

PALM TREE JUSTICE AND SETTLEMENT OF MATRIMONIAL PROPERTY UNDER A STATUTORY MARRIAGE IN NIGERIA*

Abstract

This study examines how women under a statutory marriage in Nigeria benefits from properties she and her husband acquire during their marriage. The study went further to examine if court applies the concept of Palm tree justice while exercising their statutory discretion in settlement of matrimonial properties during dissolution of marriage. This study used doctrinal research method in analysing some texts, journals and articles by renowned scholars in respect of women's right to property in Nigeria. It is interesting to emphasize that women can as well, ask for a share of matrimonial properties without a matrimonial proceeding. It is observed that the court tend to ask for parties' contribution either to the purchase or development of the property/ies and the said contribution guides the court in the exercise of its discretion. The judges tend to employ the concept of Palm tree justice in a situation where law, equity and precedent cannot do the actual justice a matter requires. The judiciary has been exercising its discretion judiciously in favor of women that are able to lift the burden of proof imposed on them by giving credence to the doctrine of resulting trust. This study strongly recommends that women should ensure that any of their documentable contribution is documented.

Keywords: Palm tree justice, Matrimonial property, Settlement, Statutory marriage, Nigeria

1. Introduction

For better understanding, the discussion on the topic will start with the definition of some concept. The concept of palm tree justice is defined as justice summarily administered, especially without regard for legal principle or precedent.¹ Etymologically, it is with reference to the Islamic judges or qadi, who traditionally administered justice under a palm tree. The origin of palm tree justice concept can equally be traced to the Holy Bible where Deborah is portrayed as the best Judge and this made people to recognize her wisdom and come to her for counsel and conflict resolution.² It is said to be an old Arabic or Jewish idea of a wise man dispensing justice under a palm tree.³ Palm tree justice is equally referred to as an ad hoc legal decision-making, the judge metaphorically sitting under a tree to make rulings based on common sense rather than legal principles or rules.⁴ Literally, palm tree justice can be portrayed as a pragmatic approach to justice that is entirely discretionary and transcends legal rights or precedent, enabling the court to make such order as it thinks fair and just in the circumstances of the case. It is noteworthy that the palm tree justice concept more often than not is dismissed by legal luminaries as capricious, subjective and unprincipled variety of justice brought about by excessively liberal application of legal principles;⁵ this happens more often in criminal matters. Illustratively, Hon. Justice Abiriyi (J.C.A.) in a Nigeria matter, held that:

The Court below undoubtedly did palm tree justice in the case before it ... In the instant case, the prosecution charged the Appellant for a robbery in which not a single witness was called even though the prosecution had the names and addresses of five victims of the robbery who made statements that are attached to the proof of evidence. All five victims come from one village Donga. No police officer from Donga Police Station where the robbery was first reported testified. In spite of all these the Court below pronounced the Appellant guilty of the offence charged. The Appellant did not confess to the offence for which he was pronounced guilty. This was a travesty of justice.⁶

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¹ <https://www.lexico.com/definition/palm-tree_justice> (accessed on 19/10/2020)

² Judges 4:5

³ <https://en.wiktionary.org/wiki/palm_tree_justice> (accessed on 19/10/2020)

⁴ <<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100302992>> (accessed on 19/10/2020)

⁵ Saurabh Malik, Allow concept of 'palm tree justice' (published in *The tribune*, Chandigar, Monday 19 October, 2020) <<https://www.tribuneindia.com/news>> (accessed on 19/10/2020)

⁶ *Embarga v. State* (2018) LPELR – 44058 (CA)

The court went further to admonish that:

Trial Courts should not do palm tree justice because the idea of a wise man dispensing justice under a palm tree is unknown to our law. There was no basis for convicting the Appellant for the offence charged when the prosecution refused to prosecute the Appellant for the offences for which he was charged. It was equally a travesty of justice to rely on the uncorroborated purported statement of the Appellant to convict him of a purported offence for which he was not charged. The constitutional rights of the Appellant under Section 36(5) and (6) of the 1999 Constitution were thereby violated.⁷

However, in a matrimonial matter, as is analyzed below, the role of palm tree justice cannot be dispensed with in its entirety. Palm tree justice plays a role tantamount to exercise of court's discretion in the settlement of matrimonial property; even when the marriage is void or under custom. Meanwhile, the judges are to exercise the discretion, whether under the concept of palm tree justice or not, judicially and judiciously.

2. Systems of Marriage in Nigeria

There exist in Nigeria two different system of marriage law: a system based on English law⁸ and a system based on 'native law and custom'.⁹ Marriage under English law in Nigeria is referred to as statutory marriage while marriage based on native law and custom could be either customary/Islamic marriage. The conduct of statutory marriage in Nigeria is guided by Marriage Act¹⁰ while matrimonial proceeding, example of which is dissolution of the statutory marriage in Nigeria is guided by Matrimonial Causes Act¹¹ through judicial process in a High court of any state of the federation.¹² Statutory marriage is monogamous in nature; that is '... the voluntary union for life of one man and one woman to the exclusion of all others.'¹³ The proprietary rights of women in a statutory marriage are far protected than women under customary marriage. Upon divorce, a woman married under customary law has no claim over a house jointly owned by her husband. Her position is not helped by provisions of the Matrimonial Causes Act in respect of maintenance and settlement of property.¹⁴

3. The Innovations of Married Women's Property Act in Nigeria

Married Women's Property Act was enacted to remove married women's disabilities by placing married women on the same footing with their husbands with respect to contract, earnings, the ownership of property and the right to sue and be sued. In Nigeria, Married Women's Property Act of 1882¹⁵ gives women the right to acquire, hold and dispose of property, whether acquired before or after marriage. In addition, section 43 of Nigerian Constitution¹⁶ empowers every citizen with right to acquire and own immovable property anywhere in Nigeria. Some states¹⁷ of the federation have enacted Married Women's property Law in their various states and it has the same wordings as used in the Married Women's property Act of 1882.¹⁸ The issue of settlement of property/ies can arise either at the subsistence of a statutory marriage or at its dissolution. This paper discusses settlement of property in a statutory marriage while the marriage is subsisting and at its dissolution.

⁷ *Ibid*

⁸ Statutory marriage

⁹ Marriage under Customary law and Islamic law

¹⁰ Cap M6, Laws of Federation, 2004

¹¹ Cap M7, Laws of Federation, 2004

¹² Section 2(1) Matrimonial Causes Act

¹³ *Hyde v. Hyde* (1886) LR 1 P & D 130, 133

¹⁴ The Matrimonial Causes Act, expressly excludes the application of its provisions to marriages under customary and Islamic law

¹⁵ An Act which was imported from England, as a Statute of general application. It was held to be of persuasive guideline in *Arajula v. James Monday*, Suit No. 1/169/2015 reported in loyalnigerianlawyer.com

¹⁶ Constitution of Federal Republic of Nigeria, 1999 (as amended)

¹⁷ Including Oyo, Lagos, Ogun, Edo, Ondo, Delta and Cross River

¹⁸ Oyo state's law is referred to as The Married Women's Property Law, Cap 71, Laws of Oyo State of Nigeria, 1978 and Cross River State's law is referred to as Married Women's Property Law, Cap M4, Laws of Cross River State, 1991

4. Settlement of Property at the Subsistence of Statutory Marriage

By section 17 of Married Women's property Act, a husband or wife can make an application to any judge of the high court as to title to or possession of property. Apart from exercising her right under Married Women's Property Act regarding her title or possession of property,¹⁹ a married woman may also apply to the high court in a matrimonial proceeding²⁰ for settlement of property whether the property was acquired before or after the marriage. Section 17 of the Married Women's Property Act, 1882 provides:

In any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way to any judge ... and the judge ... may make such order with respect to the property in dispute ... as he thinks fit.

Section 72 of Matrimonial causes Act also supports settlement of property. But it is only in a proceeding under Matrimonial Cause Act. Let us reproduce section 72 of Matrimonial causes Act for better understanding:

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 settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

Generally, it is accepted that sections 17 of Married Women's Property Act and 72 of Matrimonial Causes Act, though empower a judge to make order as he/she thinks fit, is nevertheless, a procedural one. This was exactly the position of Lord Upjohn in *National Provincial Bank v. Hastings Car Mart (or Ainsworth?)*,²¹ where he describes section 17 of Married Women's Property Act of 1882 as a 'purely procedural section' which cannot confer any new substantive rights. It does not empower the court to 'vary agreed or established rights to property in an endeavor to achieve a kind of palm-tree justice'.²² In other words, where the title to a property is in the name of 'A', another party 'B' cannot without lifting the burden of proving his/her contribution to the said property, lay claim on same. The court will consider the circumstances of each case and will arrive at an order. In other words, the court can apply the concept of palm tree justice relying on sections 17 of Married Women's Property Act and 72 of Matrimonial Causes Act, in a situation where the woman's contribution is ascertainable. Meanwhile, section 17 of Married Women's Property Act can be used at any time, whether or not a marriage is dissolved, to resolve question as to title to or possession of property. However, it is not a means of giving title which did not previously exist. The same approach applies to section 72 of Matrimonial Causes Act. There is no doubt that the section 17 of Married Women's Property Act and section 72 of Matrimonial Causes Act bequeath a discretionary power on the judge. Discretion has been defined as 'the power or right to decide or act according to one's own judgment; freedom of judgment or choice'.²³ Conversely, discretion involves situational considerations; its misuse can adversely impact the court's authority and good reputation. In a California case, *Jansen v. Jansen*²⁴ the county court exercised its discretion and awarded E1,000 to the man out of the proceeds of sale without any prove of financial contribution by the man. The court took into account forgone opportunity like the man's studies. In a Nigeria case of *Arajula v. James Monday*²⁵ the court equally exercised its discretion in awarding possessory right to the wife in the interest of the children despite the fact that their marriage is under customary law and has been dissolved.

¹⁹ Whether or not the marriage is dissolved

²⁰ Proceedings for (i) dissolution of marriage; (ii) nullity of marriage; (iii) judicial separation; (iv) restitution of conjugal rights; or (v) jactitation of marriage. See generally, section 114 of Matrimonial Causes Act

²¹ [1965] 3 W.L.R 1, at pp23-35

²² Per Lord Hodson in *National Provincial Bank v. Hastings Car mart (or Ainsworth?)*, *ibid*, at page 11

²³ *E.F.C.C. v. Akingbola* [2015] 11 NWLR (pt. 1470) p. 282 para. A

²⁴ [1965] 8 W.L.R 875

²⁵ Suit No. 1/169/2015 reported in loyalnigerianlawyer.com

It is worthy of note that where an application under the Married Women's Property Act is being heard at the same time as an application for ancillary relief in matrimonial causes, all application will be heard by the same tribunal. The court may 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 parties are, or either of the parties is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case. The court in making such order may consider the whole or part of property dealt with by ante-nuptial or post-nuptial settlement on the parties to the marriage, or either of them.²⁶ Notwithstanding that law allows either party to the marriage to apply to the court for a share of the matrimonial assets in Nigeria, it is mostly women who make such an application. This could be attributed to the fact that most women in Nigeria are dependent on their husbands and the fact that most title documents are in the name of the man or at least in the name of 'Mr. & Mrs. ...' And notwithstanding that either of the parties in marriage can bring an action for the regularization of their title document, this option is rarely exercised. Statutorily, where it is established that the title to a property is not reposing on the right person, the court is empowered to 'order any necessary deed or instrument be executed, and that the documents of title to be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order.'²⁷ In the event that court orders for execution of a deed or instrument and a party refuses or neglects to do so, 'the court may appoint an officer of the court or other person to execute the deed or instrument in his name and to do all acts and things necessary to give validity and operation to the deed or instrument.'²⁸ The deed or instrument so executed by the appointed person shall have the same force and validity as if it had been executed by the person directed by the order to execute it.²⁹ Nevertheless, where a party makes an application under section 17 of Married Women's property Act or section 72 of Matrimonial Causes Act, for settlement of property, the courts in Nigeria seems to prefer to order a lump sum or periodic payment.

5. Settlement of Property at the Dissolution of Marriage

As earlier stated in the introduction, dissolution of statutory marriage in Nigeria is governed by Matrimonial Causes Act through judicial process in any High court of the Federation.³⁰ In a matrimonial proceeding where issue of sharing of property arises, either of the parties may be asked to prove his/her contribution towards the purchase and/or development of the property/ies in question. Even when a party contributes in the purchase/development of property/ies in question, he/she is left with the burden of proving his/her contribution. Most docile party's contribution is difficult to prove as a result of lack of receipt to back up the contribution or the contribution being intangible.³¹ In most matrimonial proceeding in Nigeria, the title document and receipt bears the man's name or at least in the name of 'Mr. & Mrs. ...' which is a no name in law; the woman being at the receiving end. Therefore, it is the trend in a divorce cases for the judge to give a woman a lump sum or periodic payment³² rather than giving her the property; since the court in exercise of its discretion is not allowed to vary an agreed or established right to property. In *Manakaya v. Manakaya*,³³ although the husband had landed properties and investments worth millions in Nigeria, the court awarded the wife a lump sum payment. In a situation where court occasionally granted women a proprietary right to property, it is never absolute but usually has a condition attached to it. In *Kafi v. Kafi*,³⁴ the high court exercised its discretionary powers under section 72 of the Matrimonial Causes Act and inter alia, made an order that certain property be settled by deed on the respondent and the children of the marriage. It took into consideration several contributions both material and otherwise³⁵ that the respondent had made. The petitioner

²⁶ Section 72 (1) & (2) of Matrimonial Causes Act

²⁷ Section 73 (d), *ibid*

²⁸ Section 74 (1), *ibid*

²⁹ Section 74 (2), *ibid*

³⁰ See Ikenga K.E. Oraegbunam, 'Nigerian Divorce Laws: Implications for the Indissolubility of Christian Marriage under Canonical Jurisprudence', *Journal of Women and Minority Rights*, Vol. 2, 2011, pp.85-109.

³¹ Not being in a monetary form

³² Section 73 (1) (a) and (b) of Matrimonial Causes Act

³³ (1999) NWLR (Pt. 472) 256

³⁴ (1986) 3 NWLR (Pt. 27) 175

³⁵ For example, the fact that the respondent contributed towards the development of the properties by physically participating in the supervision and construction of her husband's properties in Lagos, which involved general supervision, fetching water

appealed to Court of Appeal objecting to this even though he had several other properties. The Court of Appeal affirmed the lower court's decision but added that the deed of transfer provide that the property must not be disposed of by sale in the life-time of the respondent, so as to ensure that it remained her home and that of her children. In the case of *Egunjiobi v. Egunjiobi*³⁶, though the title deed was in the husband's name, the wife having established her financial contribution to the construction of the house was granted by the Western state court of appeal in affirmation of lower court's decision, a 1/3 share of the proceeds of the sale of the property in the event of its sale. In *Ogedengbe v. Ogedengbe*,³⁷ the High court of Lagos state applied section 17 of Married Women's Property Act 1882 and ordered the husband to allow the wife and the children to reside in the matrimonial home, unless and until he provides suitable alternative accommodation for them.

The courts in Nigeria have not totally relaxed the subjective proprietary rights of women in matrimonial proceedings. In a later case of *Akinboni v. Akinboni*,³⁸ the Court of Appeal *inter alia* granted the respondent/cross-petitioner and the four children of the marriage the right to reside in one flat³⁹ on the condition that they were of good behavior. The wife had not been able to prove joint ownership of the property. The petitioner/appellant was restrained from selling or disposing the flat as long as his ex-wife and children continued to be of good behavior and maintained peace at the property. In *Arajula v. James Monday*,⁴⁰ after the erudite consideration of the court, per Hon. Justice M.L. Abimbola⁴¹, the court only gave possessory right to the claimant when the court ordered as follows:

the completed three bedroom on the land be retained and the claimant and her children should stay therein and remain in possession and occupation as the matrimonial home and the four children are entitled as beneficial owner, by way of presumption of a resulting trust created by both for their children and the mother can remain in possession so long as she remain unmarried, she is directed to be in possession undisturbed in order to take care of the children therein. The uncompleted storey building however is ordered to be sold by both parties and the proceeds divided in equal shares. The half share shall be go to the claimant for the maintenance of the children and their education but a divorced wife has no business to be maintained. She is not entitled to any maintenance allowance; but would be entitled to maintenance of the children by way of settlement if she has custody of the children of marriage.

The court further opined that the intention of the parties at the time of purchase and construction of the building is for joint ownership of the property and the disproportional contribution is irrelevant. Therefore, the court held that the beneficial interest in the property belongs to the parties jointly. This is what is known as 'palm tree justice' as a principle under the principles and philosophy of the Married Women's Property Act. The court employed the concept of palm tree justice in the *Oghoyone v. Oghoyone*,⁴² in applying section 17 of Married Women's Act to a void marriage. The Court of Appeal, per Rhodes-Vivour, J.C.A held:

... If on the other hand the fact that the marriage is void means no property rights accrue, then the parties were simply living together as friends or in a similar manner. What then becomes of property they both claim to have contributed to purchase? Surely such property can only be addressed in the way the learned trial Judge has done.

The court of appeal affirmed that the parties share proceeds of the sale of the property equally and maintained that the position is what is expected in equity.

for use of the builders, buying building materials and preparing food for the workers. She also contributed to the success of her husband's business.

³⁶ (1976) 2 FNLR 78

³⁷ Suit No. LD/102/62 (unreported)

³⁸ (2002) 5 NWLR (Pt. 761) 564

³⁹ At the matrimonial home

⁴⁰ *Ibid*, n 7

⁴¹ The Chief Judge of Oyo State

⁴² (2010) LPELR – 4686 (CA)

6. Palm Tree Justice and Discretion under Section 17 of Married Women's Property Act

Palm tree justice in the opinion of this study, plays the role of complete and unfettered discretion on the judge. The concept envisages the judge being fair and just to the parties. However, the discretion conferred on judges by section 17 of Married Women Property Act of 1882 is a procedural one. For instance, in Victoria, Smith J. in *Wood v. Wood*⁴³ said:

the Judge, in exercising the discretion, should be guided by the following general principles:

(a) In so far as an actual intention as to ownership is disclosed effect should be given to it.

(b) In so far as no actual intention is disclosed the judge should make such order as is 'fair and just in the special circumstances of the case'.

(c) For the purpose of deciding what is fair and just in relation to property acquired during the marriage as the result of payments or efforts by both spouses:

(i) The Judge is not bound to apply the presumptions and technical rules by which ownership is ascertained at law or in equity;

(ii) he should lean towards equality, particularly in relation to property which the spouses have been using in common, and also in cases in which the contribution by each has been substantial and the proportion appears to have been due to chance circumstances rather than design.

Therefore, one can conclusively imply that the concept of palm tree is vague and arbitral while the discretion under section 17 is procedural. In giving credence that the discretion under section 17 of Married Women Property Act is matter of procedure, Evershed M.R. in an English case of *re Rogers' Question*⁴⁴ said: What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself. Support for the view that the discretion conferred upon the judge by section 17 must be exercised judicially and is not as wide as the words 'palm tree justice' might suggest can be found in the judgments in the English cases: *Cobb v. Cobb*⁴⁵ and *Silver v. Silver*.⁴⁶ In *Cobb v. Cobb*, Romer L.J. said:

Counsel . . . submitted that the court had power under section 17 of the Married Women's Property Act 1882 to establish a title to property contrary to the intention of the parties I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under section 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair.⁴⁷

In *Silver v. Silver*, Parker L.J. said: 'Section 17 of the Act of 1882 leaves a very wide discretion in the court; but . . . it does not entitle the court to make an order which is contrary to any well-established principle of law.'⁴⁸

7. Conclusion

Parties to a statutory marriage have equal right to the property/ies they acquired in their marriage. Patriarchy was dethroned in Nigeria system by Married Women's Property Act, which has been enacted

⁴³ [1956] V.R. 478.

⁴⁴ [1948] 1 All E.R. 328.

⁴⁵ [1955] 2 All E.R. 696.

⁴⁶ [1958] 1 All E.R. 523.

⁴⁷ [1955] 2 All E.R. 696, 700.

⁴⁸ [1958] 1 All E.R. 523, 527

into some States Laws and Matrimonial Causes Act. The court strives to ensure that the undocumented contribution of women in respect of property purchased during the marriage is not defeated. This is most exemplified by the case of *Arajula v. James Monday*⁴⁹ where the claimant (ex-wife) maintained and established that they jointly pulled resources together to purchase and develop the property⁵⁰. The defendant denied this assertion and insisted that the claimant was a house wife and that the documents she tendered were forged. After regurgitation and deep thought over the submissions of both parties, the court opined that though the claimant's contribution to the property is mostly undocumented, the dispute between the parties cannot be determined strictly on rules of ownership or proof of title but by equitable principles and the discretion of the court about what is fair, having in mind the interest of the four children of the marriage: where will they live? The rational in *Arjula v. James Monday* is that:

a husband who marries a woman and builds a house during the pendency of the marriage stands the risk of losing that house if the latter divorces the woman who had children for him and lay claims to joint ownership unless such woman on her own volition leaves the matrimonial home.

The concept of palm tree justice plays a role to avoid arbitrary application of rules of law to justify a predetermined end. It is a practical and realistic approach to justice that is wholly discretionary and has the unending capacity to travel beyond legal rights or precedents. It helps the court to come out with orders that in its considered opinion are fair and just in the given circumstances of the case. However, it is the opinion of this study that discretion should not be exercised arbitrarily but within stipulated rules. Justice should not only be done but should manifestly and undoubtedly be seen to be done.⁵¹ Therefore, palm tree, though a good principle is settlement of property, should be disregarded because of its high tendencies of arbitrariness. It is highly recommended that women who title to their matrimonial property is in the name of their husband, should through originating process, apply to court for the regularization of their title documents. This will relief women of the burden of proving 'contribution' and will enable them to make legal use of the said document as it will portray joint ownership of the property. It will equally assist court in the exercise of her discretionary powers to confer at least possessory right on the woman or even order her to have the property instead of lump sum or periodic payment. The order the court issues depends on the circumstances of each case.

⁴⁹ *ibid*

⁵⁰ Though most of her contributions such as performance of wifely duties, example, taking care of the children, doing sundry duties and even supervision of the building and payment of four (4) children's school fees

⁵¹ Lord Chief Justice Hewart's remark in *R v. Sussex Justices ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)