

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 02/10/11  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: DLL

In re the Marriage of: ) 1 CA-CV 10-0315  
)  
GABRIEL U. OGBONNAYA, ) DEPARTMENT B  
)  
Petitioner/Appellant, ) **MEMORANDUM DECISION**  
)  
v. )  
) Not for Publication -  
OKWUCHI E. OGBONNAYA, ) (Rule 28, Arizona Rules  
) of Civil Appellate Procedure)  
Respondent/Appellee. )  
)  
)  
)  
)

Appeal from the Superior Court in Maricopa County  
Cause No. FC2006-007518/FC2006-093300 (Consolidated)

The Honorable Hugh E. Hegyi, Judge

**AFFIRMED**

Law Offices of John R. Zarzynski Phoenix  
By Georgia A. Wilder  
Attorneys for Petitioner/Appellant

Law Office of Judith E. Abramsohn Phoenix  
By Judith Elaine Abramsohn  
Attorney for Respondent/Appellee

**K E S S L E R**, Judge

¶1 Petitioner/Appellant Gabriel U. Ogbonnaya (Husband)  
appeals the superior court's denial of his motion to set aside

that part of its decree of dissolution that directs him to convey his interest in real property located in Nigeria to Respondent/Appellee Okwuchi E. Ogbonnaya (Wife). For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Husband and Wife were married in Nigeria in 1995 and have resided in Arizona since 2003. Both parties petitioned for dissolution of their marriage in September 2006.

¶3 During the marriage, Husband acquired two parcels of real property located in Nigeria (the 1996 parcel and the 1999 parcel). Wife alleged this property was purchased with community funds and, accordingly, belonged to the community. Husband maintained he purchased the land with his separate property and that it was therefore separate, not community, property. The superior court determined Husband had not rebutted the presumption that the land was community property. It awarded the 1996 parcel to Husband and the 1999 parcel to Wife, and ordered each party to pay an offset amount equal to one-half of the purchase price of the property. The court ordered Husband to transfer his interest in the 1999 parcel to Wife within six months. Husband did not appeal the decree.

¶4 In February 2009, Husband asked the superior court for an extension of time to transfer the 1999 parcel to Wife. He stated that, in an attempt to comply with the court's order, he

had hired a Nigerian attorney to register the decree and petition the Nigerian court to effect the transfer of the 1999 parcel to Wife. He attached documents indicating that he had initiated that process with the Nigerian court, but stated that he did not expect the court to enter an order transferring the 1999 parcel before the six-month deadline imposed in the decree. Wife opposed Husband's request for additional time to complete the transfer and asserted that the only action necessary for Husband to transfer the 1999 parcel was for him to execute a power of attorney that her brother, a Nigerian attorney, had prepared and provided to Husband in June 2008. In reply, Husband advised that the Nigerian court had refused to recognize the superior court's jurisdiction over the 1999 parcel or to transfer the property to Wife. The superior court denied Husband's request for an extension and ordered him to immediately effectuate the transfer of the 1999 parcel. It acknowledged that it did not have jurisdiction over property located in Nigeria, but asserted that it did have authority to order Husband to transfer the property.<sup>1</sup>

¶15 Husband filed a motion to amend the decree in which he sought relief, pursuant to Arizona Rule of Family Law Procedure 85(C)(1)(f), from that part of the decree directing him to

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<sup>1</sup> Husband later filed a motion for clarification of the court's order, which the court denied.

convey the 1999 parcel to Wife. He argued that it was impossible for him to satisfy the court's order because the Nigerian court refused to enforce that portion of the decree regarding the transfer of the 1999 parcel to Wife. In addition, he alleged that his interest in the 1999 parcel was only that of a donee of a power of attorney, and a transfer of such interest to Wife would only confer his rights to the property, not title to the land. In support of his position, Husband offered a scholarly article on the subject of alienation of Nigerian land and an e-mail from his Nigerian attorney regarding the nature of a power of attorney. Wife argued that in Nigeria property interests are commonly transferred via a power of attorney and that Husband could transfer his interest in the 1999 parcel to her by executing the power of attorney Wife's brother had prepared. The court denied Husband's motion for relief from the decree and ordered him to transfer the 1999 parcel to Wife within six months. Husband timely appealed the order.

¶16 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).<sup>2</sup>

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<sup>2</sup> We reject Wife's argument that the court's order is not a "special order" after final judgment appealable under A.R.S. § 12-2101(C). Husband's motion to amend the judgment cited Arizona Rule of Family Law Procedure 85(C)(1)(f), the corollary to Rule 60(c)(6) of the Arizona Rules of Civil Procedure, and requested partial relief from the decree. An order denying a Rule 60(c) motion is an appealable special order after final

## ISSUE

¶7 Husband argues the superior court abused its discretion by denying his motion to set aside that portion of the decree directing him to transfer his interest in the 1999 parcel to Wife because the evidence established that it was not legally possible for him to do so.

## DISCUSSION

¶8 We review the superior court's denial of Husband's motion for relief from judgment for an abuse of discretion. *Fry v. Garcia*, 213 Ariz. 70, 72, ¶ 7, 138 P.3d 1197, 1199 (App. 2006). An abuse of discretion occurs when the court commits an error of law in the process of reaching a discretionary decision. *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258, 262 (App. 2009) (citation omitted).

¶9 Husband moved for relief from that portion of the decree that requires him to transfer his interest in the 1999 parcel to Wife on the grounds that such a transfer is not possible under Nigerian law. He had the burden to show (1) extraordinary circumstances of hardship or injustice justifying relief, and (2) a reason for setting aside the judgment other than those set forth in Arizona Rule of Family Law Procedure 85(C)(1)(a)-(e). See *Hilgeman v. Am. Mortg. Sec., Inc.*, 196

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judgment. *M & M Auto Storage Pool, Inc. v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 141, 791 P.2d 665, 667 (App. 1990).

Ariz. 215, 220, ¶ 15, 994 P.2d 1030, 1035 (App. 2000) (analyzing Ariz. R. Civ. P. 60(c)(6)). By denying Husband's motion and ordering him to convey the 1999 parcel to Wife, the superior court necessarily concluded that Husband had not shown he was entitled to relief (i.e., that he is unable to convey the property).

¶10 Arizona Rule of Civil Procedure 44.1 allows the court, in determining foreign law, to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Arizona Rules of Evidence." Ariz. R. Civ. P. 44.1. The court's determination of foreign law is treated as a ruling on a question of law, see Ariz. R. Civ. P. 44.1, and we review it de novo. *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8, 200 P.3d 1043, 1045 (App. 2008).<sup>3</sup>

¶11 Wife did not submit any evidence regarding Nigerian law, and there is no indication that the superior court conducted any research regarding Husband's ability to transfer the 1999 parcel under Nigerian law. Thus, it appears the only material the court considered in reaching its decision was that

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<sup>3</sup> We have previously noted that unless a party states and proves the laws of a foreign country, our courts will presume they are the same as in Arizona. *Noble v. Noble*, 26 Ariz. App. 89, 93, 546 P.2d 358, 362 (1976) (approving trial court's application of Arizona law in dissolution action to determine the rights of Arizona domiciliaries to real property located in Denmark). It does not appear the court did that in this case.

offered by Husband. Husband did not submit any Nigerian statutes, case law, or other primary sources as evidence of Nigerian law governing conveyances of real property. Instead, he produced an article published in the Journal of African Law, entitled *Alienations Under the Land Use Act and Express Declarations of Trust in Nigeria*. The article describes the history of the Nigerian Land Use Act, which vests all land within a state in the governor of that state to hold in trust for the benefit of Nigerians. According to the article, "the only interest a person can have with respect to land is a right of occupancy granted or deemed to be granted by the appropriate authority," and the Act "prohibits an alienation of a right of occupancy without the consent of the appropriate authority." That portion of the article concerning alienation of property via a power of attorney states:

To avoid the provisions of the Act, many land transactions in Nigeria are carried out through the use of a power of attorney. As a conveyancing device, a power of attorney provides an easy escape from the prohibitory sections of the Act. But this comes at a huge cost as it leaves the donee with only a precarious interest in the land. Nnaemeka-Agu JSC's observation in *Ude v. Nwara* remains one of the clearest judicial expositions of the nature and impact of a power of attorney affecting land: **"A power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so is not an instrument which confers, transfers, limits, charges or alienates any title to the donee: rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party."** Consequently, a power of attorney is not

contemplated by sections 22 and 26 of the Act. This omission, however, puts the donee in a very vulnerable position. For instance, the donor could directly and validly sell the land to a third party during the subsistence of the power of attorney so long as the donee has not exercised the power of sale. A power of attorney is also revoked by the death (or bankruptcy) of the donor unless it was granted to secure a proprietary interest in land (for instance, in pursuit of an equitable mortgage) or to secure the performance of an obligation owed to the donee. **Worse still, the donee's powers are personal to him or her and are not transmissible to successors-in-title. Due to the maxim [a delegate cannot delegate his authority], a donee cannot grant a power of attorney to a third party. For instance, a donee cannot avoid the provisions of the Act by granting another power of attorney to a third party.** Accordingly, the Court of Appeal observed in *Olorunfemi v. NEB Ltd* and *Ihekwoaba v. ACB Ltd* that a power of attorney granted by a mortgagee to a purported purchaser is not legally recognizable and cannot effectively confer any interest on the purchaser/donee. **Since it is not an instrument of transfer or alienation of land, a power of attorney is not registrable. However, a power of attorney might become registrable if the power of alienation is given to the donee which he or she then exercises.** A purchaser of land who opted for a power of attorney in order to avoid the provisions of the Act may end up with a worthless document. It is pertinent to bear in mind the admonition of Pats-Acholonu JCA (as he then was) that a power of attorney is not the equivalent of a lease or assignment, whether or not it is coupled with interest, and that it "is erroneously believed in not very enlightened circles particularly amongst the generality of Nigerians that [a] power of attorney is as good as a lease or assignment."

(Emphasis added; citations omitted). Husband also submitted an e-mail from his Nigerian attorney, in which the attorney wrote that a power of attorney is not an instrument that "confers, transfer, limits, charges or alienates any title to the Donee."



These materials indicate that a donee's interest under a power of attorney may be limited to a personal right to act on behalf of the donor unless the document grants the donee the power to alienate the subject property.

¶12 Here, Husband acquired his interest in the 1999 parcel via an irrevocable power of attorney that authorizes him to, *inter alia*, "mortgage, charge, sell, lease, let and otherwise dispose of or assign the said property to any person whatsoever, including the donee of this power, and to apply to the relevant authority for the renewal of the lease or right of occupancy to be granted to him in his name absolutely without reference to me." (Commas supplied). The document further allows Husband to appoint a "substitute or agent who shall have all the rights conferred by" the power of attorney. Thus, under the express terms of the power of attorney, Husband has the right to convey the 1999 parcel to any person, including Wife. Husband offered no evidence that these provisions are void under Nigerian law or that he cannot effectuate such a transfer.<sup>4</sup>

¶13 Husband has not shown extraordinary circumstances that warrant relief from the decree. We find no abuse of discretion in the superior court's denial of Husband's motion.

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<sup>4</sup> For example, Husband offered no evidence that he had applied to the appropriate Nigerian authority for consent to his alienation of the 1999 parcel to Wife.

## CONCLUSION

¶14 For the foregoing reasons, we affirm the superior court's denial of Husband's motion for partial relief from the decree. Both parties request an award of attorneys' fees incurred on appeal pursuant to A.R.S. § 25-324(A) (Supp. 2010). Attorneys' fee awards under that statute are based on the "financial positions of the parties," *Gerow v. Covill*, 192 Ariz. 9, 19, ¶ 46, 960 P.2d 55, 65 (App. 1998), as well as the "reasonableness of the positions each party has taken." A.R.S. § 25-324. We have no current financial information regarding the parties' financial resources, and neither party took an unreasonable position on appeal. Therefore, we deny the requests. We award Wife her costs incurred on appeal subject to compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/  
DONN KESSLER, Presiding Judge

CONCURRING:

/S/  
DIANE M. JOHNSEN, Judge

/S/  
SHELDON H. WEISBERG, Judge