[1994] 1 FLR 410, [1994] 1 FCR 257

McCABE v McCABE

Court of Appeal (Civil Division)

[1994] **1 FLR 410,** [1994] 1 FCR 257

HEARING-DATES: 4 August 1993

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CATCHWORDS:
Divorce -- Validity of marriage -- Marriage in accordance with Akan customary law taking place in Ghana -- Parties not present at ceremony -- Parties cohabiting and having two children -- Mother petitioning for divorce -- Whether formalities of Akan customary marriage complied with -- Whether marriage valid

HEADNOTE:
The respondent, an Irishman, and the appellant, who was Ghanaian, lived together in London. When the appellant became pregnant her great-uncle suggested that the couple should marry in accordance with Akan customary law in Ghana. The respondent agreed and, as instructed by the great-uncle, provided £100 and a bottle of gin. These were taken to Ghana where a ceremony took place at the appellant's father's house before members of her family. Part of the £100 was distributed to the family and some of the gin drunk as a blessing. The appellant and respondent were told of the ceremony though neither was present. They continued to live together and had two children registered in each case as the respondent's. In December 1988 they separated and the appellant petitioned for divorce on the ground of Matrimonial Causes Act 1973, s 1(2)(b). The respondent in answer alleged that no valid marriage had taken place. The judge, after hearing the evidence of the parties and their witnesses and of two experts on Ghanaian law, and directing himself that he had to determine the decision to which a Ghanaian judge would come, decided that in one essential respect, ie publicity outside the family circle and representation of the other side by an appropriate proxy, the formalities of an Akan customary marriage had not been complied with, and consequently that a valid marriage had not been performed. He held that had the marriage been valid he would have pronounced a decree nisi on the ground of s 1(2)(b). The appellant appealed against the judge's decision and the respondent cross-appealed against the judge's finding that he had consented to the marriage.

Held -- allowing the appeal -- on the evidence, the essential components of a valid marriage under Akan customary law are the consent of each party to the marriage and the consent of each family. Publicity represented the evidence necessary to authenticate the ceremony; while the presence of a proxy was neither a requirement nor a necessary formality. On the facts found by the judge, to the effect that there had been consent by each party to the marriage and the consent of each family and that the marriage had been consummated by the cohabitation of the parties as husband and wife, the essential formalities of a customary marriage had been observed; and, since the judge believed the

evidence of the appellant's family, sufficient authentication of the customary marriage was likely on the balance of probabilities to be likely to satisfy a Ghanaian court. There being no basis on which to disturb the judge's findings as to the respondent's consent, the cross-appeal would be dismissed. The court would declare that the marriage between the appellant and respondent had been valid. The judge's findings on s 1(2)(b) would be confirmed and a decree nisi of divorce pronounced.

CASES-REF-TO:

Asumah v Khair [1959] GLR 353
Gym v Insaidoo [1965] GLR 574
Yaotey v Quayle [1961] GLR 573

INTRODUCTION:
APPEAL from the decision of Judge Compston sitting as a judge of the High Court

COUNSEL:
Graham Lodge for the appellant; Jeremy FJ Russell for the respondent

PANEL: Butler-Sloss LJ, Bracewell J

JUDGMENTBY-1: BUTLER-SLOSS LJ

JUDGMENT-1:
BUTLER-SLOSS LJ: This is an appeal from the decision of Judge Compston sitting as a High Court judge on 15 October 1992. The appellant asserted that she was the lawful wife of the respondent and that on 20 February 1985 they went through a marriage ceremony according to Akan customary law in Asylum Down near Accra, Ghana. The respondent denied that the ceremony created a valid marriage. The judge held that an essential formality of an Akan customary marriage was not complied with which vitiated the marriage. The appellant appeals from that decision and seeks a declaration that the marriage is valid and that the court should, upon her petition for divorce, pronounce a decree nisi. The judge held that if there had been a valid marriage he would have pronounced a decree nisi on the ground of s 1(2)(b) and would have dismissed the answer of the respondent.

The facts of this appeal are most unusual. There was considerable conflict of evidence at the hearing. The judge accepted the evidence of the appellant and preferred it throughout to the evidence of the respondent. The facts set out in this judgment are those found by the judge. The appellant is Ghanaian and came to London on 5 September 1982. In 1983 she met the respondent, a Southern Irishman. She became pregnant by him and had an abortion. In June 1984 she again became pregnant by him. They started to cohabit. In December 1984 the appellant's great-uncle, Mark Benson, came to London with other relatives; he found she was pregnant and that the respondent was the father. It is agreed that he met the respondent on three occasions, two of which the judge found to be significant.

A lunch party was arranged at which were present the appellant, members of her family and the respondent. Marriage was discussed and in view of her pregnancy the great-uncle urged them to marry. He suggested a customary marriage might take place in Ghana on his return. The respondent was told that he needed to provide £100 and a bottle of Schnapps. The respondent agreed to the marriage plan. They all met a few days later on the third occasion and the petitioner and respondent arrived with £100 in cash and a bottle of gin in place of Schnapps, both provided by the respondent. The great-uncle was entrusted with the money and the gin to take back to Ghana. The father and the uncle of the appellant gave evidence, accepted by the judge, as to the circumstances of the ceremony in Ghana. According to them the ceremony took place at the father's house on 20 February 1985. The great-uncle was ill and could not attend, so uncle Nelson performed the ceremony according to Akan custom. Neither the appellant nor the respondent was present, but about eight members of the appellant's family attended. Uncle Nelson told the relatives present that the respondent wanted to marry the appellant and that he had sent via the great-uncle 'aseda' or 'sanction money' (a sort of dowry) of £100 and a bottle of gin. He then asked the father if he agreed to the marriage. The father said he agreed and then the family gathering said they agreed. They opened the gin and poured some into a glass as a blessing of the marriage and some was drunk by those present. The £100 had been changed into cedis, part of which was distributed to the relatives. A few days later the appellant's father visited his home town and informed other relatives that the ceremony had taken place and gave them part of the £100. The appellant received letters from her father and great-uncle describing the ceremony which she read to the respondent but did not keep. Two children were born to the appellant and respondent in 1985 and 1988. In each case the respondent registered them as his children. The parties continued to cohabit until their separation on 17 December 1988. The appellant petitioned for divorce on the ground of s 1(2)(b), behaviour of the respondent. In answer the respondent raised the issue of the ceremony; alleged that it was not a valid marriage and that he had not gone through a ceremony or form of marriage with the appellant in Ghana. He also denied the allegations of behaviour.

Judge Compston heard all the issues arising from the suit together. In addition to the evidence of the parties and their witnesses, he had both written and oral evidence from two experts on Ghanaian law, including Akan customary law, which he found to be the relevant customary law applicable to the appellant's family. He correctly directed himself that he had to apply Ghanaian law and upon the most unusual facts of this case he had to determine the decision to which a Ghanaian judge would come as to the validity of the ceremony on 20 February 1985. He decided that in one essential respect, that is to say publicity, the formalities had not been complied with and consequently a valid marriage had not been performed. The appellant appeals against that decision and the respondent cross-appeals against the judge's finding that the respondent consented to the ceremony of marriage.

The law of Ghana is based upon the English common law. By the Courts Act 1971, s 49, r 1, it also recognises the personal law of a Ghanaian as the customary law of his group:

'Marriage under customary law is a lawful marriage recognised by the laws of Ghana.' (Per Ollennu J in Yaotey v Quayle [1961] GLR 573 at p 576.)

This appeal is concerned with Akan customary law of marriage which both expert witnesses agreed applied to the appellant. According to Professor Allott, called by the respondent, the Akan group of people is the largest ethnic group in the southern half of Ghana and is divided into a number of separate communities such as the Fanti or Ashanti.

But he added at para 13 of his affidavit sworn on 13 February 1992 that there were sufficient features in common to enable one to state the main requirements of an Akan customary marriage generally -- which was reinforced by the decisions of superior courts attempting to create some degree of uniformity. Three decisions were cited to the judge and to us. Two related to the Fanti customary law and the third to the Akan customary law. It seems clear however to me that we can properly rely on the decisions on Fanti law in the light of the evidence of Professor Allott. There was considerable evidence provided to the judge as to the essential requirements of the customary marriage. This was not altogether easy to follow since the formalities appear to vary considerably, not surprising since this is a matter of custom and not statute. However, in Asumah v Khair [1959] GLR 353, a decision of the Ghana Court of Appeal, Ollennu J said at p 356:

'Borrowing the words of the learned author of Sarbah's Fanti Customary Law, we say that the customary law relating to marriage is simple in the extreme.'

In Yaotey v Quayle (above), a decision of the High Court in Acera, Ollennu J carefully reviewed earlier decisions on the requirements for a customary marriage. At p 578 he said:

'It follows from all these that the essentials of a valid marriage under customary law are:

(1) agreement by the parties to live together as man and wife;

(2) consent of the family of the man that he should have the woman to his wife; that consent may be indicated by the man's family acknowledging the woman as the wife of the man;

(3) consent of the family of the woman that she should be joined in marriage to the man; that consent is indicated by the acceptance of drink from the man or his family, or merely by the family of the woman acknowledging the man as the husband of the woman; and

(4) consummation of the marriage, ie that the man and woman are living together in the sight of all the world as man and wife.

Now, one peculiar characteristic of our system of marriage which distinguishes it from the system of marriage in Europe and other places is that it is not just a union of "this man" and "this woman": it is a union of the family of "this man" and "this woman".'

According to the findings of the judge, in this case both the bride and the groom consented; the bride's family consented and accepted the drink from the groom; the man and woman lived together as husband and wife. There was no consent from the groom's family, but it appears he had no family and consequently that formality in any event had to be dispensed with. So far the ceremony, the subject of the appeal, appears to conform with the essentials of a valid marriage as set out by Ollennu J. He did not refer to the requirement of publicity.

In a decision of the High Court of Sekondi, Gym v Insaidoo [1965] GLR 574, Koranteng-Addow J said at p 582:

'Publicity, in the absence of writing, is and has been one of the essential features, nay, requirements of customary transactions such as marriage and conveyance of land. Dr Danquah in his Akan Laws and Customs (1928), pp 147-148, describes the transaction in these terms:

"In the course of time the husband . . . would inform his parent or guardian of his intention, and it devolves upon the father, uncle or other guardian, with whom he has been living, to send to the parents of the intended wife, for the purpose of 'begging' them to give their daughter in marriage to his son or nephew as the case may be . . . He [the father] gives his messenger . . . aseda or sanction money, and when the presentation of the girl is made by her parents that money is paid over to Bagua or witnesses present, the husband's own messengers retaining for their own use half (6s) of this amount in their capacity as witnesses or Baguafo."

The detailed account given above of the method of contracting a valid customary marriage illustrates and underscores the importance of publicity.'

The two expert witnesses, Professor Read and Professor Allott, agreed with the requirements set out by Ollennu J and that publicity was a further requirement. The question of publicity became, at a late stage of the hearing, the major issue, one important aspect of which was its meaning in a customary marriage. On this issue the two professors were not in agreement and the judge preferred the evidence of Professor Allott.

Mr Lodge for the appellant argued that the evidence of Professor Allott had substantially changed between his affidavit and oral evidence and had become inconsistent, a matter not referred to or recognised by the judge, who none the less did not accept other parts of his evidence. The evidence of Professor Read on the other hand was consistent throughout. Further, the judge had misunderstood the meaning and purpose of publicity and had misdirected himself on the supposed requirement of proxies which according to Mr Lodge were not a necessary part of the proceedings.

In view of these submissions it is necessary to look at the evidence of both experts with a little care. Professor Read in his affidavit, para 5, sworn on 6 November 1990, said that the courts of Ghana have prescribed certain basic requirements for the validity of these

marriages. Details of the ceremony would vary. Among the requirements was 'publicity within the community'. In his oral evidence he was asked:

'Q: Although you actually use the word "ceremony" the essence is what?

A: Publicity and consent. I would say some overt acts are required which evince the consent of the parties and the consent of the bride's family . . . Ceremonies otherwise are infinitely variable.

Judge: . . . The providing of publicity and your consent are essentials. The ceremonial details can vary?

A: Yes . . . and may be quite attenuated; quite brief.'

The two professors had provided an agreed note for the judge in which they wrote:

'Publicity, represented by the request -- at the meeting of representatives of the two families -- for the hand of the bride from or on behalf of the groom to the person giving her in marriage.'

Counsel referred to this part of the report and asked Professor Read:

'Q: Is that accepted by you as a requirement for the formation of a valid Akan marriage?

A: Well no, My Lord. I would put this in the context of what we have already discussed. I am there stating what would be the normal practice for a full customary marriage in Ghana . . .

Q: The normal practice in Ghana would be publicity, as you represent at the bottom of the page?

A: Yes. Really, that is another way of referring to the ceremonies, which I think we have already touched on.'

In his view there was no higher standard of proof for a marriage with a non-Ghanaian, but the court would require very clear evidence that the foreigner had consented to be married in such a ceremony but he did not have actively to participate. Professor Read reiterated that the ceremonies were infinitely variable and agreed with Professor Allott's affidavit that they were not legally necessary at all. The man would not need an actual proxy to attend the ceremony, although it would be normal in his absence. He knew of cases where the bride's family stood in for the groom in the absence of the groom and his family. The man would in any event have to communicate his consent, to the satisfaction of the parties at the time and to the court when it came to adjudicate. He accepted that it was a novel case. He recognised that the approach of the Ghanaian court was strict and not an endorsement of cohabitation. His conclusion was that on the facts of this case a ceremony of marriage which took place as described would be held by the Ghanaian

court to be valid and to have been conducted according to Akan customary law.

Professor Allott said at para 14e of his affidavit (above) that marriage ceremonies were not legally essential but had social and evidentiary significance. At para 17 he said that evidence to prove a customary marriage consisted of reliable testimony from the representatives of both sides reporting the marriage ceremony. He then cited the passage from the judgment of Koranteng-Addow J in Gym v Insaidoo on publicity which I have set out above, which he referred to again in his oral evidence where he said:

'. . . he [the judge] used this as an illustration of the importance of publicity -- the representatives of the husband -- meaning that people other than the bride's family were present to take part in the proceedings. This is what he meant by publicity.

Judge: Ie publicity to the other side?

A: Exactly . . .

How to ensure there will be evidence of a transaction and its character. Customary law tries to achieve that in two ways. First, by the preservation of tangible evidence -- that is what you can touch -- of the transaction. Secondly, the evidence of impartial witnesses.'

Tangible evidence appears to refer to conveyances of land. Professor Allott then said (for the first time):

'So far as proxy marriages are concerned, it seems to me absolutely vital that the husband or . . . if it is his proxy, it must be his proxy or representative should be there at the ceremony.

Judge: So it is absolutely vital that the husband has an actual proxy?

A: Yes.'

He expressed the strong view that it was wholly inconceivable and inappropriate that the groom should have nominated the head of the bride's family as his representative. He then said:

'If there is a need for representation of both sides in a normal customary ceremony when the husband is present a fortiori it is absolutely essential that there should be bilateral representation if he is not present, because the possibilities for misunderstanding or worse, are obvious.'

He considered that the absence of representation would be a fatal flaw. He also considered that what he described as the ambiguities of the handover of the money and gin in England would also be regarded as creating serious doubts, as would the position of a non-Ghanaian taking part in a customary ceremony. In his view these facts would affect the burden of proof.

He was asked whether his evidence departed from the agreed statement but he stated that it explained it. He said of his affidavit evidence, para 14e (above):

'I mentioned "e" out of caution, to say that other things are customary and part of the package, as I called it, but are not legally held to be required.

. . . I am saying the meeting of the families is necessary.'

Unfortunately this very important issue was not further explored, and I find myself in some confusion as to what Professor Allott really meant.

The evidence of both professors also dealt with issues which do not appear to be relevant to the problems raised in this case and I have great sympathy with the judge attempting from the wealth of detail to extract the relevant passages. Even with the help of the transcripts, not available to the judge, I have found it difficult. In an understandable attempt to make some sense out of all this the judge suggested an analogy with the marriage of Queen Mary of England and King Philip of Spain where the Spanish ambassador acted as proxy for the King. The judge suggested in his judgment that it would have been incomprehensible if the Queen's Lord Chancellor had acted as proxy and said:

'Really that is what took place here. Not only was uncle Mark Benson not present, but on any view he was a wholly inappropriate proxy; and the result was of course not that, in my view, there was anything malicious about it, but there was no publicity outside the family circle when this customary marriage was performed -- which would seem to me to vitiate the marriage completely.'

From the evidence provided to the judge I have come to the following conclusions about Akan customary marriage. The essential components are the consent of each party to the marriage and the consent of each family. The marriage is consummated by the cohabitation of the parties after the ceremony as husband and wife. The actual form of the ceremony will vary. In a full ceremony it will include the attendance of all the relevant people and will include the giving of aseda in the form of money and Schnapps or gin for the pouring of the libation or blessing and to be ceremonially drunk by those present, as also some of the money is distributed to those present. But aseda may be dispensed with. The ceremony itself is not legally required. However, in the absence of writing or registration, there must be credible evidence of the consents of the parties and the families, which in almost all cases will not be available to satisfy a court in the absence of impartial witnesses.

Publicity, upon which so much time was spent at the hearing, appears to represent that evidence necessary to authenticate the ceremony entered into by the parties and their families. Professor Read said it meant overt acts such as took place on the facts before us, which could be recognised as indicating a marriage. In his oral evidence he saw it as the ceremony itself. In his affidavit evidence, and to some extent in his oral evidence,

Professor Allott treated the component of publicity not as an essential ingredient of the marriage of the same significance as consent but required to authenticate the ceremony which was taking place. The decision in Gym v Insaidoo, upon which he relied heavily on the issue of publicity, was concerned in that part of the judgment with a dispute as to whether any ceremony ever took place. Koranteng-Addow J found that he disbelieved the evidence that a ceremony had taken place since there was no evidence other than one witness for the man alleging the existence of the marriage. In the present appeal there are several witnesses to the ceremony whose evidence was credible and relied upon by the judge. Professor Allott doubted the evidence of the purpose of giving the money and gin in London and whether the respondent had given his consent. If the purpose of giving the money and the gin and the consent of the man were in doubt, a court faced with evidence as to the ceremony from the woman's side only would be most unlikely to find that a valid marriage had taken place. But the judge was satisfied that the respondent consented and gave aseda to the great-uncle to take to the father. The non-appearance of the great-uncle at the ceremony through ill-health was irrelevant, in my view, since the evidence of what he did was accepted by the judge. There was no evidence that the respondent appointed the great-uncle to be his proxy. It would have been highly desirable for the respondent to have a proxy and one who was not a member of the appellant's family. But on the evidence of Professor Read and the written evidence of Professor Allott a proxy was not essential, indeed if, as Professor Allott himself said, a ceremony itself is not necessary how can a proxy be essential? Publicity of some sort is an essential feature, but the presence of a proxy does not seem to me to be a requirement, nor a necessary formality in the absence of the party to the marriage.

I am well aware that the judge heard both expert witnesses examined and cross-examined at some length in the witness-box. The court is slow to interfere with the trial judge on issues of fact even if they are matters of foreign law. However, reading the evidence of both experts and the marked and unexplained change of evidence of Professor Allott on the matter decisive in the judge's mind, I am afraid that I cannot uphold the budge's decision on this issue. In my view the importance of publicity is the proving of the fact of the marriage, that is to say, the consents of the parties and their families. There were exceptional features of this case in that neither party was present; no one stood in either for the appellant or for the respondent who is a foreigner domiciled and resident in another country; only the appellant's family attended. In almost every case these facts would be likely to lead any court and in particular a Ghanaian court to view the evidence with a degree of marked scepticism and to have such serious reservations about the whole proceedings so as not to be satisfied that a valid marriage ceremony had been performed. The cohabitation of the parties alone would not be sufficient. Ghanaian law imports the English common law which, I assume, includes a presumption of marriage. I have my doubts, however, whether such a presumption can have much force where a customary ceremony has taken place. In any event it is not necessary to invoke the presumption on the facts of this case.

In the present appeal the judge made vital findings of fact that the appellant and the respondent both consented. The consent of the respondent was communicated to the appellant's family with the offering of gin and £100 by the great-uncle. A ceremony of

marriage was performed by the uncle in the presence of the appellant's family who themselves consented. Letters describing the marriage ceremony were sent to the appellant and read to the respondent. After the ceremony they cohabited for some years and had children. Having come myself to the conclusion that there was no formal requirement for a proxy nor a circumscribed form of publicity in these customary ceremonies, on the facts found by the judge the essential formalities of a customary marriage were observed and there was, since he believed the evidence of the appellant's family, sufficient authentication of the customary marriage to be likely on the balance of probabilities to satisfy a Ghanaian court.

Subject to consideration of the respondent's notice by way of cross-appeal, I would declare that the ceremony performed on 20 February 1985 was a valid marriage ceremony.

Mr Russell in his respondent's notice sought to reopen the issue of consent. I have read the relevant transcript of the evidence about the meetings in London. The issue of consent depends upon the credibility of the witnesses. The judge who saw and heard the witnesses formed a firm view and made the finding that the respondent consented to the customary marriage. I have found nothing to lead me to conclude that he erred in any way in coming to that conclusion and in my view it would be impossible to disturb his findings on consent.

I would allow the appeal and dismiss the respondent's notice. The effect of those decisions is that there is a valid marriage and a valid petition for divorce. I see no reason to disagree with the judge's findings on s 1(2)(b) and would uphold the judge's decision to dismiss the respondent's answer. I would pronounce a decree nisi of dissolution of marriage.

JUDGMENTBY-2: BRACEWELL J

JUDGMENT-2:
BRACEWELL J: I agree.

DISPOSITION:
Decree nisi. Answer dismissed.