

A FACILE REVIEW CONCERNING THE CONCEPT OF CONTRACT TO MARRY IN NIGERIAN FAMILY LAW*

Abstract

In a society like Nigeria, where marriage is highly respected and upheld, it is not strange that people get engaged and celebrate marriages very often. The popular 'Owambe' happens almost every Saturday in recent times. This union of a man and a woman as husband and wife stems from a prior courtship, from here there is a proposal for a marriage to take place at a futuristic time and this is what the law recognizes as an agreement or contract to marry. Albeit, everything may seem blooming, there is a possibility that one party to this agreement reneges on his promise but owing to the fact that the law recognizes the agreement as binding on both parties, the law takes the wheel to award damages to the aggrieved party since the court cannot and will not force an unwillingly party into marriage in order to prevent future problems. This paper will succinctly explain what an agreement to marry is, when it is seen to have been breached, the remedies available to the non-defaulting party and most importantly the prerequisites to bring an action in court.

Keyword: Contract, Marriage, Family, Law, Nigeria

1. Introduction

Marriage is a sacred union between a man and wife, the bible even tells us that 'and the Lord said, it is not good that the man should be alone, I will make him a help mate for him'. Another is 'go into the world and multiply, leave your parents and cleave unto your wife'¹. This marriage can only take place where there has been a prior contract to that effect². A contract to marry is a consensus and a mutual agreement between a man and a woman to marry at a future date³. Both parties must not have any impediment limiting or restricting them from marrying⁴. Contract to marry is also referred to as betrothal or a promise by a party to another party to marry at a future date, there must be a commitment and obligation flowing from the part of the parties to live together as husband and wife. Contract to marry may be created orally or documented (i.e. through writing)⁵. Where a contract to marry is created orally, the conduct of the persons is relevant in proof of the promise to marry⁶. Furthermore, a contract of marriage can also be ascertained from the exchange of correspondence between the parties⁷. However, it suffices to state that it is require by law that parties must fulfill some certain condition to be able to negotiate a contract to marry⁸. In this regard, where there is a valid contract to marry and there is a breach of the agreement, the affected party could sue or institute an action. Although, a party who an action is instituted against could raise a defence for the breach of contract marry⁹. It is concerning the above that this study tends to examine the concept of contract to marry, capacity to enter into a contract to marry, proof of breach of contract to marry, justification of breach of marriage and damages for breach of contract to marry.

2. Capacity of a Party to a Contract to Marriage

For a party to enter into a contract to marry in a monogamous system, such party must have all the necessary capacity to contract the marriage. In determining the capacity of a party, the following factors need to be considered;

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¹ Nwagbara, I. 'Recognition of Polygamous Marriages under the English Law', *Global Journal of Politics and Law Research*, (2004) vol. 2, pages 52-62

² Andreas Rahmatian 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' *International Journal of Law, Policy and the Family*, (1996) Vol. 10(3), Pages 281-316,

³ Ojogbo, S. 'Judicial and Scholarship Dilemma in Statutory and Customary Law Divorce in Nigeria', *Nigerian Law and Practice Journal*, (2011) vol. 4(2), pages 5-16.

⁴ Oluwaseye Oluwayomi Ikubanni and Paul Atagamen Aidonjioje 'The Legality of Virtual Marriage in Nigeria given the Covid19 Pandemic Social Distancing: An X-Ray of the Matrimonial Causes Act' *Madonna University Law Journal* Vol. 6(1), pages 45-55

⁵ Olokooba, S. M. 'Analysis of Legal Issues Involved in the Termination of the 'Double-Decker Marriage' under the Nigerian Law', *Nigeria Current Law Report*, (2007), 192-199

⁶ *Ezeanah v Attah* (2004)7 NWLR (pt 873) 468

⁷ *Obasawa v Ibodiaran* (1971)1 UILR 149

⁸ Sagay, I. *Nigerian Family Law: Principles, Statutes and Commentaries*. (Malthouse Law Books, 1999).

⁹ Emmanuel Folayan Ijalana*, Julius Olaseinde Agbana 'A Critical Appraisal of the Concept of Double-Decker Marriage under the Nigerian Family Law' *Beijing Law Review* (2021), Vol.12 (4)

Single Status of a Party

For a party to have the capacity to marry, such a party must be single and not married to a third party. Where a party is married, and he made a promise to marry to a third party, the third party can bring an action for breach of promise to marry, provided the third party do not have the knowledge that the person making the promise was married at the time the promise was made. If the third party had the knowledge that the other party making the promise is married, his/her claim for damages will not succeed on the application of the maxim *ex turpi causa non-oritur action* (which means 'from a dishonourable cause an action does not arise'). As a matter of law in Nigeria section 39 of the Marriage Act¹⁰ provide thus; 'Whoever, being unmarried, goes through the ceremony of marriage under this Act with a person whom he or she knows to be married to another person, shall be liable to imprisonment for five years.'

In the English case of *Wilson v Carnley*¹¹ is the locus classicus case where the court of Appeal laid down the general principles that a contract to marry to which a married person is a party is against public policy and morals, in this regard a contract to marry with a party that is already married is void. From the wordings of the court, the essence of voiding a contract to marry entered with a party that is already married is to maintain public policy and morals. In this regard, the case of *Wilson* considered it as against public policy to enter into a contract to marry with a party that is married. However, the extent to which public policy can be determined to invalidate a contract to marry was further stretch. In the case of *Fender v. St. John Mildmay*¹² Lord Wright and Lord Thankerton held that though the defendant marriage was still subsisting, however, since he had obtained a decree nisi of divorce before he promised to marry the plaintiff, the contractor promised to marry was not void. Their decision was reached by distinguishing the instant case from the case of *Wilson v Carnley*, by stating that decree nisi was a shred of good evidence to show that the marriage has come to an end. However, Lord Atkin in the course of delivery it judgment stated that where a marriage has completely broken down, such as a woman leaving her husband and children to lodge with her lover, the husband is free to enter into a contract to marry with a responsible woman, Though Lord Wright and Lord Thankerton disagreed with lord Atkin that it is against public policy. Furthermore, in the case of *Skippy v Kelly*¹³, the court was of the view that a promise to marry is void why divorce petition is still pending in court. From the above, it is very clear that there is no clear cut approach of determining to what extent a promise to marry or contract to marry is against public policy. However, the fact of each case and the prevailing public morality (public policy) could be used in determining the invalidation of promise to marry.

Infancy

By virtue of section 1 of the Infant Relief Act¹⁴ (which is a statute of general application in force in Nigeria) declare all contract made by an infant as invalid, except those contracts in respect of necessities. Furthermore, section 29 of the Nigeria constitution¹⁵ recognised 18 years as the mature age for any individual residing in Nigeria. Section 22 of the Child Right Act¹⁶ declares the celebration of marriage where any of the parties are below 18 years of age as void and made it an offence for anyone to betroth a child below the age of 18. In view of the above, it suffices to opine that an infant cannot enter into a contract to marry, such contract will be void and dead on arrival before any court for determination.

3. Parental Consent

When contracting or entering a contract to marry (under the Marriage Act) the law requires the parties to be of full and matured age, in this regard the consent of the parent or guardian is not required. In the case of *Ugboma v Morah*¹⁷ the plaintiff sued the defendant for breaking his promise to marry her, the Defendant argued that the plaintiff does not have the capacity to enter into the contract since in Igbo custom stipulate that consent of their parents must be sorted. The court dispensed with the defendant argument and held that where parties are of age, it cannot be a defence for the defendant to argue that the plaintiff lacked the necessary capacity to make a valid promise to marry for reason of not seeking her parents' consent. The court further stated that parties could validly conduct marriage under the Act without their parent consent if they are of age. However, where the promise to marry is under the ethnic customary marriage law or Islamic marriage law, the consent of the parent is sacrosanct.

4. Nature of Breach and Proof of Contract to Marry

To substantiate a breach of promise to marry, a claimant must prove the two primary and basic elements. Two elements are necessary to constitute a breach of agreement or promise of marriage. First, the party jilted must

¹⁰ Marriage Act

¹¹ (1908) 1 KB 729

¹² (1908) 1 KB 720, 724

¹³ (1926) 42 TLR 258

¹⁴ Infant Relief Act 1874

¹⁵ 1999 Constitution as amended 2011

¹⁶ Child Right Act, 2003

¹⁷ (1940) 15 NLR 78

prove to the satisfaction of the court that there was in fact a promise of marriage under the relevant law be it Marriage Act, Islamic or customary law on the part of the other sex. Second, the party reneging has really and as a matter of fact failed or refused to keep the agreement of marriage. An agreement to enter into a marriage should leave nobody in doubt as to the real intention of the parties to enter into a marriage. A mere convivial or romantic relationship without more is not enough for a court to found an agreement to marry. To prove the first element, evidence adduced must go beyond mere discussions about the future or mere pronouncement of love, the best way to show this is by an actual proposal of marriage ie show of an engagement ring, pictures, text messages, letters, written agreement. It is important to note that mere boyfriend and girlfriend relationship without more cannot be taken as promise of marriage and subsequent breakup as a breach of that promise to marry otherwise the court would be full with persons without just cause suing for breach which will amount to abuse of court process, thus the law is clear on the circumstances where such promise is deemed to have been made. Like all other contracts, there must be consideration. Often times, the reciprocal promise of a woman to marry a man who promised her marriage is regarded as consideration, simple 'Yes, I'll marry you' will do the trick.

However, in proving that there had been a breach of marriage in Nigeria, Tobi, J.S.C. in the case of *Ezeanah v Attah*¹⁸ stated thus;

Two elements are necessary to constitute a breach of agreement or promise of marriage. First, the party jilted must prove to the satisfaction of the court that there was, in fact, a promise of marriage under (Marriage Act) or under Islamic Law or under customary law on the part of the other sex. Second, the party reneging has really, and as a matter of fact, failed or refused to keep the agreement of marriage.

Furthermore, section 197 of the Evidence Act further added that if a plaintiff must succeed in an action for a promise to marry his/her testimony must be corroborated by some other material evidence in support of such promise.

From the above in proving a breach of marriage, the following must be proved;

The aggrieved party must prove to the satisfaction of the court that there was, in fact, a promise to marry.

A party who is aggrieved that a contract to marry has been violated by the other party must prove that the promise was made orally or documented (i.e. through writing). Where a contract to marry was created orally, the conduct of the persons is relevant in proof it. Contract of marriage can also be ascertained from the exchange of correspondence between the parties. See the case of *Ugboma v Morah*¹⁹. However, where the promise is made subject to a condition precedent until the condition is fulfilled there can be no breach of promise to marry, in *Aiyede v Norman Williams*²⁰ the plaintiff and defendant were studying outside Nigeria and they both agreed to get married but subject to the defendant obtaining his father consent, the defendant wrote to his father seeking his consent, but his father refused. The defendant later married another person and was sued by the plaintiff for a breach to promise to marry. The court found that since the promise to marry was subject to the defendant obtaining his father consent and the defendant was declined consent by his father; there was no breach of promise to marry.

The party who made the promise has really, and as a matter of fact, failed or refused to keep the agreement of marriage

Presuming or having an assumption of that a party may not keep to his/her promise to marry will not suffice to prove that there was a breach of promise to marry. In *Ugboma v Morah*, the court found that from the evidence given and presented before the court, there was indeed a promise to marry and the defendant was in breach of promise to marry to the plaintiff. In *Uso v Iketubosin*²¹, the plaintiff was able to successfully prove that the defendant promised to marry her in 1947, but later breach the promise and marry another lady in 1957. The court held in favour of the plaintiff that the act of the defendant constitutes a breach of his promise to marry the plaintiff.

The Aggrieved party Evidence must also be corroborated by some other material evidence in support of such promise.

This is as provided in section 197 of the Evidence Act. In *Bessela v Stern* in corroborating the plaintiff action for breach of promise to marry, the plaintiff's sister stated that she overheard the plaintiff told the defendant 'you always promised to marry me, and you don't keep your word.' and she further head the defendant said to the plaintiff that he would give the plaintiff some money to go away. The court held that since the sister evidence was

¹⁸ (2004)7 NWLR (pt 873) 468

¹⁹ *Martins v Adenugba* (1946) 18 NLR 63

²⁰ (1960) LLR 253

²¹ (1975) WRNLR 187

not discredited, it is a shred of material evidence that corroborated the plaintiff testimony of the defendant promise to marry.

5. Justification for Breach of Contract to Marry

A defendant who intends to raise a defence in a breach of promise to marry can rely on any of the following defences which are;

General Defence

A defendant who intends to defend a breach of promise of marry may rely on all the defence in suit for breach of a commercial contract; in this regard, a defendant may raise the defence that the promise to marry was obtained by the plaintiff in any of the following ground such as; fraud, misrepresentation or duress, in *Wharton v Lewis* Abbott CJ found that the defendant that was induced to make his promise to marry the plaintiff because the plaintiff told the defendant that her father would leave property for her on his death whereas in fact the father recently compounded with his creditor. The court held that such an act amounts to misrepresentation. A defendant can also plead the defence of discharge of obligation that both parties mutually agreed that the promise to marry should be brought to an end. In *Davis v Bomford* the court held that since after 2 years the defendant expresses his desire to terminate the engagement between the plaintiff and him; and there was no correspondence between two parties, it can be said that the plaintiff mutually agreed to terminate the promise to marry.

Special defence

A defendant can also rely on the following special defences which are;

That the aggrieved party is suffering from physical or mental infirmity

This defence is only applicable where the defendant does not have knowledge of the plaintiff infirmity, in this regard where the defendant has knowledge of the infirmity of the plaintiff before he made the promise, he is deemed to have accepted the plaintiff unconditionally. In *Jefferson v Paskell*, Phillimore LJ stated thus;

... On principle it would seem that there must be some cases of mental or physical infirmity (as has been decided that there are cases of moral infirmity) which supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry....

Furthermore, the defendant is also required to prove that the infirmity actually renders the aggrieved party unfit for marriage, the infirmity is not temporary, and the infirmity actually exists. Note that the defendant can also rely on the defence that he/she is suffering from some infirmity of the mind that renders him incapable of consummating the promise to marry. He can also plead that the aggrieved party is morally loose and unfit for marriage. However, it is not enough to state that an aggrieved party to a promise to marry is loose and immodest, had illegitimate child unknown to the defendant before the promise was made or he/she is of bad character, such claim or defence must be proved to exist. In *Baddeley v Mortlock* the court dismissed the defence of the defendant because he could not prove that the plaintiff was a man of bad character as she claimed.

6. Damages for Breach of Contract to Marry

The general rules that apply in awarding damages in contract law also apply when determining damages to be awarded in a breach of contract to marry. When there is a breach of contract to marry, damages often awarded are by the court are of two categories, and they are;

General Damages

General damages are damages as presumed by law to be the direct natural, or probable consequence of the act complained of. It is damage that the court would award in the circumstance of a case where there is no yardstick with which to assess the award except the expectations of a reasonable man. In *Peter Bank v First Bank Nigeria PLC*²² the Court of Appeal stated that general damages need not be specifically pleaded and proved. In determining the amount of general damages to be paid to an injured party, the court often considered the position the injured party would have been if there has not been a breach of the contract. However, the granting of general damages is within the discretion of the court. Where there is a breach of contract to marry, there are certain factors the court often considered when granting general damages. In *Esisi v Obafunmilola*²³, it was held that where the plaintiff is a woman, she may claim for the loss of the status of a married woman, by which she would have been entitled to support and maintenance by her husband. In granting general damages in regard to the above, the court often -

²² (2018) LPELR-44140

²³ Suit No. FAC/L/182/177 (unreported) Federal Court of Appeal Lagos

considered the property, position and status of the defendant, in *Ugboma V Morah*²⁴, the court was of the view that since the defendant was a minor government official and the plaintiff a prosperous trader, there was no great loss of establishment. Furthermore, the court will also take into consideration the injured feelings and pride of the aggrieved party. The quantum to general damages to be awarded may also be increased if the injured party can prove that he/she had little or no chances of marrying, in *Uso v Iketubosin*²⁵ it was held that an aggrieved party may raise the issue that the tendency of marrying another person may low, in order for the court to considered the granting of an increased general damages. Furthermore, in *Gamble v. Sales*²⁶, it was stated that a defendant can mitigate its general damages by stating that the aggrieved party is in a bad state of health.

Special Damages

Special damages are damages that are alleged to have been sustained in the circumstances of a particular wrong. Unlike general damages, special damages must be specifically pleaded and strictly proved with evidence before the court can grant it. In this regard, where there is a breach of contract to marry, money spent on durable articles intended for use on the wedding day, preparation of the intending matrimonial home and any other forms of entertainment, if specifically pleaded and proved, the court may award such special damages, in *Shaw v. Shaw*²⁷ the plaintiff sue the defendant who died intestate for breach of promise to marry, having deceived her that he was a widower. The court granted her 1000 pounds as damages, and the court further stated that if she was the widow of the deceased, that is what she would have been entitled to. Engagement ring used in proposing can be claimed under special damages if successfully pleaded and proved, in the case of *Jacobs v Davis*, the plaintiff engaged the defendant with a diamond engagement ring, the defendant without just cause broke up the engagement. An action was instituted in recovery of a diamond engagement ring. The court held that the defendant was bound to return the ring. Furthermore, a gift given in contemplation of marriage can be claimed under special damages. However, it must be strictly proved that it was a gift given in contemplation of promise to marry, in *Ezeana v Attah*²⁸ Tobi, J.S.C. held thus;

Premarital gifts, in order to qualify as gifts in furtherance of an agreement to marry, must be clearly, cleanly and unequivocally traceable to an agreement on the part of the parties to marry..... the court must not come to the conclusion that the parties agreed to get married hence the gifts.

However, the court in *Samson v Samson*²⁹ had held that gifts or present from friends and relative to a party are intended for that party, an aggrieved party cannot claim such gift or present as special damages.

7. Conclusion

It has been examined that a contract to marry is a mutual agreement between a man and a woman to marry at a future date. A contract to marry may be created orally or documented. There are certain condition that must be met for a party to successfully enforce a breach of promise to marry they; parties must not be single, parties must have reach the required age to marry and where the promised to marry is under customary law parties must sort for their parental consent. Where a party successfully proved a case of breach of promise to marry, the court may award general and special damages as claimed by the party. Furthermore, a party accused of a breach to promise to marry can raise the following defence: general defence in contract law and special defence which are; that the aggrieved party is suffering from physical or mental infirmity and that the aggrieved party is morally loose and unfit for marriage.

²⁴ (1940) 15 NLR 78

²⁵ (1957) WRNLR 187

²⁶ (1920) 36 TLR 427

²⁷ (1954) 2 All ER 639

²⁸ (2004) 7 NWLR (PT 873) 468

²⁹ (1960) 1 WLR 190