**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA- A.D. 2021**

**CORAM: DOTSE, JSC (PRESIDING)**

**PWAMANG, JSC**

**DORDZIE (MRS.), JSC**

**PROF. MENSA-BONSU (MRS.), JSC**

**KULENDI, JSC**

**CIVIL APPEAL**

**NO. J4/01/2021**

**21ST APRIL, 2021**

**TONY LITHUR ……. PETITIONER/APPELLANT/RESPONDENT**

**VRS**

**NANA OYE LITHUR ……. RESPONDENT/RESPONDENT/APPELLANT**

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**JUDGMENT**

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**DOTSE, JSC:-**

This is an appeal by the Respondent/Respondent/Appellant, hereafter referred to as the Appellant against the decision of the Court of Appeal dated the 3rd day of December, 2019 which decision actually upheld an appeal lodged by the

Petitioner/Appellant/Respondent, hereafter referred to as the Respondent against the decision of the High Court, Accra dated 8th February 2019.

**PROLOGUE**

There is pending between the parties herein a Divorce and Matrimonial cause before the High Court, Accra. That Petition is at the instance of the Respondent herein. Whilst that petition was pending, learned Counsel for the Appellant, at the instance of the Appellant filed an Application on Notice headed as follows:-

> ***"Motion on Notice for Interim Relief Pending Determination of Substantive Matrimonial Cause."***

In view of the antecedents of the matters raised in the record of appeal and in the many depositions contained in the affidavits either in support or in opposition filed by the parties, it is has been considered worthwhile to set out in detail the facts upon which this Appeal, has been premised.

Even though on the surface, the issues to be decided in the appeal are in a narrow compass, the surrounding facts germane to an effective resolution of the case have to be set out in a general context.

**FACTS OF THE APPEAL**

It is therefore worthwhile to set out in detail the Application for *"Interim Relief Pending Determination of Substantive Matrimonial Cause"* filed by the Appellant and referred to supra as follows:-

> ***"TAKE NOTICE*** *that this Honourable Court will be moved by Victoria Barth, Counsel for and on behalf of the Respondent/Applicant herein praying this Honorable court for an order* ***ejecting the Petitioner from Plot No. 125, Okyeame Street, New Ogbojo,***

***Accra being the matrimonial home of the parties herein and a further order restraining the Petitioner from entering or going anywhere near the matrimonial home or the person of the Respondent/Applicant, upon the grounds deposed to in the accompanying Affidavit and or any further orders (s) as this Honourable Court may deem fit."***

In order to understand the extent of the strained relations between the parties, it is also necessary to quote in extenso the following depositions contained in *paragraphs 51, 52, 55 and 56* of the affidavit of the Appellant in support of the Application for *"Interim Reliefs"* referred to supra:-

**51. "That I therefore pray that this court makes an order to eject the Petitioner from the matrimonial home and to restrain him from coming anywhere near the matrimonial home or my person pending the determination of this suit.**

52. That the Petitioner is best suited to move to the East Legon property which he has refurbished to his taste and which property he claims in paragraph 113 of his Reply that I am not familiar with.

55. That I pray the court orders the **parties to have joint use and occupation of their house in Ada and for the parties to have use of the said home on alternate weekends.**

56. That I am advised by Counsel and verily believe same to be true that granting this Application in the terms sought **will avert imminent danger and chaos and will safeguard the rights of both parties pending the determination of the substantive matter." Emphasis supplied**

Thereafter, the following depositions in *paragraphs 6, 8, 9, 10* and *11* were contained in a supplementary affidavit filed by the Appellant in further support for the *"Interim Relief":-*

6. "That despite the fact that the Respondent has moved out of the matrimonial home, Respondent continues to engage in acts **intended to cause fear, insecurity and anxiety in the matrimonial home and to ultimately make the matrimonial home uninhabitable.**

8. That from 19th of July, and on the 26th, 27th, 28th and 29th of July 2018 right to the 10th of August 2018, the Respondent removed our matrimonial property such as kitchenware, furniture, household chattels, fittings, fixtures, library books, law text books, documents, equipment and other household items onto vehicles including commercial loading vehicles to be delivered at the East Legon property.

9. That Respondent abruptly terminated the contracts of the houseboy and cleaner, the laundryman, the chef, the gardener, the swimming pool attendant, the security guards, the aquarium maintenance man, and the veterinary officer taking care of the dogs.

10. That on 26th July 2018, when Respondent left the matrimonial home with some more items, the water pump which pumps water into the house was coincidentally damaged and the house was without water.

11. That on separate occasions, and in a similar fashion the generator, electric fence and security system and pump for the swimming pool mysteriously got damaged and all had to be repaired."

In order not to be outdone, the Respondent herein also deposed to the following averments in paragraphs 4, 7, 22 and 40 of his affidavit in response to the Application for *"Interim Relief"*.

4. **"I deny, in response to Paragraphs 8 and 9 of the Affidavit in support, that I have created an atmosphere of hostility against Applicant at home. I had stopped communicating with Applicant long before I informed her about my decision**

**to seek divorce. Nothing has changed in that regard. I have never banged doors when I bump into Applicant at home. As much as possible, I actually avoid meeting her. Applicant is simply having a hard time accepting the fact that things are not what they used to be.**

7. In response to Paragraphs 11 and 12 of the Affidavit in Support, I say that before the spraying was done, I had duly notified our daughter the day before and asked her to take charge of the process. I am informed by our daughter and verily believe same to be true that the Applicant was made aware of the impending spraying exercise. The spraying was done when I was not at home. Our daughter also has a key to the master bedroom, and if the bedroom were sprayed, she would have been the one who would let the workmen into the bedroom. The sprayer had never ever sprayed the bed previously, and has confirmed to me that he did not spray the bed this time. It has never been the practice that I would strip the beddings or remove the curtains after spraying the room anyway. The first time I heard of this accusation was at DOVSU. **The complaint Applicant made to DOVSU was that I had personally sprayed chemicals on her bed to harm her. I was completely stunned when I was informed.**

22. I deny in response to Paragraphs 34 and 35 of the Affidavit in Support that Applicant has any interest in the Ada home. She kept a nightdress, a pair of shoes and few cosmetics at my self-acquired property at Ada the second time she visited the property with me. I did not see the need to keep those items at the property once I had filed my Petition. I returned them to her soon after I filed the Petition months ago.

40. I oppose, respectfully, the grant of the orders requested for by Applicant in paragraph 55 of the Affidavit in Support. It is merely designed to provoke me. The last time that Applicant went to Ada was on Sunday October 22, 2017 when she

had sought and obtained my permission to host her year group. As I had indicated in my Reply to Applicant's answer, Applicant has been to the property only four times in the last three years. Requesting for an order to now begin to use the Ada property with me runs counter to the spirit of the present application **even at the superficial level, which is to avoid confrontation. This is because ordering me to allow Applicant joint use of the property would merely create a new potential area of conflict, ill-feeling, disruption that did not exist previously, which, in my humble view, is what Applicant seeks to do by her prayer. There is no need imposing something on what did not exist in the first place."**

On the 8th day of February 2019, Her Ladyship Hafisata Amaleboba (Mrs) presiding over the Divorce and Matrimonial Division of the High Court, Accra delivered herself on the Application for "Interim Relief" as follows:-

*"As the parties are engaged in ongoing litigation in this matter, I am unable to make orders to restrain the Petitioner, from coming within a certain distance of the Respondent, as same will be incapable of compliance, since the parties will both have to attend this court.* ***I do, however, expect that both parties will act to avoid any breaches of the law, while this matter is pending before this court****.*

*Upon all of the foregoing, the court makes the following orders*

*The prayer for the Petitioner to return items to the matrimonial home, will abide a determination upon evidence adduced at the trial, of all the said items in Petitioner's possession;* ***which of them are matrimonial; and the distribution thereof. In the interim, the Petitioner is restrained from disposing of any of the items in his possession, pending the final determination of this suit.***

*Counsel for Respondent has informed the court that, pursuant to an amicable agreement between the parties, on interim access and custody of the youngest male child of the*

*marriage, the prayer for same has been abandoned. In the circumstances, no orders will be made in this regard.*

***The prayer for the parties to have alternative use and occupation of the house at Ada is granted. The parties are to have use of the said house on alternative weekends.***

***The Petitioner is restrained from visiting the matrimonial home and from taking any further items from same.***

***These orders are to subsist until the final determination of this suit unless any further or other orders are made.***

*The Application is granted in part."*

As the Respondent herein felt aggrieved by the decision of the High Court dated 8th February 2019 and referred to supra, he caused an appeal to be filed against the said decision to the Court of Appeal. He also filed an application for Stay of Execution of the said Ruling in respect of which a decision was rendered on the 27th May 2019, refusing the said application as follows:-

*"The wording contained in the part of the Ruling appealed against, to wit: "The prayer for the parties to have use and occupation of the house at Ada is granted. The parties are to have use of the said house, on alternative weekends", without more, does not in my view, require the Petitioner to do an act within a specified time, or refrain from doing an act. Having therefore, examined this part of the Ruling appealed against, I am satisfied that, the part of the decision appealed against, is an order of the Court that is not capable of execution, by any of the known processes of execution, provided by the Rules of Court.*

***It is settled law that, where an order or decision of a court, is incapable of execution by any of the known processes of execution, an order for stay of***

***execution cannot be granted in respect of the said order or decision. I will in the circumstances, refrain from determining the merits of the Application.***

***Consequently, having come to the conclusion that the part of the Ruling appealed against, as it stands presently, is not capable of execution, I am unable to grant an Application for stay of execution, in respect of same.***

*Accordingly, the Application is refused."*

On the 3rd day of December 2019, the Court of Appeal in a unanimous decision allowed the repeat application for Stay of Execution of the orders of the High Court in the following terms:-

*"By Court: Upon hearing both Counsel put forth their arguments for and against the motion and upon a perusal of the documents put before us,* ***we are of the candid opinion that the Applicant has demonstrated exceptional circumstances to warrant us to grant the application. Consequently, the application is hereby granted. There would be no order as to costs."***

**THE INSTANT APPEAL**

The Appellant, feeling aggrieved by the decision of the Court of Appeal dated 3rd December 2019 and referred to supra, caused an appeal to be filed against the said decision to this court on the 12th February 2020 with the following as the grounds of appeal.

a. That the learned Justices of the Court of Appeal erred and occasioned a grave miscarriage of justice when they held that there were exceptional circumstances for granting the Repeat Stay Application, thereby depriving the Appellant of her fundamental right to Marital Property as guaranteed by Article 22 (3) of the

Constitution, 1992 and affirmed by the Supreme Court's decision in ***Arthur v Arthur [2013-2014] 1 SCGLR 543***.

b. That the Learned Justices of the Court of Appeal committed an error of law and occasioned a grave miscarriage of justice when they disregarded the settled position of the law and the **hackneyed authorities regarding non-executable orders and overruled the Appellant's preliminary objection to the Repeat Stay Application on the basis that the High Court's orders were declaratory in nature and therefore not executable.**

**c.** That the learned Justices of the Court of Appeal committed an error of law and occasioned a miscarriage of justice when in exercising their concurrent jurisdiction with the High Court to hear the Repeat Stay Application, they considered a Supplementary Affidavit filed by the Respondent for the first time in the Court Appeal, **in spite of the Appellant's preliminary objection that such Supplementary Affidavit should not be countenanced in a Repeat Application for Stay of Execution.**

d. Further ground (s) of appeal shall be filed upon receipt of the record of Appeal.

No further grounds of appeal have been filed.

**ANALYSIS OF THE STATEMENTS OF CASE FILED BY LEARNED COUNSEL FOR THE PARTIES**

Whilst commending learned counsel for the Appellant, Mrs. Victoria Barth, for the detailed and well composed statement of case, it does appear to us that, learned counsel went over board and took a lot of extraneous matters into consideration in the statement of case so filed. **For example, it is quite clear that, this being an interlocutory appeal, issues of title to the properties, and the provisions of Article 22 (3) of the Constitution 1992 which was used in the decision of this court in *Arthur v Arthur [2013-2014] 1 SCGLR 543*,** holding 1 thereof should not have had pride of place in the Statement of

Case. This is because issues of who owned this or that property did not constitute the basis upon which the learned High Court Judge granted the Interim Reliefs which formed the bedrock of this Interlocutory Appeal.

Without intending to be repetitive, it is perhaps necessary to quote again portions of the learned trial Judge's orders dated 8th February 2019 on the Interim Relief as follows:-

> *"The prayer for the Petitioner to return items to the matrimonial home* ***will abide a determination upon evidence adduced at the trial,*** *of all the said items in Petitioner's possession, which of them are matrimonial, and the* ***distribution thereof. In the interim, the Petitioner is restrained from disposing of any of the items in his possession, pending the final determination of this suit." Emphasis supplied***

The rationale behind the learned trial Judge's orders referred to supra actually speak to the generality of the issues dealt with under the application for Interim Relief. This to our understanding meant that, pending the resolution of the substantive petition, in which the court will make a determination as to which of the properties are matrimonial properties and the subsequent distribution thereof, the parties were to hold the items of properties in their possession until the final determination thereof of the Petition

With that scenario at the background, the contention by learned counsel for the Appellant inviting this court to apply the provisions of Article 22(3) of the Constitution 1992 is actually begging the question and appears to constitute the court as determining the substantive issues raised in the Petition in an application for the interim reliefs.

In order for this invitation to rely on the above constitutional provisions to be clarified, we deem it appropriate to refer in extenso to the entire Article 22 (1) (2) and (3) of the Constitution 1992 which states as follows:-

22 (1) "A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

(2) Parliament shall, as soon as practicable after the coming into force of this Constitution enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article;

**(a) spouses shall have equal access to property jointly acquired during marriage;**

**(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."** Emphasis supplied

In the instant case, even though there is a petition praying for the dissolution of the marriage, that has not yet been granted by the court. This court should not lose sight of the fact that, this appeal has been necessitated by the application of the Appellant for *"Interim Relief Pending Determination of Substantive Matrimonial Cause."*

This Court should be deemed as having interpreted marital property in Article 22 (3) in ***Arthur v Arthur*** already referred to supra as follows:-

> ***"Marital property is thus to be understood as property acquired by the spouses during the marriage, irrespective of whether the other spouse has made a contribution to its acquisition."*** *Emphasis supplied*

The above statement in our opinion has direct relevance and effect on the determination of this appeal.

What this means in substance is that, the Article 22 (3) provisions of the Constitution only become effective upon dissolution of the marriage when the distribution of the properties are being considered.

We have also perused the brief but incisive statement of case by Osafo-Buabeng, learned counsel for the Respondent herein.

We also note with appreciation the fact that learned counsel confined his arguments within the remit of the scope of the *"Interim Relief"* and refrained from making an invitation to the court to as it were make pronouncements on the substantive Petition.

It should be noted quite clearly that, the application of Article 22 (3) provisions of the Constitution to determine what constitutes marital property and which of them should go to Appellant or Respondent can only be done at the end of the case after evidence has been led. At the stage the application for *"Interim Relief"* had been made, the court was only invited to exercise its discretion to ensure that there is no imminent danger or chaos to the Appellant and that the rights of both parties would be safeguarded and protected pending the determination of the substantive matter.

In our opinion therefore, the way the trial court and the intermediate Appellate court dealt with the above resolutions is what constitutes the appeal herein before us.

In the determination thereof of this appeal, the issues of title to the properties and the subsequent application of Article 22 (3) of the Constitution 1992 to the determination thereof of the appeal are not considered germane at this stage mainly due to the interim nature of the application and the mischief it was meant to cure at the material time

**GROUNDS OF APPEAL**

Having apprized ourselves with the grounds of appeal and the arguments contained in the Statements of case filed by learned counsel for the parties herein, we intend to deal with all of them together in the following manner. This is because, for example ground A of appeal which states as follows:-

a. **"That the learned Justices of the Court of Appeal erred and occasioned a grave miscarriage of justice when they held that there were exceptional circumstances for granting the Repeat Stay Application, thereby depriving the Appellant of her fundamental right to Marital Property as guaranteed by Article 22 (3) of the Constitution, 1992 and affirmed by the Supreme Court's decision in *Arthur v Arthur [2013-2014] 1 SCGLR 543*."**

With our discussion stated supra, it means therefore that all the arguments contained in support of the said ground cannot stand. This is because, not being a resolution of the substantive pending Divorce and Matrimonial cause, those issues do not serve as a guide in dealing with the matters contained in the determination of this Interlocutory Appeal.

For example, in coming to her decision, the learned trial Judge did not take into consideration whether title to the matrimonial home in Ogbojo and the East Legon properties which were settled in favour of the parties before she directed them to move into those properties pending the hearing and determination of the substantive case. Similarly, the constitutional provisions in Article 22 (3) were not used to decree ownership or make authoritative pronouncements on the rights of the parties vis-à-vis those properties.

What mattered most at the material time were the exceptional circumstances that formed the basis of the trial court and subsequently that of the Court of Appeal's decisions on the matter.

The Appellant herself called the shots in her affidavit in support of her application for *"Interim Reliefs"* referred to supra in paragraphs 51, 52, 55, 56 of the main affidavit in support and paragraphs 6, 8, 9, 10 and 11 of the supplementary affidavit all referred to supra. In those depositions, the Appellant made it look unsafe and dangerous to have the Respondent and herself share any property much more come into close proximity. These

facts definitely constituted exceptional circumstances such that the Court of Appeal was entitled to take them into consideration when evaluating the basis upon which the trial court made the orders in respect of the Ada property considering the heightened state of hostilities that exists between the parties, which scenario was painted vividly from reading of the depositions contained in the affidavits of the parties. A Court of law, such as this court should be cautious in ensuring that the orders it makes does not lead to violence.

These matters indeed constituted exceptional circumstances for which the Court of Appeal cannot be faulted in the decision it came to on appeal by the Respondent herein. Prevention is definitely better than regret.

**GROUNDS B AND C**

b. **That the Learned Justices of the Court of Appeal committed an error of law and occasioned a grave miscarriage of justice when they disregarded the settled position of the law and the hackneyed authorities regarding non-executable orders and overruled the Appellant's preliminary objection to the Repeat Stay Application on the basis that the High Court's orders were declaratory in nature and therefore not executable.**

c. **That the learned Justices of the Court of Appeal committed an error of law and occasioned a miscarriage of justice when in exercising their concurrent jurisdiction with the High Court to hear the Repeat Stay Application, they considered a Supplementary Affidavit filed by the Respondent for the first time in the Court Appeal, in spite of the Appellant's preliminary objection that such Supplementary Affidavit should not be countenanced in a Repeat Application for Stay of Execution.**

In these two grounds B and C, learned Counsel for the Appellant anchored her arguments on the fact that, the learned Justices of the Court of Appeal *"disregarded the settled position of the law regarding non-executable orders and over ruled the Appellant's preliminary objection to the repeat Stay Application on the grounds that the orders of the High Court were declaratory and therefore not executable"*, for ground B. And also that, the learned Justices of the Court of Appeal erred in exercising their concurrent jurisdiction in considering a repeat application by relying on a supplementary affidavit filed for the first time in that court despite the Appellant's preliminary objection that such supplementary affidavit should not be used in a repeat application for stay of execution as contained in ground C.

We have apprized ourselves with the detailed submissions of learned counsel for the Appellant and the Respondent in respect of these two grounds of appeal, B and C respectively. We have also considered all the legal authorities referred to and we wish to put our decision in the very narrow context in which the relevance of this case requires.

For example, with the decision of this court, by an enhanced panel of seven (7) in the case of ***Ogyeadom Obranu Kwesi Atta VI v Ghana Telecommunications Co. Limited Civil Appeal No. J8/131/2019, dated 28th April 2020***, the reliance on earlier decisions of this court on the principle that a judgment that is declaratory cannot be stayed is no longer good law. The principle of stare decisis required that, decisions of this court, to the extent of which they change and or depart from previous binding decisions must be applied by all courts.

Article 129 (3) of the Constitution which provides as follows:-

> *"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so, and all other courts*

*shall be bound to follow the decisions of the Supreme court on questions of law." Emphasis supplied*

It therefore bears emphasis that the Supreme Court must be deemed to have departed from its previous decisions which followed the principle relied upon by learned counsel for the Appellant.

In appropriate circumstances such as has been amply exhibited in the instant case, this court was clear in its decision that, henceforth, it may stay execution of decisions which appear not to be executable, but in real terms achieve executable inevitabilities. For example, if the Respondent herein fails to comply with the decision of the learned trial High Court Judge, he could have been cited for contempt with all its attendant executable consequences, i.e. serve time in prison. The decision in the ***Ogyeadom Obranu Kwasi Atta VI v Ghana Telecom*** should therefore be looked at in that respect as seeking to bring sanity to the otherwise confused arena where courts of law looked on in despair and often times adopted principles like suspension of judgment etc. in order to achieve substantial justice, and prevent failure of justice because of the over reliance on the rigid application of the principle of not executing non executable decisions.

See cases like of

1. ***N. B. Landmark Ltd. v Lakiani [2001-2002] SCGLR 318***
2. ***Appiah v Pastor Laryea Adjei [2007-2008] SCGLR 863***
3. ***N.D.K Financial Services v Yiadom Construction and Electrical Works and Others [2007-2008] SCGLR 93***
4. ***Merchant Bank Ghana Limited v Similar Ways [2012] 1 SCGLR 440***
5. ***Standard Chartered Bank Ghana Limited v Western Hardwood [2009] SCGLR 196***
6. ***Golden Beach Hotels Ghana Limited v Pack Plus International Limited [2012] SCGLR 452***

7. ***A.D.M Cocoa Ghana Limited v International Loan Development Limited Civil Motion No. J8/47/2015 dated 7th May 2015 unreported.***

We therefore consider as very disingenuous the attempt by learned counsel for the Appellant to rely on a concurring opinion of our respected brother Pwamang JSC in the said ***Ogyeadom Obranu Kwesi Atta VI*** case to advocate a contrary opinion.

Out of abundance of caution, let us refer to portions of our brother Pwamang JSC's closing statements in his opinion just referred to in the said case.

> *"For the purpose of disposing of the application before us, I shall treat it as one seeking the stay of execution of the judgment of the High Court which I understand to be the alternative prayer of the applicant. As my analysis above shows, the court has jurisdiction to entertain that application and make an order in order to prevent its final judgment in the substantive appeal being rendered nugatory and by virtue of Articles 131 and 129(4) of the Constitution and Or 43 R11 of C.I.47. On the basis of the matters deposed to in the affidavit in support, I find merit in the application and make an order staying execution of the judgment of the High Court in this case dated 10th May, 2017 pending the determination of the appeal of the applicant lodged in this court."*

It can therefore be seen that the two opinions of the court have the same effect and value.

At this stage we accordingly dovetail our discussions on grounds B to C as follows:-

Whilst learned counsel for the Appellant, Mrs. Victoria Barth has contended that, the Court of Appeal erred by allowing the Respondent to introduce by a supplementary affidavit, facts which were in existence but were not included in the affidavit before the trial court for the Stay of Execution, learned counsel for the Respondent, Osafo Buabeng argued that the said contention has been based on a misconception of the nature of the jurisdiction of the intermediate Court of Appeal in a repeat application for Stay of Execution.

Both counsel anchored their submissions on the case of ***Republic v Court of Appeal Accra, Ex-parte Ghana Cable Ltd, Barclays Bank Ghana Limited- Interested Party [2005-2006] SCGLR 107*** and application of Rules 27 and 28 of the Court of Appeal Rules 1997 (C.I. 19) with its amendments in C. I. 21 and 25.

A close reading and understanding of Rule 28 of C. I. 19 establishes the following procedural guidelines in the Court of Appeal, where an application may be made either to the trial Court or the Court of Appeal specifically as follows:-

1. In all cases, such an application i.e. stay of execution shall be made first to lower court, and this is the trial court
2. Following the refusal of the application by the trial court the applicant shall then move the Court of Appeal for the determination of the application.

What application then is presented before the Court of Appeal following a refusal of same by the trial Court?

From practice, a fresh motion paper and its supporting affidavit is filed before the Court of Appeal, sometimes attaching the grant of the application on terms considered as onerous by the Applicant or by an outright dismissal.

Twum JSC, in the case of ***Republic v Court of Appeal Accra, Ex-parte Ghana Cable Ltd,( Barclays Bank Ghana Limited – Interested Party)*** already referred to supra, stated as follows:-

> *"In the particular arrangement created by Rules 27 and 28 of C.I. 19, the Court of Appeal has a* ***separate*** *and* ***distinct*** *and* ***independent jurisdiction*** *to consider the repeated application. Rule 28 merely postpones the exercise of its jurisdiction until it knows what the High Court has decided. Rule 28 does not confer jurisdiction on the Court of Appeal after the High Court has exercised its own jurisdiction. The true ratio decidendi of the Supreme Court decision in Ex-parte Sidi is that as long as the Applicant feels that a grant*

*on terms by the High Court is not the answer to his prayers, he has the right to repeat this application in the Court of Appeal. And once the application is properly filed in the Court of Appeal, it must* ***consider the application on the merits, afresh and come to an independent decision.*** *In the nature of things, unless the Court of Appeal confirms the decision of the court below, its own order prevails". Emphasis supplied*

This in effect is an endorsement of the principle that the Court of Appeal is to consider the application before it on the merits of the application as filed, and that the decision the court makes must be a fresh consideration of the entirety of the application both on the facts and the law and finally that in doing so, the court must not be bound to any apron strings, that is to say the earlier decision of the trial court has no bearing on the outcome of the Court of Appeal's own decision.

In the scheme of things, the Court of Appeal may endorse the decision of the trial court but that decision is that of the Court of Appeal.

What this means therefore is that, the Court of Appeal in arriving at its decision is entitled to look at all the materials provided by the processes put before them.

Looking at the contents of Rules 27 and 28 of the Court of Appeal Rules which are headed *"Effect of Appeal"* and *"Court to which application should be made"*, we are inclined to accept the position that, the import of the Rules is to make the application before the Court of Appeal a repeat application in procedure but not in content. Otherwise, the Court of Appeal will not have any discretion in the matter and would have been bound to look only at the processes filed before the trial court. But as was explicitly explained and stated in ***Ex-parte Ghana Cable Limited, (Barclays Bank Ghana Limited – Interested Party)*** supra, the jurisdiction of the Court of Appeal is not only separate and distinct under this repeat application, but is also independent and not tied to the apron strings of any other processes other than those contained in the repeat application.

We are therefore of the considered opinion that, the decision of our esteemed brother Akamba JSC, sitting as single Justice in the Case of ***Ghana Commercial Bank (No.1) v Bulkship & Trade Limited (No 1) 2015-2016 SCGLR 748 at 757*** and also the case of ***Nii Kojo Danso II v The Executive Secretary, Lands Commission, The Executive Secretary, Land Valuation Board, The Attorney-General and Joshua Attoh Quarshie [2018] DLSC 4135*** at page 13 per Pwamang JSC where he drew the distinction between repeat interlocutory applications and appeals against an interlocutory decision speaks volumes and should therefore serve as useful guide in circumstances like this. It states thus:-

> *"It is important to underscore the substantial difference between a repeat interlocutory application and an Appeal against an interlocutory decision of the High Court.* ***With the repeat application, the Court of Appeal exercises its own discretion in the matter as it sees fit,*** *but with the Appeal against an interlocutory decision of the High Court, the Court of Appeal determines if the High Court exercised its discretion in the case in accordance with correct principles of law.* ***In such Appeals, the Court of Appeal has no discretion of its own in the matter." Emphasis supplied.***

*See Dennis Law, Supreme Court, Legal Nuggets 2019 page 87*

It is interesting to observe that, the above decision has also reiterated the fact that, the Court of Appeal has unfettered discretion in considering repeat applications filed before it for determination.

We are therefore of the settled and conclusive opinion that, the Court of Appeal in considering its jurisdiction in a repeat application such as the instant one the subject matter of this appeal, being a fresh application before it, is definitely not dependent on the processes filed in the trial court.

The Court of Appeal can therefore under the circumstances where appropriate during the hearing of the repeat application before it consider matters that were not placed before the trial court.

**CONCLUSION**

Having taken all the above factors into consideration, especially the explosive nature of the relationship between the parties herein, which has found expression in the narratives in Statement of the facts, it is considered worthwhile, prudent and reasonable not to disturb the decision of the Court of Appeal.

We have already referred to in extenso details of the depositions in the affidavits of the parties herein, especially those of the Appellant. We have been left in no doubt, that in order to ensure that peace reigns between the parties pending the resolution of the substantive Petition, care must be taken to prevent the path of the parties from crossing.

A Court of law, must always ensure that its decisions do not lead to a breach of the peace and where red flags are raised and it is impossible to ignore those flags, prevention is definitely better than cure or regret. It is therefore our considered opinion that, the level of mistrust, hostilities and loss of understanding between the parties is such that the alternative use of the Ada property which is what the Appellant asked for and was granted by the learned trial Judge is a recipe for chaos, disaster and calamity. Even though we are not doomsday prophets, we have experience enough in such matters and we think a stich in time saves nine.

In this respect, we deem it also prudent to sound a note of caution that, this being an interlocutory appeal which has no bearing on the determination of the substantive petition, the parties are to remain civil to each other pending the determination of the petition.

Under the circumstances, the appeal herein filed by the Appellant against the decision of the Court of Appeal dated the 3rd day of December 2019 fails and is accordingly dismissed.

We accordingly affirm the said decision. We however direct the parties herein and their counsel to expend some of the energies exhibited in the conduct of the instant appeal towards the prosecution of the substantive Petition. This will not only ensure an early resolution of the Petition between the parties, but will also bring to an end the determination of the rights of the parties, constitutional and statutory of all proprietary and matrimonial interest therein.

The Respondent is however restrained from taking any steps to alienate the said property at Ada, the subject matter of this appeal pending the determination of the substantive petition.

**V. J. M. DOTSE**

**(JUSTICE OF THE SUPREME COURT)**

**G. PWAMANG**

**(JUSTICE OF THE SUPREME COURT)**

**A. M. A. DORDZIE (MRS.)**

**(JUSTICE OF THE SUPREME COURT)**

**PROF. H. J. A. N. MENSA-BONSU (MRS.)**

**(JUSTICE OF THE SUPREME COURT)**

**E. Y. KULENDI**

**(JUSTICE OF THE SUPREME COURT)**

**COUNSEL**

O.K OSAFO BUABENG ESQ FOR PETITIONER/APPELLANT/RESPONDENT WITH HIM, AGYENIM-AGYEI BOATENG ESQ.

VICTORIA BARTH ESQ FOR RESPONDENT/RESPONDENT/APPELLANT.