

A CASE FOR GLOBAL ENFORCEABLE PRENUPTIAL AGREEMENTS*

Abstract

Ever since 1929, the English Courts have outrightly rejected the recognition and enforcement of pre-nuptial agreements, primarily on grounds of “Public Policy”. Most African countries have equally stigmatized them as un-cultural. With the passage of time however, the unpredictability, uncertainty and gender discrimination often observed in the sharing of marital property in court actions, led to the emergence and popularity of prenuptial agreements in many jurisdictions as a legal antidote to some of these flaws. The writer evaluates the obstinate and uncompromising attitude of the English judges and Nigerian legislators, and makes a case for a global recognition and enforcement of pre-nuptial agreements in the light of current trends and realities of our time.

Introduction

Around the world there has been a growing trend for intending couples to enter into prenuptial agreements in order to secure their financial interests in the event of divorce. A prenuptial agreement has been defined as “a written contract between a bride and a groom – to- be, that sets out to agree on how their assets are distributed (or remain theirs) should their marriage fail”.¹ It is believed in many quarters that a great heartache can be avoided by a woman in her future marriage, if she, as the bride – to – be agrees to sign a carefully considered prenuptial agreement, that guards her right before entering into wed lock.² The above view is probably informed by the fact that the law on the division of property on divorce of many countries of the world is highly discretionary and sometimes discriminatory. In most countries the courts are often vested with wide arbitrary powers. There are no fixed yardsticks or clear- cut criteria that would guide the courts in the sharing of marital property in the event of divorce. This uncertainty and lack of predictability in financial aspects of the divorce law has drawn diverse criticisms from around the globe, and has also posed a fertile ground for gender discrimination³. These traits of the system have obviously prompted many legal scholars and judges alike to call for clearer guidelines as to what might happen to marital property on divorce⁴. *Thorpe L.J.*, in the English case of *Lambert v Lambert*⁵ stated;

I am conscious that this conclusion does little to increase clarity or predictability of outcomes. However, any expectation of such was surely unrealistic. Specialists in the field, whether judges, practitioners or academics, have yet to suggest a principle or mechanism that might produce greater certainty or predictability within the very wide discretionary field for which parliament opted in 1984. Such new approaches as have been advocated or debated all require legislation for their introduction. Accordingly it must be recognized that a largely unfettered judicial discretion comes at a price⁶.

This problem at stake is not peculiar to the English legal system. Many other countries of the world have also encountered similar problems. For instance, Section 72 of the Nigerian

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¹ Prenuptial Agreements, low.weddinguideuk.com/articles/legal/prenuptial.accessed on the 14th of May 2009

² www.ertoday.com/prenuptial.Accessed on 14th of May 2009.

³ Sylvia Ifemeje, **Contemporary Issues in Nigerian Family Law** Nnolix Educational publications (2007) p174

⁴ Ifemeje *op.cit*, p174.

⁵ Jeremy D. Morley “Enforceable Pre-Nuptial Agreements: The world View” www International divorce. com/ england. 17 of 23.

⁶ [2002] EWCA CIV 1685.

Matrimonial Causes Act⁷, which is the core Nigerian legislation on settlement of Matrimonial property on divorce in Nigeria, has been criticized, as ill – defined, as there are no clear – cut criteria or guideline that would assist the Nigerian judges in deciding who gets what property on divorce. In Zimbabwe as well, Welshman,⁸ has also criticized the non- existence of a fixed rule of apportionment of marital property on divorce.

It was against this backdrop of uncertainty, unpredictability and unfairness of the law that prenuptial agreement sprung up to fill the existing gaps that have long been yawning for a fill-up. This paper shall presently examine the historical origin of pre-nuptial contract, its enforceability and the effectiveness of prenuptial agreement as a viable weapon to ameliorate the observed anomalies in the sharing of marital property in many jurisdictions shall also be examined.

Historical Background, of Prenuptial Agreements

Pre-nuptial agreements have been in existence even before the Common law came into being. In fact, the Jewish marriage contract known on ‘Ketubah’ dates back to at least 2, 000 years. In France, history has it that the customary pre-nuptial contract derives from the dowry, first recorded in the ninth century. At Common law pre- marital agreements regulating financial rights and obligations of spouses during their marriage were fully enforceable. By the mid – seventeenth century, they were included in the Statute of Fraud⁹ and were traditionally known as Marriage Settlement.¹⁰ Prior to 1857 in England, marriage contracts were entered into to deal with the eventuality of death and not divorce because prior to 1857, divorce was not allowed by the English courts. Also previously in America, a prospective husband often requested for a future partner to execute a prenuptial agreement¹¹. A dramatic shift has however been observed in America in recent times as women over the last 20 years now make the request in order to protect their accumulated assets and future income.

The current law relating to pre-nuptial agreements is traceable to the English case of *Hyman v Hyman*¹². This 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. 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.

An Examination of the Enforceability of Prenuptial Agreements

With global explosion in divorce rate in many countries of the world, intending couples now resort to pre-planning and signing of pre-nuptial agreements before entering into marriage contracts. While many countries of the world have warmly embraced prenuptial agreements,¹³ many countries are still dragging their feet or have outrightly refused to accept its enforceability. England, for instance has since the case of *Hyman*,¹⁴ faulted prenuptial

⁷ CAP M7 LFN, 2004

⁸ Ncube Welshman, “Re-allocation of Marital Property at the Dissolution of Marriage in Zimbabwe.” **Journal of African law** vol 34, 1990 p.I.

⁹ English 1677 Statute of Frauds.

¹⁰ Morley, *op.cit* at 2 of 17. Accessed on 14th of May 2009.

¹¹ Pre-nuptial Agreement, www.Peterson and harris com/newsletter. 1.of 3.

¹² [1929] A.C. 601

¹³ Australia, America Canada, New Zealand, South Africa.

¹⁴ **Hyman V. Hyman** (*supra*)

agreements on three grounds. Firstly, prenuptial contracts have been rejected on grounds of public policy. Secondly, it has been argued that enforcing such agreements would weaken the sanctity of marriage, if people were permitted to enter into them armed with a preplan of what should happen if the marriage were to fail. Thirdly, the court was of the firm view that the parties should not be permitted to oust the jurisdiction conferred exclusively upon the courts to dissolve or alter couples' marital status.

All African countries, except South Africa, have shunned recognizing pre-nuptial agreements or considering its enforceability at all. This obstinate stand could be traced to African sociological background; African culture has been roundly criticized as very "illiberal towards women's rights".¹⁵ Consequently, the use of prenuptial agreements has been stigmatized in Africa. It could therefore be argued that cultural factors have seriously jeopardized the growth of prenuptial agreements in Africa. Any African woman who insists on drawing up a prenuptial agreement before marriage would definitely run the risk of being labeled a "gold – digger"¹⁶ or "a fortune hunter."

The writer shall presently examine the reasons the English courts have proffered for their seeming rigid stand.

The English Courts and Prenuptial Agreements

(a) Public Policy Argument

The English courts, as earlier observed since the case of *Hyman v Hyman*,¹⁷ have refused to enforce prenuptial agreements, basically on grounds of public policy. The English courts, after 80 years' anniversary of Hyman's case, have stuck to their guns. Galaxy 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*¹⁸ 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*¹⁹ the public Policy argument still prevailed. The English judges' uncompromising stand to bend the rule, has elicited a lot of criticisms from Family law scholars like Morley,²⁰ who has argued that the ruling in *Hyman*,²¹ against prenuptial agreements was based exclusively upon a judicial view of the state of Public Policy in 1929. 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. He concluded by stating that pre-nuptial agreements must be enforced so long as they fulfill certain conditions²². He believed that meaning of Public Policy changes with time. For instance, in *Bevan Ashford v Geoff Yeandel*,²³ Sir Richard Scott V.C, held that notions of Public Policy change with the passage of time, and an arrangement or agreement held in the past to be champertous and consequently unlawful and void ,need not necessarily be so held today. Finally, on the issue of

¹⁵ A.G. Karibi – Whyte, "Succession Rights of Women in Nigeria Law", **Law and Family**. Enugu 1994,p23.

¹⁶ Ifemeje, *op cit* 197

¹⁷ **Hyman V. Hyman** (*supra*)

¹⁸ [1995] F.L.R. 45

¹⁹ [1997] F.L.R 900.

²⁰ Morley *op cit* 6

²¹ *Hyman op cit* 11.

²² Morley, *op cit* 7

²³ [1998] 3 WHR 172 at 181

the need for the English Courts to have a change of mind on this issue of Public Policy, the English judges have been called upon to have a re-think of their position in view of the fact that, the meaning of Public Policy should be reviewed in the light of current opinion and social attitude.

The American Supreme Court of Florida in the case of *Posner v Posner*²⁴ refused to follow the English view, the Court stated that the Public Policy argument was out of tune with current changes in the society. The present writer totally agrees with the reasoning of the American Court, and further submits that in all cases the term “public policy” should be restricted to those exceptional cases where the harm to the public is genuinely threatened.

(b) Sanctity of Marriage Argument

It is an open secret that the traditional concept of marriage has changed dramatically in many countries of the world, in the past few decades²⁵. 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 divorce rate increased in 1996 by 2.7%.²⁶ In America, statistical data show that the divorce rate had increased by 27.9% from 1970 to 1992.²⁷ In Canada, 50% of marriages end in divorce.²⁸ This instability in the durability of the marriage institution which is supposed to be a life-long affair has naturally given rise to the emergence of 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. This global resurgent interest in feminist jurisprudence has positively impacted on women, who are now more assertive of their rights. Examples of such non-discriminatory international instruments are; The Charter of United Nations; The Universal Declaration of Human Right [UDHR]; Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], The African Charter on Human and Peoples’ Rights.

(c) Ousting of Courts’ Jurisdiction Argument

The argument [as canvassed in the case of *Hyman*, that the parties should not be allowed to oust the jurisdiction exclusively conferred on the courts], has been criticized as unfounded on the ground that all Courts in the Common law jurisdictions that have enforced prenuptial contracts reserve the power to refuse enforcing unconscionable or unfair one-sided agreements in deserving cases. It can therefore be argued that this argument under consideration is baseless.

Prenuptial Agreement as a Legal Antidote to Gender Discrimination in Sharing of Marital Property in Divorce

In many jurisdictions of the world, the law regulating the sharing of marital property is discretionary in nature. There are no laid down criteria, or yard sticks 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

²⁴ 233 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 .

²⁵ Sylvia Ifemeje “The Legal Definition of Marriage and the Changing Concept of Marriage – A Global Overview” *Unizk Law Journal*, vol 6 No /2007, p229

²⁶ London Guardian of 29th August, 2003

²⁷ Statistical Abstract of the United States

²⁸ Divorce.www.real.woenca.com July16, 1999

or the other, [often 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.²⁹ Prenuptial agreements therefore emerged to mitigate the observed injustice in the system; it has so far succeeded in injecting an element of certainty, predictability and fairness in matrimonial proceedings.

In Nigeria, this lacuna in the law has been criticized as very unfair to the women folk. For instance, the cases of *Nwanya v Nwanya*,³⁰ and *Shodipo v Shodipo*,³¹ have brought to the fore the level of marginalization and discrimination which Nigerian women often have to contend with in the sharing of marital property in Nigeria.

In *Nwanya's case*,³² the Judge who was faced with the task of settling the marital property in the divorce case awarded only a paltry sum of ₦5,000 to Mrs. Nwanya. When the matter went on appeal, Justice Olatuwura JCA, declared that the trial judge ought not to have even granted the paltry sum at all, because Mrs. Nwanya failed to lead any evidence in proof of her contribution. While in *Shodipo's case*, the Court assessed the marital value of the property of the divorcing couples at ₦10,000, 000 yet it awarded only ₦200,000 to Mrs. Shodipo i.e. 1/50th of the total value of the marital property. The judge flagrantly refused to take into consideration Mrs. Shodipo's invisible or unquantifiable contributions to the marriage in question, which spanned over 24 years.

It is quite clear that if the two women in the above cases had cared to consult the services of a lawyer to prepare prenuptial agreements for them, they would not have found themselves in this unenviable position.

In fact, Lord Justice Thorpe, of the English Court of Appeal, in the case of *Lambert v Lambert*,³³ condemned a similar English approach by Justice Connel as discriminatory. Mr. Justice Connel, the trial court judge noted that Mrs. Lambert had made a full contribution by looking after the home and their two children, who are now at the university. He found that she made a 'modest' business contribution. He also found that Mr. Lambert worked long hours, and was often away from home for much of the working week. The judge having considered their respective contributions came to the conclusion that Mr. Lambert's contribution had been 'exceptional' and therefore, allowed him to keep 63 percent of the assets.

When the matter went on appeal, Lord Justice Thorpe observed;

If all that is regarded in the scale is the breadwinner's success, then discrimination is almost bound to follow since there is no equal opportunity for the home maker to demonstrate the scale of her comparable success.

The above Nigerian and English cases have brought to the fore the need for more certainty and predictability in this volatile area of economics of divorce. It is firmly believed that a delicate

²⁹ Ifemeje, *op.cit.*174

³⁰ (1987) 3NWLR (pt 62) 697

³¹ (1990) 5WRN 98

³² *Nwanya V. Nwanya* (*supra*)

³³ [200] EWCA

issue of this magnitude should never be left to the unfettered discretionary powers of the judge. A Prenuptial agreement therefore, needless to say, is actually, a major legal antidote or weapon at the disposal of every woman, to secure her financial interest, in the event of divorce. She actively makes an input as to how the marital property would be shared out in the event of divorce.

Pre-nuptial agreement, from all indications, 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.

A Case for Global Enforceable Prenuptial Agreements

While it is conceded that prenuptial agreements may be fraught with some drawbacks, for instance a pre-nuptial agreement prepared by the parties, and may be superseded by later events, like the birth of children, illness, or bankruptcy,³⁴ it has been argued that;

All the same, there are some good reasons for the English approach and it is not entirely irrational. For a start, it is not obvious how far a pre-nuptial agreement ought to be allowed to prevail before it is superseded by later event: For instance, an agreement which might seem very sensible in, say the first year of a marriage might become increasingly irrelevant after the birth of children in a 30 year marriage³⁵

The truth of the matter is that it is truly difficult to anticipate and provide for all eventualities as supervening events have a way of making an existing agreement look very irrelevant. It can however be argued, that this argument pales into insignificance when one remembers that for a prenuptial agreement to be enforceable by a Court, it must pass some laid down test; it must be fair and the parties must have had the opportunity of consulting independent legal advice.

The present writer further opines that prenuptial agreements should become enforceable in every jurisdiction of the world. It is truly a legal antidote against gender discrimination in the sharing of the marital property. The arguments of public policy; preservation of the sanctity of marriage and ousting of the jurisdiction of the Courts, are now untenable on the grounds already advanced. Prenuptial agreements on the contrary afford the parties the opportunity to take decisions and responsibilities for their own lives.³⁶ Moreover the courts, of most jurisdictions often ensure that parties in stronger negotiation positions do not take undue advantage of the weaker party.

Prenuptial agreements have also been found to be cost effective, as they totally eliminate the usual lengthy, acrimonious legal battles often associated with financial aspects of divorce. All that the courts now have to do is just to enforce the terms which the parties themselves agreed upon in the absence of undue influence or manifest injustice. Besides it is quite evident that the international trend is now leaning heavily in favour of global enforceable prenuptial agreements, and there is every need for every country to recognize and enforce same in order to avoid unnecessary conflict of laws across borders.

³⁴ Prenuptial Agreements in England, www.terry.co.uk/pre-nuptial. Accessed 23rd April, 2009

³⁵ *Ibid* at 2 of 4

³⁶ Morley *op.cit* 20 of 23.

A case is hereby made for the legal enforceability of prenuptial agreements in virtually every country of the world. In Africa, South Africa is the only African country that enforces them. Other African countries should follow suit. In England while pre-nuptial agreements currently have no legal standing, however, pressures have continued to be mounted on the British Parliament to review its obstinate stand, and, it would appear that, in recent times, the English traditional view is shifting gradually. The English Courts may likely start dancing a different tune in no long distant time, this is as a result of the fact that today, English cases like *M V M*,³⁷ *K V K*,³⁸ and *Clare Dyer's* case³⁹ all point to the irresistible conclusion that, there is a growing trend for English judges to take note of prenuptial agreements.] In *M v M*,⁴⁰ the Court was prepared to take the couples' prenuptial agreement into account as a factor tending to reduce the final award to the wife. In *K V K*,⁴¹ the Court held that the wife was limited to the terms, concerning capital distribution, which she had agreed to, in a pre-nuptial agreement. The Court in this case, further laid down the factors to be considered in determining the weight to be attached to pre-nuptial agreements. The decision stated that where there is no duress, and the parties have received independent legal advice; the relevant facts had been disclosed; and the agreement is not manifestly unfair, the Courts are increasingly likely to uphold the terms of the nuptial agreement. The growing popularity of prenuptial agreement was best captioned by the presiding judge in the English *Dyer's case*, when he commented⁴² 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.

Conclusion

In conclusion, it is hoped that the countries that are yet to accept the enforcement of pre-nuptial agreement should endeavour to take a leaf from countries like, Canada, America Australia, Netherlands, etc which already have a long established practice of enforcing prenuptial agreements. The need for a world- wide legal recognition of prenuptial agreements is imperative in view of the fact that people now travel and live across borders and expect their pre-nuptial agreement to be accorded legal recognition in any country of the world in which they may wish to settle down. Besides, our laws should be more forward looking. Prenuptial agreements, contrary to popular belief, do not destroy the romance of an upcoming marriage, rather they afford the couples the opportunity to share their hopes and dreams, and articulate their aspiration. A relationship based on reality is definitely stronger than one built on illusion⁴³. Even, the former English Parliamentarian Secretary, as far back as 1998, gave a boost to pre-nuptial agreements when he conceded that there are "significant advantages" to legally binding prenuptial contracts.⁴⁴

³⁷ (2002) I F.L.R. 654

³⁸ (2003) I F.L.R. 120

³⁹ (2002) Tuesday, Nov 12, 2002, London Guardian.

⁴⁰ *supra*

⁴¹ *Supra*

⁴² *Supra*

⁴³ *Ibid* at 2 of 2.

⁴⁴ Prenuptial Agreements lowweddingguideukcom/articles. Accessed on 14th May2009