

# PROPERTY RIGHTS OF WOMEN MARRIED UNDER CUSTOMARY LAW: REVIEW OF *ARAJULU V. MONDAY*

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## **Abstract**

Under customary law, women are regarded as subordinates to husbands and are deprived of equal rights to the matrimonial property where a dissolution marriage occurs. This practice of denying women equal property rights is repugnant to the principles of natural justice. This article adopts the desktop research to examine the decision in *Arajulu v. Monday* where ownership of property acquired during the subsistence of a customary law marriage was determined. It examines if adequate monetary consideration is sufficient alone to determine the legal ownership of property acquired during the subsistence of marriage. It found that in determining ownership rights under customary law marriage, strict rules of ownership or proofed title should not be adopted. This case addressed for the first time owner of the property for women married under customary law. It concludes by advocating that courts rely on the rules of natural justice when determining ownership of matrimonial property.

**Keywords:** *Customary law; Property; Rights; Married women; Marriage*

## **1. INTRODUCTION**

The indigenous form of marriage peculiar to the Nigerian people before the advent of colonialism is the customary law marriage. It is a system of marriage conducted according to the custom and

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tradition of the intending couple. The introduction of the British rule brought about legal dualism.<sup>1</sup> Under customary law, marriage is not regarded as a bond between two people alone but extends to the members of their community.<sup>2</sup> In Nigeria, customary laws differ from place to place as a result of several ethnic groups. However, common features exist concerning the marriage union and dissolution of the marriage union. Some of these features/practices are discriminatory and examples can be seen in cases dealing with property rights of women, custody of children<sup>3</sup> and divorce. Under the strict customary law practices, women are not unilaterally allowed to initiate divorce except with the approval of her parents,<sup>4</sup> the same situation cannot be said to apply to the men for they are not faced with this requirement. This article examines the issue of divorce and rights to ownership of properties acquired during the subsistence of marriage. It has been observed that questions concerning properties acquired under a customary law marriage have persistently addressed by scholars but not dedicated significant attention by the courts. After a divorce, the practice is to send a woman out of her husband's house in total disregard to her emotional, psychological, and financial investments in building the home. The usual practice is for the man to take exclusive custodial right over the children. This right over the children is capable of transmission to the husband's relatives.<sup>5</sup>

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<sup>1</sup> Allot, A.N., *Discussing African law in Integration of Customary and Modern Legal Systems in Africa*, (University of Ife, 1971), at p. 88; Zabel, S., and Ceylon, B., "Legislative History of Gold Coast and Lagos Marriage Ordinance", 13(3) *Journal of African Law*, 1969), at pp. 158-78.

<sup>2</sup> Onokah, M.C., *Family Law*, (Ibadan, Spectrum Books, 2003), at p. 15.

<sup>3</sup> *Abiakam & Ors v. Anyanwu* [1975] 5 E.C.S.L.R., at p. 305.

<sup>4</sup> Obi, S.N.C., *Modern Family Law in Southern Nigeria* (London: Sweet & Maxwell, 1966), at p. 50.

<sup>5</sup> See the Dictum of Per-Okoye, J in *Abiakam & Ors v. Anyanwu*, above note 3 at p. 305.

It has been stated that the reasons for this practice are based on the fact that Nigeria is a patrilineal society. This is contrary to what obtains under the Act where the welfare of the children is given uppermost consideration. These inequalities are evident in the property rights of women married under customary law. Married women are seen as married being married into the family, hence become a full member of her husband's family under the union.<sup>6</sup> Where a woman is divorced, she leaves her husband's house without taking any of her property along. In several customs, the woman is expected to refund the marriage symbol which is the bride price, this practice is unfair and against the rules of natural justice.<sup>7</sup> Women married under the Act, are protected by the law and accorded a much fairer treatment compared to the women married under the Act.

Recently a High Court sitting in the Ibadan Judicial Division delivered a judgment in *Arajulu v. Monday*<sup>8</sup> and determine the legal ownership of properties acquired during the subsistence of a valid customary law marriage. The Court relied on the Married Women Property Law of Oyo State and the principles of natural justice and held that the claimant had not the only propriety right in the property but also a possessory right which could be perpetual, the customary law divorce does not tantamount to the denial of the woman access to the house. The Court relied inter alia on *Hine v. Hine*<sup>9</sup> and held further that in the determination of strict legal rights, issues concerning fairness, justice, and equity should be deployed in the case. The court acknowledged the fact that the

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<sup>6</sup> Izzi, M.O., "The Injustice of Customary Law Marriages in Nigeria: Emerging Issues". *Ife Juris*, 2019, at pp. 86-100.

<sup>7</sup> *Egri v. Uperi* [1974] 4 E.C.S.N L at p. 632.

<sup>8</sup> *Arajulu v. Monday* Unreported Decision of the Oyo State High Court of Justice, Court 1. Delivered 28 February, 2019. Suit No. 1/169/2015 at pp. 1-30.

<sup>9</sup> *KharieZaidan v. Fatima Khali Mohssen* [1962] 1 WLR 1124 at p. 1128.

presentation of some receipts in respect of the property bearing the names of the couple gave the intention of a joint property irrespective of the disproportional contribution.

This article reviews this decision because property acquired during the subsistence of marriage under customary should not be exclusively owned by the man as it is in practice. It also examines the need to identify and accept the fact that a woman need not show evidence of financial contribution to a property. Acts that had been done by a woman during the pendency of a marriage such as domestic chores, tendering the children and the husband, etc. are all of the beneficial interests of the marriage. Contribution to the marriage must be limited to financial contribution but be appreciated as time, emotions, and labour a wife expends in a marriage that cannot be quantified.

The article examines these issues under seven parts. The first part deals with the introduction, the second part examines customary law and the status of women married under customary law. The third part examined the dissolution of marriage under customary law. The fourth part examines the case of *Arajulu v. Monday* in Perspective, while the fifth examines the matters arising from the case. The imperative of protecting women's property rights is examined in the sixth part and the seventh part concludes and makes recommendations.

## 2. CUSTOMARY LAW AND STATUS OF WOMEN MARRIED UNDER CUSTOMARY LAW

In assessing the indigenous legal order in Nigeria, customary law is the starting point of the Nigerian legal history.<sup>10</sup> In *Kharie Zaidan v. Fatima Khali Mohssen*<sup>11</sup> the Supreme Court defined Customary Law as a system of law, not being a common-law and not being a law enacted by any competent legislature in Nigeria, but that which is enforceable and binding within Nigeria as between the parties subject to its sway. Similarly, in *BilewuOyewumi v. Amos Owoade Oginesa*<sup>12</sup>, customary law was defined as the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. In a similar case of *Aku .v. Aneku*,<sup>13</sup> the Nigerian Court of Appeal defined customary law as the unrewarded tradition and history of the people which has grown with the growth of the people to stability and eventually becomes an intrinsic part of their culture. Even though the body of the Nigerian jurisprudence consists of customary law, received English law, the Nigerian legislation, and other subsidiary legislation; the position of customary law cannot be downplayed.

The inequalities peculiar with customary law practices particularly as it affects women negatively attracted several criticisms over the years. There have been a series of judicial pronouncements and legislative interventions advocating for gender equality. Some customary law practices deny women the privilege to enjoy full legal status compared to those exercised by men. For example in

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<sup>10</sup> Nwabueze, R.N., "The Dynamics and Genius of Nigeria's Legal Order", 1 *Indigenous Law Journal* (2017) at pp. 153-99.

<sup>11</sup> [1973] 1 All N.L.R, p. 86 at p. 101.

<sup>12</sup> [1990] N.W.L.R (Pt. 196) p.182, at p. 207.

<sup>13</sup> [1991] 8 N.W.L.R pt. 209 at p. 280.

Elizabeth Stevens & Another v. AG,<sup>14</sup> the petitioner filed a petition against an Article of the Constitution<sup>15</sup> which deprived women in Tanzania the right to inherit land. During the trial reference was made to International treaties eliminating discrimination against women,<sup>16</sup> The Court in delivering its judgement admitted the fact the customary practice depriving women access to land was contrary to the Constitution. The court surprisingly made a turn around and held inter alia, that customary law which contravened the Constitution could not be abolished by the Courts. Very few women have been bold enough to disregard customary law myths and consequences attached to challenging obnoxious customary law practices by seeking judicial intervention. Some scholars think that the reason for this persistence in this discrimination against women could emanate from the bride-price which is paid to the bride's parents. This indirectly presents the woman as a mere article of sale devoid of rights and duties.<sup>17</sup> This assertion has been criticised by a consensus of scholars and has explained this as a misconception of the significance of the payment of bride-price.<sup>18</sup>

The payment of bride price only serves as a legal validation of a customary law marriage.<sup>19</sup>Emiola had argued, that in reality, it is not as if women are devoid completely of rights, what occurs is a

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<sup>14</sup> *Elizabeth Stephen v. AG* (High Court of Tanzania at Dares Salaam) (Unreported) Miscellaneous Civil Case Number 82/2005. See also the judgement in *Attorney General v. WK Butambala* 1993 TLR 46.

<sup>15</sup> Article 30(3) Paras 1-51, Constitution of the United Republic of Tanzania, 1977.

<sup>16</sup> CEDAW, 1979; ACHPR, 1091; Convention of the Rights of the Child, 1989, and ICESCR, 1986.

<sup>17</sup> Coker, G.B.A., *Family Property among the Yoruba* (2<sup>nd</sup> Revised Edn.) London, Sweet, and Maxwell, 1966 at p. 364.

<sup>18</sup> Emiola, A., *The Principles of African Customary Law*, (Ogbomosho, Emiola Publishers, 2005), at p. 37.

<sup>19</sup> Mbiti, J.S., *African Religions, and Philosophy* (2<sup>nd</sup> Revised Edn.) Heinemann 1969, pp. 1-288 at p. 140.

transition from the control of their fathers to their husbands. He posits further that under customary law, “the woman’s status lies between that of a serf and an infant who has restricted capacity”.<sup>20</sup>

Evidence abounds that under customary law, women are denied the right to own landed property in their capacity. They are only entitled to own property of less importance such as cooking utensils and items of clothing. Under the Nigerian customary law, a woman needs the consent of her husband before she can get involved in more serious transactions.<sup>21</sup> A woman has no right of action under customary law, for example, a woman cannot institute an action against her husband on the ground of adultery, but her husband has the right to bring such an action against his wife. In the event of a dissolution of the marriage, a woman married under customary law is seized of the right to take custody of the children, irrespective of their ages, properties and all other properties she acquired during the pendency of the marriage.<sup>22</sup>

The husband takes them all exclusively. In addition to this, the woman is expected to refund the bride-price except in situations where the husband waives this requirement.<sup>23</sup> Women married under customary law rarely inherit properties from their fathers nor husbands. Wives are subordinate to their husbands and his family.<sup>24</sup> Although the statutory laws and judicial interventions outlaw these discriminatory practices against women, these

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<sup>20</sup> id, at p. 141.

<sup>21</sup> Emiola, *The Principles of African Customary Law*, above note 16 at p.38.

<sup>22</sup> *ibid.*

<sup>23</sup> *Ikendingwu v. Okafor* [1966-67] 19 E.N.I.R, at p.178.

<sup>24</sup> Food and Agriculture Organisation of the United Nations, Gender and Land Rights Database, available at <<https://www.fao.org/countries-list/custo...>> (accessed 19 July 2020).

practices persist.<sup>25</sup> It is pertinent to state that these discriminatory practices are more pronounced in rural areas and to strive as of ignorance, poverty, social stigma, taboos, etc.

### 3. MARRIAGE DISSOLUTION OF MARRIAGE UNDER CUSTOMARY LAW AND WOMEN'S PROPERTY RIGHTS

Under the Nigerian customary law marriage, no length of time is prescribed before divorce action can be initiated.<sup>26</sup> This is contrary to what subsists in marriages contracted under the Marriage Act, where the dissolution of a marriage could commence after two years after the marriage was conducted. The dissolution of marriage under customary law could be achieved through judicial or extra-judicial Mode. The procedures involved in dissolving a customary law marriage are not as stringent as those required for a Marriage conducted under the marriage Act, neither does it not involve technical formalities.<sup>27</sup> A man could divorce his wife unilaterally or the families of the man and the woman can jointly agree to a dissolution of the marriage. A man can divorce his wife under customary law by simply throwing out his wife's cooking utensils and personal items, thereafter the wife packs up

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<sup>25</sup> See 41(1) (2) 1999 CFRN; *Chituru Ukeje v. Gladys Ada Ukeje* (2014) 9 NWLR (Pt. 1418) at p. 384; *Onyibor Anekwe & Anor v. Maria Nweke* (2014) 9 NWLR pt. 1412 at p. 393; Articles 2, 5 and 11 of Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Article 2 and 3 of Universal Declaration of Human Rights 1948; Article 3 International Covenant on Civil and Political Rights (ICCPR) 1966; Violence against Persons Prohibition Act (VAPPA) 2015; Articles 2 and 3 African Charter on Human and People's Rights 1981 with specific reference to Articles; Article 2 and 5 Protocol of the African Charter on Human and People's Rights of Women in Africa. Article 2 and 5.

<sup>26</sup> Onokah, *Family Law*, above note 2 at p. 166.

<sup>27</sup> Oni, B.A., "Dissolution of marriage Contracted under Customary law in Nigeria: Comments on *Ezeaku v. Okonkwo*" 2015, at pp. 624- 31, available at <<https://www.davidpublisher.org>>(accessed 19 June 2020).



her belongings and returns to her parents.<sup>28</sup> Another mode of dissolving a marriage is for the man to personally return his wife to her parents.<sup>29</sup> A man could also quit his matrimonial home thereafter inform his wife about his intention to dissolve the marriage.<sup>30</sup>

On the other hand, a woman married under customary law who intends to quit her marriage can either pack her personal property and return to her parents; remarry another man and the new husband returns the bride-price to her husband<sup>31</sup> or she gets involved in an extramarital relationship with another man during the subsistence of her marriage. For termination of a marriage to be valid, the bride-price must be returned after the overt acts of dissolution of marriage as discussed above have occurred.<sup>32</sup>

A marriage could be dissolved through the judicial mode by either of the parties coming before the courts, usually, the customary courts, to obtain a release from the marriage. Parties will usually adopt this procedure where there are unsettled issues as to the quantum of the bride-price that should be returned to the husband's family,<sup>33</sup> or where the woman has refused to leave the matrimonial home after being told to leave. The courts will examine the case thereafter make a judicial pronouncement.

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<sup>28</sup> Jordan, Bishop Shanahan of Southern Nigeria at p. 225 In Onokar, *Family Law* above note 2 at p.167.

<sup>29</sup> *Okpanum v. Okpanum* [1972] 2 E.C.S.N.L.R, at p. 581.

<sup>30</sup> Evidence abounds of the prevalence of this form of dissolution of marriage in Nigeria.

<sup>31</sup> *Solomon v. Gbobo* [1974] E.C.S.N.L.R, at p. 457; *Edet v. Essien* [1932] 11 N.L.R, at p.47.

<sup>32</sup> *Nwangwa v. Ubani* [1997] 10 NWLR (Pt. 526) at p. 599.

<sup>33</sup> *Solomon and Gbobo*, above note 29 at p. 456.

Section 43 of the Constitution provides for the rights of every citizen of Nigeria to acquire and own immovable property anywhere in the world,<sup>34</sup> and they have been described as immutable inviolable rights of its citizens.<sup>35</sup> Issues concerning marriage under customary law leave a woman at a disadvantageous position where it pertains to her property upon divorce.<sup>36</sup> For example the Obi Customary Law Manual applicable<sup>37</sup> to Anambra and Imo States provides thus:

Although the movable and immovable property which a married woman acquires belongs to her exclusively, such property is subject to the overall control of her husband. She must obtain her husband's consent before he can give away any property she acquired during marriage to any person other than her child in a lifetime or by will.<sup>38</sup>

Under the Nigerian customary law, the recognition of women's rights to the property is still in the opinion of the writer, a mirage despite the various Conventions, Protocols, Charters, Judicial

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<sup>34</sup> Section 43 Constitution of the Federal Republic of Nigeria 1999.

<sup>35</sup> Oliyide, O., *Rights*, (Lagos, Nigeria, Throne of Grace Publishers Ltd, 2006), at p.32.

<sup>36</sup> Efe, C.J & Eberechi, O.E., "Property Rights of Nigerian Women at Divorce: A Case for Redistribution Order". Open access online law publication, 2020. Doi<http://dx.doi.org/10.17159/1727-3781/2020/v23ioa5306>, available at <<https://journals.assaf.org.za>>article> (accessed 18 July 2020).

<sup>37</sup> Obi, S.N.C., *The Customary Law Manual: A manual of Customary Laws Obtaining in the Anambra and Imo States*, para 32, cited in Akolokwu, G., & Raji, B.A., "Property Rights of Married Women under Customary law in Nigeria: Myth or Reality?" 1 Legal Network Series, 2018, p.1 at pp. 1-24.

<sup>38</sup> *ibid*.

interventions, calls by Non-Governmental Organisation's.<sup>39</sup> The basis for this discrimination against women has been traced down to patriarchy.<sup>40</sup> Customary laws in Nigeria deprive women of the right to inherit her husband's property after his demise even where it is established that the woman contributed to the acquisition of the properties. The opposite situation occurs where a woman is married under the Marriage Act, where the woman's rights are upheld as guaranteed by the law. Generally, in Nigeria married women under customary law and the marriage Act, women are expected to be taking care of by their husbands. <sup>41</sup>A woman married under customary law has no right to claim a house jointly built by her and her husband. The right she has to the home terminates upon divorce and she is expected to move out of the home without a right to jointly claim the home.

The Marriage Act makes extensive provisions on the maintenance and settlement of matrimonial property in situations where the dissolution of marriages occur.<sup>42</sup> The woman is expected to tender evidence as proof of the extent of contribution, and she is made a part of the property to the extent that is commensurate to her contribution. Women under customary law have recently been judicially recognised as having equal rights to own property and these decisions have been celebrated. However, what obtains, in reality, is a gross denial of these rights. It is worthy of mention that this practice does not apply to all customary laws in Nigeria, but

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<sup>39</sup> See *Chituru Ukeje v. Gladys Ada Ukeje* at p. 310; *Onyibor Anekwe & Anor.v. Maria Nweke*, above, note 23 at pp 395 at 399 respectively.

<sup>40</sup> Akolokwu, G & Raji, "Property Rights of Married Women under Customary law in Nigeria: Myth or Reality?" above note 36 at p. 15.

<sup>41</sup> *id.*, at p. 7.

<sup>42</sup> *Shodipo v. Shodipo* [1990] WRN at p. 98; *Nwanya v. Nwnaya* [1987] 3 NWLR (Pt. 62) at p.239.

operate in various degrees depending on the customs of the ethnic group.

Denying women the right to access land and other properties of value have attracted global recognition and have been described as a breach of their human rights.<sup>43</sup> Even the courts had in some instances deprived women of rights to own property under the Act, for example in *Davies v. Davies*, Buckley, held thus;

Yoruba native law and custom deprived the widows of inheritance rights in her deceased husband's estate because the devolution of property follows the blood. Consequently, unless property given to wife is proved to be an outright gift during the lifetime of the husband it will devolve on the husband's death as family property to be inherited by the deceased husband's children, or relatives where there are no children.<sup>44</sup>

The position above depicts the fact that in Nigeria, marriage does not accord equal partnership rights to spouses upon death or divorce. The financial benefits of a marriage ought to be shared bearing in mind the fairness and equity.

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<sup>43</sup> See generally above note 23.

<sup>44</sup> *Davies v. Davies* [1929] 2 NLR at p. 79; *Oke v. Oke* [1974] 3 SC at p.1; *Akinnubi v. Akinnubi* [1979] 4 NWLR (Pt. 486) at p. 144.

#### **4. THE CASE OF *ARAJULU V. MONDAY* IN PERSPECTIVE**

The parties in this case approached the State High Court to determine ownership properties acquired during the pendency of their marriage. The defendant had issued a quit notice to the claimant to vacate a property acquired during their marriage. The defendant alleged that the claimant made no financial contributions to the purchase of land nor erecting the building. The parties, in this case, got married under customary law in 1997 and the union had produced four children who were living with the claimant in one of the disputed properties. The defendant filed an action for divorce at a Grade 'C' Customary Court in Oyo State and a divorce was obtained in July 2014. The claim against the defendant is for;

- a) A declaration that the one plot of landed property; the three (3) bedrooms flat and the uncompleted story building thereon at No 7 Fadama, Biala Estate, Olodo, Ibadan, Oyo State are jointly owned and possessed by the claimant and defendant.
- b) An order that one plot of landed property, the three (3) bedrooms flat, and the uncompleted story building thereon be sold and the proceeds of the sale be divided into two halves between the claimant and the defendant in the case.
- c) An order of perpetual injunction restraining the Defendant either by himself, agents, privies, or whosoever called from humiliating, harassing, intimidating, or assaulting the claimant.

The defendant filed a counterclaim and joined issues with the claimant in a statement of defence stating the following; -

- a) A declaration that the receipts dated 15<sup>th</sup> January 2011, 25<sup>th</sup> February 2012, and 19<sup>th</sup> April 2012 was forged to fraudulently use the same to take over the defendant/counter claimant property situate at No 7 Fadama, Biala Estate, Olodo, Ibadan, Oyo State.
- b) Perpetual injunction restraining the claimant her servants, privies, and anyone through her from further occupying or having the said property.

The claimant gave evidence to the fact that during the subsistence of the marriage she had jointly contributed to building a house that was unilaterally sold by the defendant without her knowledge. She alleged that she jointly contributed to the purchase of another land upon which the subject matter of the case was erected. The claimant expended the sum of N2m of her money for the purpose building of the houses which was for the benefit of the children. In addition to this, she had contributed substantially to the upkeep, feeding, and education of the children. The claimant also gave evidence of assaults she had received from the defendant in a bid to eject her. She concluded by stating that if the defendant is allowed to sell the house, this will cause hardship to the claimant as her children.

The claimant tendered evidence of copies of receipts of purchase of land;<sup>45</sup> purchase of building materials;<sup>46</sup> pictures of photographs showing pictures of the disputed property at various stages of

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<sup>45</sup> Exhibit A1, A2, and A3. Receipts of purchase of land.

<sup>46</sup> Exhibit 4. Joint expenditure on the purchase of planks for the roofing of the building.

construction, copies of documents including the certificate of Registration of Business name. In addition to other documents, the defendant gave evidence by presenting three witnesses. The first witness (DW1)<sup>47</sup> who is a surveyor testified that he only knew the defendant but not the claimant as he never had any transaction nor dealings with her. The second witness (DW2) a land agent/insolvency practitioner, testified that both parties were known to him and that during the time he worked for them, the claimant was a full-time housewife. He testified that he sold a piece of land to the claimant and the money was paid in three installments and that the claimant signed some receipts as a witness to the agreement.

The third defendant witness (DW3) also testified that he knew that parties in his capacity as the bricklayer that worked on the subject matter. He gave evidence that all the building materials utilised for the construction of the building were bought by the defendant. He corroborated DW1 and DW2's evidence that the claimant was a full-time housewife during the period of construction.

The defendant gave evidence as DW4 as stated that, the claimant was a full-time wife who was not working and did not contribute towards the purchase or construction of the building on the land. He testified to the fact that he sold the initial land under construction because he bought the land, hence did not need the consent of the claimant to dispose of it when he did. He confirmed the claimant's position that she only signed as a witness when the land transactions were completed. He denied any form of joint contribution between him and the wife towards buying the land nor building of the disputed property. He gave evidence to the fact that

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<sup>47</sup> (DW1) Defendant witness 1.

the claimant only went to supervise the building while it was under construction only when he away and unable to personally supervise the construction of the building. He confirmed that he instituted an action in the Magistrate Court to evict the claimant from the said property.

The defendant tendered several documents to buttress his claim. However, he denied any form of violence against the claimant. He concluded by stating that the claimant intends to fraudulently take the disputed property from him by tendering fake receipts to the court as evidence. He prayed the court to evict the claimant since the marriage had been dissolved.

After the close of defence, five issues were formulated for determination by the court.

- 1) Whether Exhibits A1, A2 and A3 tendered by the claimant can validly confer joint ownership of the property situated at No.7 Fadama, Biala Estate, Olodo, Ibadan, Oyo State on the claimant and defendant,
- 2) Whether exhibits A1, A2, and A3 tendered by the claimant were not forged given their discrepancies and alterations in the dates and signatures of the receiver.
- 3) Whether exhibits A1, A2, and A3 tendered by the claimant were not forged given their distinct nature in form and character from Exhibits C and C1.
- 4) Whether from the totality of the evidence led before the Honourable Court, the claimant is entitled to the reliefs claimed in paragraph 17 of her statement of claim.
- 5) Whether the claimant is entitled to an injunction order of this Honourable Court.



## Judgment

His Lordship, Abimbola, CJ thoroughly scrutinized the fact and evidence before him and identified that the core issue in context and apt for resolution was a determination on the joint or exclusive ownership of the property within the content of the previous marital relationship. The court emphasized that in determining ownership of the property the interest of the issues of the marriage should be considered and not overlooked. The court emphasized the fact that the property was purchased during the pendency of the customary law marriage and drew a distinction between property acquired before marriage and that acquired during a marriage. The court held *inter alia* that if the property was acquired before the marriage, then the claimant had no right to claim the subject matter, hence, this situation applies if the reverse were the case.

The Court analysed the provisions of the Married Women Property Law of Oyo State 2000<sup>48</sup> which is only applicable to women married under the Marriage Act and noted that its provisions did not accommodate women married under native law and custom. The Court applied its discretion in considering the provisions of the Act<sup>49</sup> and stated that denying the ownership of title acquired before marriage would be repugnant to natural justice equity and good conscience. On the issue of the claimant not making financial contributions, the court stated that the performance of wifely duties, paying children's school fees, and tendering the children were unquantifiable in monetary funds. The supervisory role allegedly played by the claimant was held to amount to good consideration as it cannot be quantified.

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<sup>48</sup> Section 20 Married Women Property Law of Oyo State 2000.

<sup>49</sup> *Ibid* at Section 20.

In determining the issue of consideration, his Lordship stated thus: "In practice, where a party leads credible evidence in support of a claim or relief such claimant would not be denied the relief or remedy for reasons of failure to state the law under which the relief is claimed. Where there is a wrong there is a remedy".<sup>50</sup> The court identified the fact that the question that calls for determination transcends beyond a mere claim of ownership of property, but involves the issue of the right of a wife as to a matrimonial home; the right to proprietary interest; the right of occupation during the marriage and the right to maintenance of children after the dissolution of marriage.<sup>51</sup> His Lordship held, that given the issues identified, a case of this nature cannot be determined by the strict rules of ownership or proofed title but by equitable principles and the discretion of the court about what is fair having in mind the best interest of the children.<sup>52</sup>

The court relied on the decision in *Amadi v. Nwosu*,<sup>53</sup> and the principles guiding the philosophy of the Married Women Property Act<sup>54</sup> since the Act did not accommodate marriages conducted under native law and custom but recognised the validity of customary law marriages. The Married Women Property Law of Oyo State and Section 35 were relied on in the determination of this suit for they recognise the rights of women married under customary law and customary law marriage.<sup>55</sup> The court relied on the principles of natural justice, equity and good conscience on the ground that;

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<sup>50</sup> *Arajulu v. Monday*, above note 9 at p. 24.

<sup>51</sup> *Ibid* at p. 25.

<sup>52</sup> *Id*, at p. 23.

<sup>53</sup> *Amadi v. Nwosu* [1992] 5 NWLR at p. 273.

<sup>54</sup> Married Women Property Act 1881.

<sup>55</sup> Marriage Act, Section 36 M6 Laws of the Federation of Nigeria 2004.

Moreover, our native law and custom is dynamic and changes with modern concept as society becomes more civilized. Therefore, the influence of English legal Jurisprudence on rules of customary law cannot be ignored. This explains why I would be guided by those rules and the legislative intention in these provisions.<sup>56</sup>

The court relied on the Married Women Property Act to determine three principles identified which were as follows: - What was the intention of the parties as to ownership of the property at the time of purchase and construction of the building? It was found that the woman tendered receipts bearing Mr. and Mrs. This the court found to undoubtedly give effect to joint ownership. The court did not find any evidence of fraud on the receipt which was allegedly procured fraudulently. The issue of disproportional contribution was held to be immaterial. The Court found that where a husband avers that he was responsible for the purchase of land and funding of the building without the wife contributing monetarily, the wife's taking care of the children of the marriage through sundry duties and paying of school fees, is contribution worth more than money and would therefore, entitle her to joint ownership of the property allegedly build by the husband alone. This finding is profound as the Court has given impetus to non-financial contribution of the wife as a form of contribution. The wife contributes immensely in ways other than and greater than financial in the making of any home unfortunately, this unquantifiable contribution, is treated with disdain and careless abandon by the patriarchal society in Nigeria. Contribution in a marriage, should not be limited to money or financial. Taking care

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<sup>56</sup> *Arajulu v. Monday*, above note 9 at p. 26.

of the home, emotional and psychological support, feeding of the family, attending to sundry house chores, are fundamental contributions that cannot be calculated in monetary terms usually made by the wives. It may be argued that the man, provides for the family for instance, makes foodstuff and other necessities available however, without the unrecognized and unappreciated effort of the wife, the foodstuff provided, would not be converted to sumptuous meals which at times, is done at a high risk of kitchen accident. The process of converting the foodstuff, to sumptuous meals, is just as important, if not more, as providing the foodstuff.

The court referred to this form of contribution as the “palm tree principle of justice” under the principles and philosophy of the Married Women Property Act and relied on it in the determination of the suit.<sup>57</sup> The court applied its discretion and applied what was fair and just in the case. The claimant’s first relief was granted and the courts held thus “I hold that the accrued right of the claimant is not only proprietary by reason of her little contribution but also possessory and can be perpetual.” The landed property and the uncompleted building were thus held to be jointly owned by the parties. The court relied on Section 17 Married Women Property Law of Oyo State<sup>58</sup> as a source of guidance in determining these cases and noted that the Law recognise marriages under customary and gives the court a large room to apply discretion in considering issues of ownership.

The completed building was ordered to be retained and the children as beneficial owners remain in possession and occupation as the matrimonial home, by way of resulting trust created by both for their children. The claimant could remain in

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<sup>57</sup> *Arajulu v. Monday*, above at p.28.

<sup>58</sup> Cap. 83 Laws of Oyo State, 2000.

possession of the house and take care of the children so long as she remained unmarried. The uncompleted building was ordered to be sold and proceeds divided into equal shares and utilised for the maintenance of the children, though the claimant was not entitled to maintenance since she was a divorced wife.<sup>59</sup> The defendant and his privies were restrained from disturbing the peace of the claimant and the children giving the reason that;

The rationale is that a husband who marries a woman and builds a house during the pendency of the marriage stands the risks of losing that house if he later divorces the woman who had had children for him and lay claims to joint ownership unless such a woman of her own volition leaves the matrimonial property.<sup>60</sup>

The counterclaims were dismissed in entirety because the courts have sustained the claims, the counterclaims become practically unsustainable.

## 5. MATTERS ARISING

The case of *Arajulu v. Monday* sheds light on the status and rights of women married under customary law in Nigeria. Evidence abounds that in Nigerian society and under the rules of customary law, women are denied the right to land and other properties acquired during the pendency of the marriage even where the woman bear's children for her husband.<sup>61</sup> Under customary law,

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<sup>59</sup> *Arajulu v. Monday*, above note 9 at p.29.

<sup>60</sup> *id.*, at pp. 29 & 30.

<sup>61</sup> Ashiru, M.O.A., "Gender Discrimination in the Division of Property on Divorce in Nigeria", 51 (2) *Journal of African Law* 2007, p. 316, at p. 31; Onuoha R.A.,

the right a wife has to acquire and own property particularly real estate is subject to the husband's approval and total control.<sup>62</sup> The justification for this practice is that the husband owns the woman after marriage hence the capital in which the woman traded was seen as belonging to her husband.<sup>63</sup> It is important to state that the extent to which a woman can acquire and own property is dependent on the custom and tradition applicable to her husband. The practice of denying women property rights to real estate is predominantly practiced in the South East and South Southern parts of Nigeria.

To corroborate the status of women as regards real estate, Efe & Eberechi had stated thus; "under customary law, however, whether separately or jointly owned by the spouses, properties cannot be redistributed by the courts upon application of a spouse for the benefit of either spouse or the children of the marriage. What the court does is to determine "who owns what by virtue of purchase, acquisition or inheritance".<sup>64</sup> The authors identified the fact that despite the enactment of the Marriage Act<sup>65</sup> and the provisions of the Married Women's Property Act<sup>66</sup> though which does not address properties acquired in a customary marriage, the courts have persistently applied for strict legal ownership in determining issues.

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"Discriminatory Property Inheritance under Customary Law in Nigeria: NGO's to the Rescue"<sup>10</sup> (2) *International Journal of Not-for-Profit Law*, 2008p.79 at p.93.

<sup>62</sup> Onokah, *Family Law*, above note 2 at p. 25.

<sup>63</sup> *Ibid* at pp. 251-252.

<sup>64</sup> Efe, C.J. and Eberechi, O.E. "Property Rights of Nigerian Women at Divorce: A Case for Redistribution Order", 23 *Open Access Online Journal*, 2020, available at <<https://journals.assaf.org.za>>article> (accessed 19 July 2020); Nwabueze, N., "The Dynamics and Genius of Nigeria's Indigenous Legal Order", above, note 11 at p.175.

<sup>65</sup> Chapter 218, Laws of the Federation of Nigeria 1990 at Section 19.

<sup>66</sup> Married Women Property Act, above note 51 at Section 20.

The judgment delivered in *Arajulu v. Monday* is a welcome development and a departure from the earlier practice of applying the strict rules of legal ownership. This would have involved the woman tendering evidence, based on this evidence the courts determine the extent of ownership of the property. The question at this point is this, is it possible for a wife, to keep all receipts of her expenditures concerning a building? Is she expected to procure receipts for purchases made whenever she goes to buy groceries and other household wares? The thought of keeping receipts for every payment made by a wife may only arise where she intends to quit the marriage at a later date. Evidence abounds that where a building is under construction for the benefit of a family in Nigeria, the spouses and children all make sacrifices towards the successful completion of the building. Even where the wife is unable to supply sufficient monetary consideration, her wifely responsibilities and other family responsibilities are unquantifiable/unmeasurable. Another issue that should be considered is the practice of writing only the name of the husband on a land document after purchase. This does not in any way attribute sole ownership of the property to the man, for the woman could have been ignorant of the motive behind this act. It could even be that she did not deem it necessary for her name to be inputted since the property was for the benefit of the family.

The issue of contribution was determined in the case of *Linda Naruna Oluwu v. Dr. Adekunle Olayemi Olowu*,<sup>67</sup> where Per A. Adeniran, J said inter alia:

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<sup>67</sup> Unreported decision of the Oyo State High Court of Justice, delivered 28 June 2002. Suit No 1/600D/93.

Evidence abounds that the Petitioner took care of the children, took them to school, saw to the welfare of the children of the marriage, used her income for feeding of the family, encouraged the respondent to set up his clinic and assisted tremendously in providing the initial services necessary, it is unnecessary to have any document to show for all the above services or to say how much all these.<sup>68</sup>

Though the case as above bothered on a divorce petition concerning a marriage conducted under the Marriage Act, the issue of contribution to a matrimonial property was extensively determined. Per A. Adeniran adumbrated that where a spouse made contributions to the development of joint property, the legal estate of which is vested in one of them, he is presumed to hold in trust to give effect to the beneficial interest of the claimant. He relied on *Osibogun v. Osibogun*<sup>69</sup>; *Rimer v. Rimer*;<sup>70</sup> *Gissing v. Gissing*;<sup>71</sup> *Falconer v. Falconer*<sup>72</sup> and *Fribance v. Fribance*<sup>73</sup> to explain the meanings attributed to contribution in previous decisions. The court acknowledged the fact that the petitioner did not give direct evidence as contributions to the building. This the court believed was a result of the fact that the parties were living together as husband and wife peacefully, hence, "it is not expected that a transaction between the spouses will be evidenced in the same way as an ordinary commercial transaction".

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<sup>68</sup> Ibid at p. 210.

<sup>69</sup> [1977] 2 OYSHC (Pt 1) at p. 17.

<sup>70</sup> [1953] 1QB p. 63 at pp. 73-74.

<sup>71</sup> [1970] 3 W.L.R p. 257 at p. 259.

<sup>72</sup> [1970] 1 WLR p. 1333 at p. 1336.

<sup>73</sup> [1957] 1 WLR p. 384 at p. 389.



It is rather worrisome that the courts having analysed the meanings of contributions in this case and established the same, still went ahead and gave judgment in favour of the respondent given that her monetary contributions were not substantial.

The recent decision in *Ellen Tewesa v. Chinwemwe Tewesa*<sup>74</sup> can be regarded as a departure from the rule of depriving women of property rights after a dissolution of marriage has occurred. The grounds for the petition filed by the petitioner in a High Court of Malawi was a demand for the division of the respondent's academic honours. In the ruling Judge S.A Kalembere held that, the property in the educational qualification is family property. Though the Court emphasized that educational qualification cannot be transferred through inheritance after the demise of the owner, whose name is expressly written on the certificate. Similarly in *E.S & S.C v. United Republic of Tanzania*, CEDAW admonished the respondents (State party) to repeal and amend all discriminatory customary laws in Tanzania.<sup>75</sup>

The decision in *Arajulu v. Monday* should be applauded for it has for the first time brought to limelight the issue of joint or exclusive ownership of property acquired during the subsistence of a customary law marriage. In the cause of examining the issues in this suit, the quantum of consideration appropriate to lay claim to ownership of a property acquired during the subsistence of

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<sup>74</sup> *Ellen Tewesa v. Chimemwe Tewesa*, matrimonial Cause No.9 of 2012, High Court of Malawi at Blantyre, See also *Laurence Mtefu v. Germana Mtefu* (High Court of Tanzania, at Dar es Salaam (Unreported) Civil Appeal No. 214/2000 para 6. Msuya, NH, "Challenges Surrounding the Adjudication of Women's Rights in Relation to Customary law and Practices in Tanzania". 22(1) *PER Potchefstroom*, 2019 available at <[www.scielo.org/scielo](http://www.scielo.org/scielo)> (accessed 26 September 2020).

<sup>75</sup> *E.S & S.C v. United Republic of Tanzania* Communication No. 48/2013, UN Doc. CEDAW/C/60/D/48/2013 (2015) para.16.

marriage was thoroughly examined. The courts refused to apply the strict rules of legal ownership of property but applied the principles of natural justice. The provisions of the Married Women's Property Law of Oyo granted the courts the wide powers to apply discretion.

The worth and value of a housewife were identified in this case to be unquantifiable so long as the woman performed wifely duties, such as tending to children, taking care of the spouse, etc. On the contention of “contributions” to the building, the courts held that wifely duties were unquantifiable hence formed valuable consideration to the right to jointly own property acquired during a marriage. The fact that the woman could not present adequate receipts to confirm proof of the marriage does not in any way take away the fact she performed wifely duties especially where it was established that in some instances, the claimant supervised the building of the house when her husband was away.

The previous practice of applying the strict legal rules should not be applied strictly for the peculiarity of each case should determine what rules should be applied when courts are confronted with issues of this nature. The courts should apply discretion should be applied bearing in mind the rules of natural justice, equity, and good conscience bearing in mind the intention of the parties when the building was under construction in addition to the welfare of the children of the marriage. If the courts had applied for the strict legal ownership this would have done a serious injustice to the claimant and her children.

## 6. THE IMPERATIVE OF PROTECTING WOMEN'S PROPERTY RIGHTS

Women property rights have been defined as "the rights to own, acquire through purchase, gift or inheritance, manage administer, enjoy and dispose of tangible and intangible property, including land, housing, money, bank accounts.....under international human rights law, women and men are entitled to equal legal protection of their rights".<sup>76</sup> The Nigerian Constitution and other legislations make adequate provisions for every citizen, the rights to own properties and to be protected from all forms of discrimination on account of sex, religion, etc.<sup>77</sup>

In affirmation of these laws, the Supreme Court addressed the issue of female property rights in the landmark cases of *Chituru Ukeje .v. Gladys Ada Ukeje and Onyibor Anekwe& Anor .v. Maria Nweke*<sup>78</sup> where it restated the rights of a widow without a male child to inherit from her husband. These customary law practices were held to be discriminatory, barbaric, and repugnant to natural justice, equity, and good conscience.

Despite the laws made by proscribing discrimination at the Domestic, Regional and International levels, the practice of denying women the rights to own property acquired during the

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<sup>76</sup> Human Rights Watch., *Women's Property Rights Violations in Sub-Saharan Africa*, available at <<https://www.hrw.org>>property>qna> (accessed 20 July 2020); Dodeny, M., *Improving Access to Land and Strengthening Women's Land Rights in Africa*. World Bank Conference on Land and Property, 2013 available at <<https://web.law.columbia.edu>> (accessed 20 July 2020).

<sup>77</sup> Sections 42 (1) (2) Constitution of the Federal Republic of Nigeria, 1999.

<sup>78</sup> *Chituru Ukeje v. Gladys Ada Ukeje* (2014) 9 NWLR (Pt. 1418) at p. 310; *OnyiborAnekwe& Anor v. Maria Nweke* (2014) 9 NWLR (Pt. 1412) at p.399.

subsistence of a marriage persists under customary law.<sup>79</sup> Obnoxious customary law practices have persistently remained a clog in the wheel of justice to women attaining equal rights to own properties. This article in no way infers that customary law should be disregarded particularly when it is recognised as a source of law by those bound by it. However, it is apposite to state that customary law practices that discriminate against women be discarded in favour of more acceptable practices. The era of portraying women as objects that have no right to property is radically advocated to be abolished. The fact that women now acquire properties (real estates) just like the men should not be overlooked but taken into consideration in determining ownership of properties.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides for the right to adequate food, clothing, housing, and the continuous improvement of living standards of oneself and one's family.<sup>80</sup> These rights are protected under International Human Rights law, in addition to this, is the right to enjoy these rights on an equal basis with men, without discrimination. If the realization of these rights is to be achieved, then it is imperative that customary laws that discriminate against these rights be abolished. Women disproportionately lack the

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<sup>79</sup> Nelson, T., "Inheritance and Disinheritance: African Customary Law and Constitutional Rights", 88 (4) *Journal of Religion*, (2008), at pp. 100-134; Chaloka, B., "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System". *Human Rights of Women Journal*, (2011), at pp. 285-306; Candide-Johnson, C.A., *Inheritance Law and Women's Property Rights*. Summit, Organised by the Murtala Muhammed Foundation at the ECOWAS Centre, Abuja Nigeria (2005) at p.5; Adebola, M & Olotuah, O., "Violation of Women's Property Rights within the Family: Empowering Women for Gender Equality" 1 (1) *Journal of Domestic Violence* at pp. 58-63.

<sup>80</sup> I.C.E.S.C.R, adopted 16 December 1966 entered into force 3 January 1976 Article 11 (1).

rights to own real estate and this is a violation of their rights to own property.<sup>81</sup> The right to own land, housing, and property is essential to economic security and the survival of women.<sup>82</sup> Factors that have contributed to this discrimination has been attributed to the fact that homes are registered in the husband's names. Where women are denied equal rights to own and control property, this automatically deprives them of the opportunity to make community decisions nor partake in community decision making that is led by men who are the homeowners.<sup>83</sup> This imbalance has been identified as "creating a structural dependence on men for access to resources, which in turn can subject women to insecurity and violence".<sup>84</sup>

The Universal Declaration of Human Rights (UDHR) guarantees the rights of everyone to own property regardless of sex.<sup>85</sup> This law provides for the right to an adequate standard of living. It specifically provides that everyone should have equal rights as to marriage, during marriage and its dissolution.<sup>86</sup> Nigeria is a signatory to these International Instruments and should do all within its power to ensure maximum implementations of these laws prospecting women. It is important to respect the various customary laws practice so long as they are not repugnant to natural justice, equity, and good conscience. Practices found to be offending these rules must be transformed.

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<sup>81</sup> United Nations, *Women's Rights are Human Rights*, available at <<https://www.ohchr.org/Events>> (accessed 20 July 2020) at pp 1-125.

<sup>82</sup> United Nations Centre for Human Settlement, *Women's Rights to Land, Housing and property in Post-Conflict situations and During Reconstruction: A Global Overview*, Land Management Series. No 9 (Nairobi, 1999) at p.2.

<sup>83</sup> I.C.E.S.C.R, above note 69 at p. 67.

<sup>84</sup> id, at p. 68.

<sup>85</sup> The Universal Declaration of Human Rights (UDHR) 1948, Articles 17 (1), and (2).

<sup>86</sup> id, Articles 16,17, and 25 UDHR.

## 7. CONCLUSION AND RECOMMENDATIONS

The decision in *Arajulu v. Monday* has laid to rest the controversy that arises in determining the ownership of property acquired during the subsistence of marriage under native law and custom. The courts have in the past determined ownership of property based on the extent of contribution of each spouse. Under customary law, no express provision is stated as to the ownership of a property after a divorce, but the predominant practice is to deprive the woman of real property acquired during the pendency of the marriage because she came into the house with nothing. Even upon the demise of a husband, the wife is seen as an object of inheritance for she forms part of the deceased's husband's estate. The quantum of the contribution of the wife should not be used as a yardstick for determining ownership or joint ownership of a property. The physical, emotional, psychological contributions of the wife in addition to the maintenance of the home should all amount to valuable contributions even though unquantifiable. The courts are urged to apply discretion and the rules of natural justice, equity, and good conscience when determining issues bothering on ownership of a matrimonial property after a divorce. The mere fact that the married Women's Property Act makes no provisions for women married under customary even though it recognises customary law should not deter the courts from applying fair and equitable rules. Denying women, the rights to properties acquired during a marriage is a violation of their rights protected by law and a grave injustice to them.

Issues bothering on divorce whether under customary law and the Marriage Act are inevitable considering the challenges bedeviling the society. It is believed that after a divorce, a man and a woman should be able to continue their lives after the marriage. The

practice of depriving a woman all that she had invested in a marriage on the guise of the custom practices and strict statutory provisions demand urgent attention to the Government and the various stakeholders. This practice violates the rights of the women and in no way guarantees the welfare of the children where the woman has their custody. To address this situation, the following recommendations are suggested.

The right of a woman to equally own property acquired during a customary marriage should be henceforth recognised. Patriarchy has contributed to this practice, however, the tide is gradually changing. Many women are now breadwinners and acquire real estate just like men. Many women are now solely responsible for the education of the children, it would be unfair to deprive women of their investments in a marriage under the guise of customary law practice.

In determining issues of ownership after a divorce, the unquantifiable contribution of a woman during the subsistence of marriage should be sufficient consideration to determine ownership. The only exception to this should be where from the very inception of the marriage, the husband had made it known that the property will be solely his and the woman had agreed to this. However, where a divorce occurs, if the marriage produced children, the interest of the children should be taken into consideration and the woman is allowed to remain in the property to care for her children, so long as she remains unmarried.

The courts are encouraged to henceforth determine cases on ownership of a property after a customary law divorce based on their peculiarities. The strict rule of legal ownership would most times cause serious injustice to the women of their inability to

tender sufficient evidence to prove ownership. It is recommended that in making decisions the rules of natural justice, be deployed to avert injustice. As demonstrated in the case examined<sup>87</sup> the judge would have averted the cause of justice by relying on strict rules on legal ownership. However, he examined other laws available and applied his discretion to do what he considered fair taking into consideration the beneficial interest of all parties. This is a silent call to our courts to release themselves from the clutches of some unfavourable laws and do what is fair and just in the interest of justice.

This article calls for serious advocacy for the awareness of female rights to own and acquire property in marriage, divorce, or inheritance, though evidence abounds through landmark judgments of the Supreme Court on the need to protect the rights of women to properties<sup>88</sup> In practice, women are still deprived of the rights to own matrimonial properties particularly under customary laws. The rights conferred on women by the law and through judicial decisions will remain at best a mirage if those subject to customary laws are not educated and enlightened about the need to stop these practices. Women who intend to challenge these practices are constrained from doing this due to taboos, fear of stigmatization, and lack of financial resources among other challenges. It is recommended that the specialized departments be created under the various ministries of Justice in Nigeria, to offer free legal services to those who cannot afford legal fees. Association of Female Lawyers and Non-Governmental Organisations should also take up the responsibility of protecting women's rights by offering considerate legal services.

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<sup>87</sup> *Arajulu v. Monday*, above note 9 at p.26.

<sup>88</sup> *Chituru Ukeje v. Gladys Ada Ukeje; Onyibor Anekwe & Anor. v. Maria Nweke*, above note, 23.