**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE COURT OF APPEAL**

**ACCRA**

**CORAM: HENRY KWOFIE JA (PRESIDING)**

**ANTHONY OPPONG JA**

**RICHARD ADJEI-FRIMPONG JA**

**SUIT NO. H1/174/2021**

**DATE: 19TH JANUARY, 2023**

**KATE AFFRAM MENSAH ..... ..... PETITIONER/APPELANT**

**VS**

**CHARLES AFFRAM MENSAH ..... RESPONDENT/RESPONDENT**

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**J U D G M E N T**

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**RICHARD ADJEI-FRIMPONG JA:**

The quest of this trial as is usual with matrimonial causes was for the trial Circuit Court to determine issues of dissolution of the parties' marriage, property settlement and child custody.

The parties contracted a customary marriage in 1980 and later in 1999, had same converted into an ordinance marriage. The relationship was blessed with four children namely Amanda--30 years, Josephine—26, Michael—23 and Joel—11.

From the facts, the relationship had in recent years turned acrimonious a key manifestation of which had been their living apart. The wife (petitioner), who is a trader has been living with the children in the matrimonial home whilst the husband (respondent) an accountant, lives elsewhere.

At the trial, not much turned on the dissolution of the marriage. The parties were ad idem that their marriage had broken down beyond reconciliation. Indeed, both had, in the petition and response respectively, asked for dissolution. The petitioner in addition asked for an order to be declared a joint owner of the matrimonial home at Santa Maria and two other properties namely, a block of seven shops at Santa Maria and another of four shops with one bedroom apartment at Sowutuom all in Accra. She also prayed that custody of Joel the last and only child who had not attained majority at the time be granted to her.

The respondent also sought a dissolution of the marriage and likewise custody of Joel. He contested the claim that the properties be declared jointly owned for the reason that the petitioner in no way made any contribution towards their acquisition.

The trial judge without much ado dissolved the marriage. He proceeded to settle the matrimonial home in favour of the respondent, the Sowutuom property in favour of the petitioner and the block of seven shops between the two of them, four to the respondent and three to the petitioner. He also granted custody of Joel to the respondent.

The petitioner is dissatisfied with the decision and appeals in this court on the following grounds:

1. *That the learned trial erred in not declaring the petitioner as joint owner of all the properties acquired jointly by the parties in the course of the marriage.*

2. *The learned trial judge erred in settling the matrimonial home on the respondent.*

3. *The learned trial judge erred in granting custody of Joel Acheampong Affram Mensah to the respondent even though the said child had at all times been in the custody of the petitioner.*

For the record, the petitioner's written submission in this court was filed on 21st October 2021 and served on the respondent on 1st December 2021. No written submission was however filed by the respondent. The effect of the default in terms of Rule 20 subrule 4 was that the respondent did not wish to contest the appeal leaving this court to make a determination on the basis of the written submission of the appellant only.

The said rule provides:

> *"4. A party on whom an appellant's written submission is served shall, if that party wishes to contest that appeal file the written submission in answer to the appellant's written submission within twenty-one days of the service or within the time that the court may on terms direct"*

On the question of custody, the record shows that at the time of filing the petition in 2012, the child was 11 years. He has now attained 18 years, the age of majority. Consequently, the third ground of appeal has turned moot. We are left with the first and second grounds of appeal both involving the issue of property settlement.

On settling the properties between the parties, the learned trial judge having referred to the provisions in article 22(2) of the 1992 constitution and some case law on the property right of spouses concluded:

> *"In evidence it was clear that at least petitioner whether in small way or substantially contributed to the putting up of the 7 store structure at*

*Santa Maria and Fan Milk property. It is also in evidence that the matrimonial property was not fully complete when the parties moved into it. It was completed during the subsistence of the marriage. In this suit, Respondent has agreed to give the Fan Milk property with one bedroom attached to petitioner and the court gives effect to that. On the 7 store property at Santa Maria currently petitioner is occupying one and has rented out two but the Respondent has not protested, the court gives effect to the implied intention of the parties. The court however gives the matrimonial home to Respondent."*

At once, it is right to say a thing about the manner the trial court embarked upon the settlement of the properties between the parties. In some regard, it would appear as though he was adopting terms of settlement of a sort or enforcing an agreement. We believe the duty of the court was to make clear findings and pronouncements about the acquisition and ownership of the properties before embarking upon the distribution. To our minds, the power vested in a trial court by Sections 20 and 21 of the Matrimonial Causes Act to settle properties and where appropriate order transfer or conveyance of interest in them requires of it to be definite, especially so when as in this case the petitioner specifically asked for a declaratory relief to that effect.

Imaginably, there could be cases where the parties to a marriage may agree as to how property is to be distributed at the time of acquisition. Where an agreement of that nature could be clearly proved, the court may give effect to it. Thus, in **ACHIAMPONH VRS ACHIAMPONG (1982-83)2 GLR 1017** Abban J (as he then was) noted:

*"The facts clearly show that there was actual agreement between husband and*

*wife about the estate house. Under the agreement, there was a clear intention on the part of both of them that the wife was to have a beneficial interest in the house. The house was truly owned by the husband. Therefore, the subsequent agreement to give beneficial interest therein to the wife operated as a clog on the house and created an equity against the husband and in favour of the wife."*

On examining the record before us, there was no proof of any such agreement between the parties. It is therefore legitimate to question what the trial judge was giving effect to.

That said however, we observe from the passage from the judgment of the trial judge referred to above that, underscoring the distribution of the two blocks of shops was his apparent thinking that they were jointly acquired. He thus recognized that *"the petitioner whether in small way or substantially contributed"* to their putting up.

In this appeal, the petitioner does not challenge what was given her of those two properties. Her grief as contained in the second ground of appeal was the settlement of the matrimonial home on the respondent. This being the case then, the first ground of appeal is important only to the extent that the matrimonial home is involved. We shall therefore for convenience, fuse the two grounds and determine them together with respect to the matrimonial home only.

Out of the above, the issue we set for ourselves to determine is whether the trial judge erred in not declaring the petitioner a joint owner of the matrimonial home and not settling same on her. The answer to this issue we believe will dispose of the appeal.

In her evidence the petitioner testified that when the parties got married, they were initially living in her mother's house. In the process, the respondent was able to buy a plot of land and put up a 4-bedroom structure for the matrimonial home. She said at the time they decided to move to stay in the property, it was roofed but uncompleted with

construction works left to be done. She said she bought T & J for the ceiling, louvres, tiles for the floor and also cemented the compound. She did all this out of her income from her trading activities.

Testifying further, she said in the course of time, the respondent went to study at the Institute of Professional Studies for about six years. During that period, she was paying the children's school fees as well as the respondent's own fees. She was also maintaining the home. She tendered receipts of fees she paid for the second and third children of the marriage. (Exhibits B series and C). Additionally, she said she paid utility bills of the home and tendered Exhibits D and E as evidence.

According to her she had lived in the matrimonial home alone for close to 9 years after the respondent had moved out. For all the period, she had been maintaining the house all by herself without any financial support from the respondent.

The respondent denied all that the petitioner claimed she bought to complete the matrimonial home. He however admits that the plot was bought and the building put up during the course of the marriage. He did not deny the fact that the property was uncompleted at the time they moved in. It is also a fact that the property was completed whilst the parties lived in it as their matrimonial.

From the above, it is established that the matrimonial home was a marital property. Marital property according to Date-Bah JSC in **ARTHUR VRS ARTHUR** is to be understood as property acquired by the spouses irrespective of whether the other spouse has made a contribution or not.

On examining the record, we find evidence to support the petitioner's case that the matrimonial home was jointly acquired. Even if there was no such evidence, the fact that the property was acquired during the subsistence of the marriage for the purpose

of being used and indeed, its use in fact over the years as a matrimonial home, would make it a joint property.

Our search for some a statutory definition of matrimonial home and how it constitutes a joint property in law achieved no result. However, William Cornelius Ekow Daniels in his seminal work *THE LAW ON FAMILY RELATIONS IN GHANA* (Black Marks Limited, p.339), writing on the subject of *Matrimonial Home and Household property* adopts the definitions contained in clauses 31 and 10 of the Property Rights of Spouses Bill and states:

> *"The matrimonial home which is the best example of a joint property, is defined as including "any house or premises occupied by the spouse and the children of the marriage during the marriage; any other self-acquired house or premises occupied by the spouses and the children during marriage; or premises rented for cohabitation or where the cohabitees or spouses live and reside."*

On *Joint Property*, he writes:

> *"Joint property of spouses is defined by clause 10 as "property however titled, acquired by one of both spouses during marriage. The definition is taken word for word from the Maryland Family Code of America which classifies joint property as "Marital property" which is subject to equitable distribution on dissolution of a marriage as opposed to separate (non-marital property) which means "property acquired before marriage, or property acquired by bequest, devise, or descent, or gift from a party other than the spouse."*

Admittedly, the Property Rights of Spouses Bill is not yet in force. However, the above definitions seem to be in accord with Ghana case law on the subject. For instance, in MENSAH VRS MENSAH (1998-99) SCGLR 350, the Supreme Court per Bamford-Addo JSC opined at page 355:

> *"…the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage."*

At page 358---359 her Lordship continued:

> *"Constitutional effect and force has been given to the principle of equitable sharing of joint property on divorce…Having regard to the law and evidence the Court of Appeal correctly held that: 'The intention to own the house jointly coupled with whatever contributions the petitioner had made towards the acquisition of the house made the parties joint owners of the property."* See also **BOAFO VRS BOAFO (2005-2006) SCGLR 705; RIMMER VRS RIMMER (1952)1 Q.B.63**

The definitions in the bill being in accord with case law we, at the very least consider them a useful guide in this discourse. By that and on considering the evidence on record, it is our view that there was sufficient factual and legal basis to declare the petitioner a joint owner of the matrimonial home. As the petitioner specifically sought that relief, the trial judge erred in not granting it in her favour. We assume the power of the trial court pursuant to Rule 32 of the Rules of this court (C.I 19 as amended) and make the declaration that the matrimonial home is a joint property.

Now, in settling the matrimonial home on the respondent, the trial judge assigned no reason. This court is therefore denied the opportunity of assessing the basis of the exercise of his discretion in favour of the respondent.

We are mindful that this being an appeal against the exercise of a trial court's discretion, we cannot interfere unless it is shown that the trial court exercised the discretion on the basis of wrong or inadequate materials or that it acted under a misapprehension of fact in that it had either given weight to irrelevant or unproved matters or omitted to take relevant matters into account. See **ADU (PER ATTORNEY) AKONNOR VRS GAHANA REVENUE AUTHORITY (112013-2014 2 SCGLR 1176, BALLMOOS VRS MENSAH (1984-86)1 GLR 725.**

The evidence shows that the parties had lived in the petitioner's mother's house prior to the acquisition of the matrimonial home. At the time they took possession of the home, the building was uncompleted. It was completed by the parties' joint effort whilst in possession. The respondent has not lived in the home for close to a decade or so. The petitioner had lived in it with the children who have been brought up there to adulthood. Over the period she has maintained the place and paid utility bills as they accrue. She and the children are obviously used to the place.

We believe if the above factors had been taken into account by the trial judge, he would not have settled the matrimonial home on the respondent. There is therefore sufficient basis to interfere with the trial court's discretion.

In her written submission, Learned Counsel has referred us to the case of **JULIANA AMOAKOHENE VRS EMMANUEL AMOAKOHENE Suit No.J4/2/2019 [2020] SC 9326** where the Supreme Court per Dordzie JSC delivered herself as follows:

> *"the evidence on record has it that the plaintiff voluntarily vacated the matrimonial home about 9 years ago, 2011 precisely. The defendant has been in occupation and obviously responsible for its maintenance all these years. We consider it fair and just in the circumstances to order that she remains in possession of House No. 23 Block D, Adiebeba and takes the said property as her share of the properties. The plaintiff on the other hand takes the Plot 1 Block C Kagyase as his share."*

Guided this way, we reverse the decision of the trial court and order that the petitioner takes the matrimonial home as part of her share of the properties. The respondent shall take the block of 3 shops with one bedroom apartment attached as part of his share. The other orders of the trial judge involving the block of 7 shops shall remain. We order the respondent to effect a conveyance of the matrimonial home to the petitioner. This the respondent shall comply within 90 days.

Appeal accordingly allowed.

**SGD**

**.....**

**JUSTICE RICHARD ADJEI-FRIMPONG**

**(JUSTICE OF THE COURT OF APPEAL)**

**SGD**

**I AGREE** **.....**

**JUSTICE HENRY KWOFIE**

**(JUSTICE OF THE COURT OF APPEAL)**

**SGD**

**I ALSO AGREE .....**

**JUSTICE ANTHONY OPPONG**

**(JUSTICE OF THE COURT OF APPEAL)**

**COUNSEL:**

**NAA ODOFOLEY NORTEY FOR PETTIONER/APPELLANT**