's Law Dictionary*, 10th Edition

[2] ibid

[3] *Hyman v. Hyman* (1929) AC 601

[4] *N v. N* (Divorce: Ante-nuptial Agreement) (Jurisdiction: Pre-nuptial Agreement (1999) 2 FLR 745.

[5] *Halsbury's Laws of England* 4th Edition (reissue) Vol 29 (3) Page 32.

Court where the issue fell on ancillary orders with respect to property in divorce proceedings.[6] The recent global trend towards popularity of nuptial agreements can however be traced to the Hague Convention, on the Law Applicable to Matrimonial Property Regime which gave legal approval to global application of pre- nuptial agreements.[7] The extant statutory provisions in matrimonial causes in Nigeria are the Matrimonial Causes Act[8], and the Marriage Act.[7] All matters with respect to the matrimonial causes are adjudicated upon within the ambit of the Matrimonial causes Act and the subsidiary Rules made thereon. The statute having been enacted, thus supersedes all references to the English jurisprudence, save that decisions of the English Courts as well as decisions from superior Courts of record in other Commonwealth countries may have some persuasive effect, especially where they are based on interpretation and application of are similarities in the terms of the relevant statutory provisions.

In Nigeria, the terminology recognized and adopted by statute is *'ante-nuptial* agreement. Section 72 of the Matrimonial Causes Act[9] which deals with the power of Court in proceedings with respect to settlement of property stipulates thus:

'power of court in proceedings with respect to settlement of property

(i) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the properties are, or either of them is entitled (whether in possession or reversion) as the Court considers just and equitable in the circumstance of the case.

(2) The Court may, in proceedings under this Act, make such order as the Court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post –nuptial settlements on the parties to the marriage, or either of them. (Emphasis supplied)

Subsection (1), of the Act preserves the power of the Court to compel the parties to a marriage to effect such settlement of property to which the parties are entitled in circumstances that are just and equitable. This will exist, where the parties did not engage in an *ante-nuptial* agreement, and where the Court elected not to unilaterally resolve hostile claims as to entitlement to contested property. On the other hand, subsection (2) recognizes the fact that parties may wilfully enter into an *ante-nuptial* agreement as to the settlement of their property. In this stead, it is trite that where parties have entered into a contract or agreement voluntarily, the terms of such agreement will be binding on them. This is primarily because a party cannot ordinarily resile from a contract or agreement just because he or she later found that the conditions and terms of the contract or agreement, are no longer favourable.[10]

Flowing from the foregoing is the legal position that like parties to a contract, the Courts are equally bound by the terms of the contract the subject matter of proceeding before them. Therefore, a court in the determination of rights, duties and obligation reserved in the contract or agreement, must respect the sanctity of the contract or agreement. The Court will thus not allow a term on which there was no agreement to be introduced into the crystalized understanding of the parties as executed by them.[11] However, the foregoing established rule of law is subject to the equally well recognized principle that

[6] *Granation v. Radmacher* Suit No. (2010) UKSC 42 Judgment, delivered on 20th October,2010 by the Supreme court of England.

[7] Known as The 1905 CONVENTION

[8] Matrimonial Causes Act, Cap M7 Laws of the Federation of Nigeria 2004

[9] Matrimonial Causes Act, Cap M7, Laws of the Federation of Nigeria

[10] See *Attorney General, Rivers State v. Attorney General Akwa Ibom* state (2011) 8 NWLR (Part 1248) 31; *Econet Wireless (Nig) Ltd v. Econet Wirless Ltd* (20140 7 NWLR (Part 1405) 1 at 41 (Para B-D)

[11] See *Ibama v. S.P.D.C (Nig) Ltd* (2005)17 NWLR (Part 954) 364; *Idufueko v. Pfized Products Ltd* (2014) 12 NWLR (Part 1420) 96.

enforceability of the contract or agreement as executed by the parties will, be conditioned on the absence of fraud, illegality, mistake, deception, misrepresentation and where the agreement is not contrary to public policy.[12]

In this regard, Section 72(2) of the Matrimonial Causes Act, having recognized and legislated on how an *ante –nuptial* agreement may be treated by a Court, has legitimized beyond contest the concept of *ante-nuptial* agreement within the ambit of the Nigerian jurisprudence. It is thus not *prima facie* illegal or contrary to public policy. Reference to Section 72(2) of the Matrimonial Causes Act will clearly disclose that an *ante-nuptial* agreement is thus enforceable under the following considerations, namely:

(i) The Nigerian Court may in a matrimonial cause when confronted with an *ante-nuptial* agreement, make such orders that are:
(a)Just and
(b) equitable;

(ii) there must be application of the parties for the benefit of:
(a) all or any of the parties, and
(b) the children of the marriage;

(iii) The order may affect the whole or part of the property, the subject matter of an *ante-nuptial* agreement.

The use of the expression 'May' in Section 72 (2) to activate the exercise of judicial power by a Court in such circumstances is directory.[13] It imports the exercise of discretion in the consideration of the terms of each agreement. Being a matter of discretion, it behoves the Court to approach the provisions of an *ante-nuptial* agreement, 'judicially and judiciously' having regard to all the circumstances of the case; the foremost consideration being that the parties wilfully entered into an agreement which ordinarily ought to be sacrosanct. Thus, in the absence of compelling circumstances why the discretion ought to be exercised in departure from the terms of the agreement, which the reneging party bears the burden of establishing, the sacrosanctity of the agreement ought to be preserved. In this regard, where an examination of the *ante-nuptial* agreement under consideration reveals clearly that either of the parties did not negotiate from a position of weakness, both parties expressing clearly the desire to maintain their independence from inception, abrogation of the agreement to enable one party claim the property of the spouse will not be equitable or just. Some of the reasons the courts are reluctant to enforce ante nuptial agreements are;

2. Public Policy Argument

The strongest argument against the enforcement of prenuptial agreement is that it is against public policy. The English courts, as earlier observed since the case of *Hyman v Hyman*, have refused to enforce prenuptial agreements basically on this ground. A plethora of English judicial decisions till date, all point to the irresistible conclusion that the English courts are not willing to shift their ground. In *F v F*[14] for instance, Thorpe J. stated that pre-nuptial agreement must be of very little significance and the court cannot be influenced by contractual terms. Even in *N v N*[15], the public Policy argument still prevailed. The English judges' uncompromising stand to bend the rule, has elicited a lot of criticisms from academic scholars like Morley,[16] who has argued that the ruling in Hyman's case, against prenuptial agreements was based exclusively upon a judicial view of the state of Public Policy in 1929.[17] He forcefully further argued that the society has radically changed since 1929, and if the Courts were to consider the matter afresh, it would arrive at a new conclusion that binding pre-nuptial agreement does not contravene public policy as the earlier decision is now unfounded and unacceptable as the meaning of Public Policy is not static and changes with time.

[12] *Koumolis v. Leventis Motors Ltd* (1973) N.C. L.R 1 at 12-14
[13] (2010) 3 NWLR (Part 1182) 564
[14] [1995] F.L.R. 45
[15] [1997] F.L.R 900.
[16] J. D. Morley, 'Enforceable Pre-Nuptial Agreements: The world View'' www International divorce. com/ england. 17 of 23
[17] ibid

Public policy has been said to be 'a very unruly horse' which once you get astride it, you never know where it will carry you and it may lead you away from the sound law.[18] Generally, public policy means the ideas which prevail in the community as at the material time as to conditions which are necessary to ensure its welfare.[19] In that regard anything that is injurious to the public interest is considered to be against public policy. However, public policy fluctuates and is not fixed or stable. As ideas change with change in circumstances from generation to generation, new heads of policy come into being and old heads undergo modification. The common law position of prenuptial agreement being against public policy does not satisfy the current reality of the family unit as compared to what it was over 200 years ago. Indeed, what was obtainable in the past is radically different from our present reality. The truth is that marriage in the 21st century is not only a romantic relationship, but also a type of business relationship. This dual nature and purpose of marriage gives rise to an increasing need for prenuptial agreements to protect each spouse's financial interest when going into the union. There is the need for the Courts to have a reconsideration on this issue of Public Policy in the light of current opinion and social attitude that shapes our present reality which has been adopted in some countries such as the United States. The American Supreme Court of Florida in the case of *Posner v Posner*[20] refused to follow the English view that prenuptial agreements offends public policy, the Court stated that the English Public Policy argument was out of tune with current changes in the society.[21]

3. Sanctity of Marriage Argument

As mentioned earlier, it is an open secret that the traditional concept of marriage has changed substantially in many countries of the world in the past few decades. This is evidenced by the high rate of divorce that has been observed in many countries of the world. More marriages are now terminated by divorce than death. In England for instance, the Office for National Statistics (ONS) estimated in 2012 that 42% of marriages in England and Wales would end in divorce.[22] The divorce rate per 1000 married women is 16.9%.[23] This figure is nearly double that of 1960, and it is estimated that almost 50 percent of all marriages in the United States will end in divorce or separation.[24] This instability in the durability of the marriage institution which is supposed to be a life-long affair has naturally given rise to the need for courts to promote pre-nuptial agreements primarily to protect the interest of the couples in the event of divorce. Besides, a lot of drastic changes have also been observed in the areas of women's rights. Many international instruments on gender rights have sprung in the past few decades which aim at eliminating all forms of discrimination against women. Pre-nuptial agreement, from all indications, should be on the front burner as it allows the parties to take more responsibility in deciding their own lives. Marriage is now an equal partnership consequently, intending couples should, as much as possible, be encouraged to draw up their own marital agreement to suit their peculiar circumstance.

4. The Way Forward

The growing popularity of prenuptial agreement even in England was best captioned by the presiding judge in the English Dyer's case,[25] when he commented as follows;

> Prenuptials are common confetti in the U.S. where hardly anyone with big bucks walks down the aisle without one … but such contracts are still a rarity here, mainly because they are not strictly enforceable in the English courts. The law does however allow judges to take a pre-nuptial agreement into account, in dividing the spoils of a defunct marriage. And in a little noticed trend, the courts are becoming more and more willing to give substantial weight to the terms a couple agreed, before they said, I do.

[18] Burrough J in *Richardson v. Mellish* (1824) 2 Bing 229 at 252.
[19] C. Nissim (2012) 'Policy entrepreneurs and the design of public policy: Conceptual framework and the case of the National Health Insurance Law in Israel' *Journal of Social Research & Policy*, 3 (1): 5-26
[20] 233 So 2d 381 (FG 1979) In the case of *Fender v St. John* [1938] AC 1 ,the court stressed that public policy should not be based on the personal 'idiosyncratic' views of a few judges .
[21] ibid
[22] The blame game: Getting divorced in the UK, Schraer R, BBC News https://www.bbc.com/news/uk-44253225 viewed on 11th February, 2019
[23] ibid
[24] Wilson & Finekinbar Divorce Statistics, https://www.wf-lawyers.com/divorce-statistics-and-facts/ viewed on 11th February, 2019
[25] (2003) I F.L.R. 120

There is a dearth of judicial pronouncements on prenuptial agreements but the Nigerian Court of Appeal in *Oghoyone v. Oghoyone* [26] considered a case where parties had executed an *ante-nuptial* agreement with respect to some but not all the properties belonging to them. The facts of the case are as follows: In 1990, the Appellant married one Wilhemina Agatha Huyssodin, a dutch National. While that marriage was still subsisting, he married the Respondent on 9th April 1994 at the Lagos City Hall. The Appellant and Respondent had no children together. They were also involved in the sale of used cars imported into Nigeria. Before the marriage between the Appellant and Respondent was contracted in 1994, they both signed a document titled: 'Memorandum of Understanding between Mr. D.E. Oghoyone and Mrs. S. Patience Oghoyone on the sharing of the joint business interest and properties'. All the properties owned by both of them were listed and they agreed to share them as shown in the document. Subsequently, the Respondent commenced matrimonial proceedings against the Appellant at the High Court of Lagos State, Ikeja. The Respondent sought a declaration that the marriage between the Appellant and the Respondent was null and void. The Respondent also sought a declaration that she wholly or partially owned two properties respectively described as Plot L, Block 26, Amuwo Odofin Layout and Plot 316, Block8 Amuwo Odofin residential Estate. In the alternative to a declaration of her title or interest in the properties, the Respondent sought an order of sale of the properties and an award of two-third of the proceeds of sale to the Respondent.

In further alternative, the Respondent sought as order of settlement of the property on her for life: and upon her death that the properties be sold and two-third of the proceeds of sales. The ante-nuptial agreement was tendered as Exhibit P52. In preserving the inviolability of the agreement and excluding the properties which formed the subject matter of the *ante-nuptial* agreement from distribution, the Court held thus [14]: Now, the parties signed a memorandum which shows how they intend to divide/share their properties. The law appears well settled that oral evidence is inadmissible to contradict, alter, add to or vary it.[27] The law is clear. Where parties have reduced into written their contract the rule is that oral evidence is not allowed to be given to add, vary it, but oral evidence can be adduced to show that there is a mistake in the written agreement. That is by the way. The issue is what becomes of the house at Plot L, Block 26, Amuwo Odofin Layout….Since it is clear that the said property is not included in the list of properties in Exhibit P.52, that the parties agreed to share[28], the learned trial Judge had a duty to make a pronouncement on what becomes of the property after the marriage had been declared void.[29] By this decision, it seems that the Nigerian Courts have departed from the position at common law that prenuptial agreements offend public policy even though the issue was not directly canvassed in the Oghoyone Case.

In many jurisdictions across the world including Nigeria, the law regulating the sharing of marital property upon dissolution of the marriage is discretionary in nature. There are no laid down criteria, or framework that guide the exercise of this discretionary powers of the Court, everything, as highlighted earlier on depends largely on the whims and caprices of the presiding judge, who may decide to tilt in favour of one side or the other, and the decision of the court may be positively or negatively influenced by the judge's personal experiences. This uncertainty has given rise to cries of massive gender discrimination in many jurisdictions of the world. Prenuptial agreements therefore can easily mitigate the observed injustice in the system as it guarantees certainty, predictability and fairness in matrimonial proceedings.

5. Conclusion

There is no doubt that *ante –nuptial* agreements are not widespread in Nigeria. This is clearly owing to the cultural inclination of the society. This explains the dearth of Nigerian judicial pronouncements on the issue of *ante-nuptial* agreement. However, it can be safely contended that:

[26] Ibid

[27] See Section 132(1) of the Evidence Act, *Shettimari v. Nwokoye* (1991) 9 NWLR (Part 213) Part 60: *Sajere v. Iretor* (1991) 3 NWLR (Part 179) P. 340.

[28] (See pages 463- 467of the record of appeal)

[29] Section 17 of the Marriage Act.

(i) an *ante-nuptial* agreement is recognised under Nigerian law by statute;
(ii) an *ante-nuptial* agreement is thus enforceable and not illegal or contrary to public policy;
(iii) the Court ultimately has a discretion to make orders affecting distribution of property in a matrimonial dispute, having regard to all the circumstances of the case, including the existence of an agreement by the parties.