IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2021

CORAM: DOTSE, JSC (PRESIDING)

DORDZIE (MRS.), JSC

LOVELACE-JOHNSON (MS.), JSC

PROF. MENSA-BONSU (MRS.), JSC

KULENDI, JSC

CIVIL APPEAL

NO. J4/31/2020

14TH APRIL, 2021

AMA SERWAA ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. GARIBA HASHIMU ……. 1ST DEFENDANT

2. ISSAKA HASHIMU ..…….. 2ND DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

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

This is a case which appears simple on its face, but which is not so, in reality, having arisen out of the relations of two migrant workers from Ghana who met and cohabited as a couple, in Napoli, Italy. The female believed they were in an amorous relationship and that marriage between them was imminent, whilst the male had other ideas and therefore initially disputed the basis of the belief of the existence of an amorous relationship. There is thus a mix of love, commercial sex work, misplaced trust, manipulation of the system and intrigue, to the befuddlement of lawyers and judges alike.

Although presented as one case, it actually consists of a total of three cases in the High Court; and an appeal to the Court of Appeal, which has culminated in the instant appeal to this honourable court. The equitable maxim "Equity will not suffer a wrong to be without a remedy" is a maxim that has been brought to life and prayed in aid in order to do justice for all the parties in this case.

BACKGROUND

This is a case in which most of the basic facts had to be pried out of the defendant, and so cannot be retold without reference to the difference between the accounts of the two parties. On account of the reversal of roles in the appeals before the Court of Appeal and this honourable court, the plaintiff/respondent/appellant would simply be referred to herein as 'plaintiff', and the 2nd defendant/appellant/respondent as 'defendant' unless the context requires more specific reference, since the 1st defendant, his father, did not join the appeal in the Court of Appeal.

According to the plaintiff, the parties met between 2000 and 2001 in Udinese, Italy and formed an amorous relationship. Although the defendant initially disputed the years, putting their initial meeting at 2003, he eventually admitted to the years 2000-2001.

He also disputed the amorous connection, but he eventually admitted that they "fell in love for an indefinite period". On the record, the relationship lasted some five years, which again, the Defendant insisted was only some two years. According to the plaintiff, she gave up her job in a carpentry business in Udinese and moved to Napoli for a better job at defendant's urging, only to discover that it was prostitution (i.e. commercial sex work as it is now known) that the defendant intended. Whatever her motivation was, she got into the trade and worked for a few years, alleging that she turned over her earnings to the defendant. The plaintiff alleged that they hoped to get married and set up home in Ghana and so she was introduced to defendant's parents and she also introduced defendant to her family. The parties were never formally married, because the relationship fell apart when they returned to Ghana, initially for a short spell.

In the course of the relationship, the defendant paid a brief visit to Ghana, during which arrangements to acquire the properties were made. Vehicles had also been shipped by the plaintiff in 2002, to someone whose name corresponded with that of 1st defendant, for them to be kept for the couple. The plaintiff later returned to Ghana, having lost her travel documents on account of some mishap. She averred that she found that the vehicles could not be accounted for, and a visit to the Licensing office told her that the vehicles had been sold by 1st defendant. Unfortunately for plaintiff, she was never able to return to Italy. The defendant promised to help her acquire fresh papers to return and introduced an agent who was going to provide the service. With the defendant acting as her guarantor, she raised a loan from Unique Trust Financial Services on the back of a Mercedes Benz car, which defendant claimed as his, as collateral. This is the vehicle whose return forms part of defendant's counterclaim against the plaintiff.

Whilst in Ghana they cohabited briefly at Tantra Hills, a suburb of Accra, in rented accommodation, as one of the properties, the Madina House was, allegedly not yet ready for occupation. When she began to hear stories of how the defendant was carrying on

with other women at the Madina house, she insisted on moving into that house. However, she was only able to stay there for a brief period before leaving on account of harassment she claimed to have suffered at the hands of defendant and his sisters. The plaintiff alleges that she delivered a still-born child, fathered by defendant, at the 37 Military hospital. Within this time period, the relationship broke down. Now jobless, without accommodation, having lost her child at birth and reduced to penury, the plaintiff suffered a mental breakdown and was taken to Kumasi by her family for treatment. She returned to Accra upon her recovery, and found that there was no hope of ever restoring the relationship because her intended had married someone else.

Trial Court

On 18th September, 2008, plaintiff issued a writ against the two defendants, Garba Hashimu as 1st defendant, and her intended husband, Issaka Hashimu, the 2nd defendant. for inter alia, breach of promise to marry. The reliefs endorsed on the writ were for:

> *1) General Damages for breach of promise to marry by 2nd Defendant*
>
> *2) Refund of loans to the tune of E20,000 from 2nd Defendant with interest thereon from ------- to date of payment.*
>
> *3) ½ of the property at Madina and at Ajirigano*
>
> *4) ½ of the 7 machines brought in with Plaintiff's money which have been in the custody of 2nd Defendant as well as an account of proceeds from same to date.*

5) As against 1st Defendant an account for proceeds from the sale of seven cars sent to him by Plaintiff and reimbursement to her of the sum with interest thereon.

6) Return to Plaintiff of the shop at Makola now occupied by 1st Defendant and general damages for the deprivation of Plaintiff

7) Any other relief.

The plaintiff stated that as a commercial sex worker in Napoli, Italy, she made good money and gave some to the defendant to send to his brother in Denmark who held an account in their joint names as well as giving him "loans" to the tune of E20,000. Further, that when defendant returned home in Ghana, to supervise the acquisition of the properties, she sent him some money; and while in Ghana to sell off second hand shoes she had brought home to sell, she sent defendant the money through an agent called 'Joe", for the purchase of the machines that were subsequently installed at Timber Market. She maintained that she had expended her earnings towards acquisition of the property because she believed they were in the process of preparing for married life together. Indeed, she alleged she even began receiving tutoring from defendant's mother towards her eventual conversion to Islam, as she was required by Islamic law to do.

On his part, the defendant resisted the claims and filed a statement of defence and counterclaim on 23rd October, 2008. He denied having any amorous links with the plaintiff, contending that she was already married with children so he could not have been in any relationship with her. In paragraph 7 of the statement of defence, he averred thus:

In answer to paragraph 8 of the Statement of Claim, the 2nd Defendant says that Plaintiff is a married woman with the husband called one Mr Kwame and has four (4) children of the marriage. It is immorally unacceptable that 2nd Defendant would therefore be having the alleged relationship with a married woman…."

The defendant contested her claims, making vehement denial of her claim that he was thus associated with her. He then proceeded to file a counterclaim, which affirmed the averments in the statement of defence, with the following reliefs:

i) A Declaration that the Landed properties at Madina and Ajiringanor or East Legon Extension are the sole properties of the 2nd Defendant herein to the exclusion of Plaintiff.

ii) A refund of the sum of c28,000.000 or Ghc 2,800 paid to the 3 sisters of the Plaintiffs.

iii) An order for the return of the Mercedes Benz Model CLK, or payment of its current value to the 2nd Defendant which she used to collaterize a loan from UT Financial Services, Ltd. Accra, which Plaintiff has refused, neglected and failed to liquidate to the 2nd Defendant.

iv) General damages for emotional stress, vilifications of the good name of the 1st and 2nd Defendants and anxiety caused to the 1st and 2nd defendants in the sum of Ghc 50.000.00

v) Costs

The case had a very checkered history in the trial court. At a stage the suit, Suit No BC 558/2008 was struck out as settled without the knowledge of the appellant. She instituted another writ BMISC 1013/2014 to set aside the settlement. The case was

dismissed when the judge found that there had been no settlement as no consent judgment was entered in Suit No BC 558/2008. There being no consent judgment, there was nothing for the court to set aside. Consequently, Suit No BC 558/2008 was revived by Notice to Proceed filed by plaintiff on 19th January, 2016. The High Court delivered its decision on 5th June 2018.

Against this 5th June 2018, decision of the High Court, the defendant filed a notice of appeal on 11th July 2018, with twelve grounds of appeal to the Court of Appeal. The grounds dealt with judgment being against the weight of evidence, hearsay evidence, error in or lack of proper appraisal of the evidence on prostitution, period of acquisition of the properties in dispute, exhibits tendered, failure to consider counterclaim or one sided judgment and excessive monetary awards against respondent. Nowhere was mention made of the legality of prostitution as a source of income for the acquisition of property by the plaintiff. The Court of Appeal upheld defendant's case and reversed the decision of the trial court.

It is against this judgment of the Court of Appeal that the plaintiff lodged the instant appeal. The notice of appeal filed on 20th December, 2019 set down the following grounds:

> (*a). That the Court of Appeal erred when it held that the Plaintiff/Respondent did not discharge the burden of proof on her.*
>
> *(b). That the Court of Appeal committed error of law when it admitted points of law as part of the written submissions of the 2nd Defendant/Respondent/Appellant without giving the Plaintiff/Respondent/Appellant an opportunity to respond to same*
>
> *(c) That the Court of Appeal committed error of law when it held that the Plaintiff/Respondent/Appellant had admitted the*

points of law raised by the 2nd Defendant/Respondent/Appellant by not responding to them.

(d) That the judgment is against the weight of evidence adduced at the trial".

Counsel for the plaintiff in the statement of case submitted that the defendant had not raised "*any point relating to the legality of the cause of action pursued by the Appellant at the trial Court*" and that "*the issue of the legality or otherwise of the cause of action pursued by the Appellant was never an issue before the trial court*".

Further, that the defendant failed to discharge the onus of proving Italian law at the Trial Court to establish the legality of prostitution in Italy hence the presumption under Section 40 of the Evidence Act 1975(NRCD 323) which makes Ghanaian Law applicable with respect to the foundation of her claim", was inapplicable.

However, counsel for the defendant maintained that under the omnibus ground of "*the judgment is against the weight of evidence*", he was entitled to argue both law and fact. The defendant boldly urged on the court that the issue of the illegality of prostitution in Italy was a matter that went to the very jurisdiction of the trial court, and therefore, the fact that it was not specifically pleaded was "inconsequential" as the Court of Appeal was duty bound to consider such a fundamental issue that went to the root of the trial court's jurisdiction. He further submitted that there was no evidence grounding the reliefs granted to the plaintiff, and that the trial court had only proceeded on sympathy for the plaintiff.

The main questions in this appeal are: (i) whether an appellant is bound by the grounds set forth in a Notice of Appeal without amendment; (ii) whether points of law not set down in such Notice of Appeal may be argued under the omnibus ground of

Appeal without leave of the appellate court; and what amounts to "opportunity to address" such legal issues by the appellate court; (iii) whether there was sufficient evidence on the record to support the reliefs; and (iv) consequently whether the trial court was right to grant those reliefs.

The four grounds of appeal can be grouped for discussion. Grounds (b) & (d) belong together, as a discussion of (d) would dispose of (b). Grounds (a) & (c) are discussed separately, despite the risk of some repetition. We begin with the omnibus ground of appeal and the issue of the fresh legal point on appeal under grounds (d) and (b).

Grounds (d) and (b)

(*a). That the Court of Appeal erred when it held that the Plaintiff/Respondent did not discharge the burden of proof on her.*

(d) That the judgment is against the weight of evidence adduced at the trial".

It is trite law that an appeal is by way of re-hearing, see *Akufo-Addo* v *Catheline* [1992] 1 GLR 377, per Kpegah JSC at p. 391; *In re Bonney (Decd) Bonney* v. *Bonney* [1993-94] 1 GLR 610 per Aikins JSC at p. 617: *Tuakwa* v *Bosom* [2001-2002] SCGLR 61 per Akuffo JSC (as she then was) at p.65. In *Asamoah & Another* v. *Offei* [2018-2019] 1 GLR 655, the defendants' omnibus ground of appeal that the judgment of the Court of Appeal was against the weight of evidence adduced at the trial, opened the way for the Supreme Court to exercise its power of re-hearing the case. Speaking for the Court, Appau, JSC stated the law at p.660 thus:

> *The authorities are legion that an appeal is by way of rehearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court was against the weight of evidence. In such a case, it is the duty of the appellate court to analyse the entire*

> *record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence on record. And it is immaterial whether the appeal is a second one from the Court of Appeal to the Supreme Court.*

Therefore, by pleading this omnibus ground, the Plaintiff has put her entire case before this honourable court for re-hearing.

It is important to address the preliminary point as to what may be pleaded under the ground of appeal as it is germane to the case of the plaintiff in this appeal. The main question is what is allowable to an appellant who pleads that "the judgment is against the weight of evidence adduced at the trial". The question of whether or not pleading the omnibus ground allows for only facts or law to be argued, has been answered in a long line of cases. In the Reply of defendant to the plaintiff's statement of case filed on 4th June, 2019, he stated in respect of *Tuakwa* v *Bosom* (supra) that the Supreme Court's new thinking had moved beyond that case.

> *"Accordingly, it is submitted that the current and new thinking of the Supreme Court is for the expansion of the frontiers of the law concerning the omnibus ground from just examining oral and documentary evidence to considering legal issues that stem from same for purposes of ensuring that a party wins on a matter on all reasonable probabilities and the applicable relevant law".*

The defendant made a lot out of the supposed "new thinking of the Supreme Court" on the omnibus ground and whether facts and law could be pleaded. He cited a number of cases which, he argued, exemplified the new thinking of the Supreme Court. In particular, he relied on *Owusu-Domena* v *Amoah* [2016]1 SCGLR 790 in which the Supreme Court had held per Benin JSC "Where the omnibus ground is pleaded, both factual and legal arguments could be made". Indeed, in *Republic* v *Judicial Committee of the Asogli Traditional Council; Ex-parte Avevor (Azameti & Ors. Interested parties)* [2018-2019]1 GLR 698, the Supreme Court held, relying on *Attorney-General* v. *Faroe Atlantic* [2005-2006] SCGLR 277 and *Owusu-Domena* (supra), that both factual and legal arguments could be made. In *Faroe Atlantic* (supra), the Supreme Court had held per Wood JSC (as she then was) at p. 308 that,

> *"it seems to me that in strictness, this common ground of appeal is one of law, for in essence, what it means, inter alia, is that, having regard to the facts available, the conclusion reached, which invariably is the legal result drawn from concluded facts, is incorrect. The general ground of appeal is therefore not limited exclusively to issues of fact. Legal issues are within its purview".*

However, in all of the cases cited, the omnibus ground had been pleaded as the single ground of appeal. Should the approach be the same when multiple grounds have already been pleaded? In the recent case of *Atuguba and Associates* v *Holam Fenwick Willian LLP* [2018-2019] 1 GLR 1, the Supreme Court seized on the opportunity to clarify what its

supposed "new thinking" on the subject is. The facts of that case were that the Plaintiff/Respondent/Appellant (herein referred to as 'Appellant' to avoid confusion) was a law firm based in Ghana, while the 2nd Defendant/Appellant/Respondent (herein also referred to as 'Respondent'), was a Limited Liability Partnership registered in the United Kingdom, also offering legal services. The 1st Defendant was also based in, and ran its business in, the United Kingdom. Sometime in 2014, the Respondent sought to engage the services of Appellant to act for 1st Defendant in civil suits brought against it in the Courts of Ghana. After the exchange of several emails the Appellant agreed to offer legal services to the 1st Defendant at agreed hourly rates. Subsequently a dispute arose between Appellant and 1st Defendant regarding the invoices for payment of legal fees. The Appellant commenced a suit against 1st Defendant and Respondent for the cost of legal services rendered, interest, general damages for breach of contract and costs. The Respondent requested the Trial Judge to exercise its discretion to strike the Respondent out of the suit as a party. The trial court refused, contending that the Respondent was a necessary party. Respondent appealed to Court of Appeal which allowed the application and ordered Respondent to be struck out of the suit. The appellant brought this interlocutory appeal against that decision and pleaded only one ground i.e the omnibus ground, that the decision was against the weight of evidence.

In support of the single ground of appeal, Appellant therein filed a statement of case arguing certain points of law. The Appellant had not sought leave to file any additional grounds. Respondent extracted those arguments and numbered them as (1) – (4) as "summary of Evidence" describing them as offending Rule 6(6) of C.I 16 and asked that the Court should strike out same. On the point of whether law and facts could be pleaded under the omnibus ground, the Supreme Court distinguished between the cases in which omnibus ground was an only ground, from those in which the omnibus ground was only one of a number of grounds of appeal. At pp.8-10, Amegatcher JSC restated the

general rule and clarified the exceptions set down in the *Owusu-Domena* v *Amoah* (supra) in the following words:

> *"We have discovered that in the detailed statement of case filed by the appellant… under the omnibus ground of appeal, the Appellant argued certain points of law. These arguments were made, unmindful of the fact that this court has ruled in a number of cases that where the sole ground of appeal is that a judgment is against the weight of evidence, the appellant would be limited to making factual arguments and would not be permitted to argue any point of law".*

At p. 10, he clarified the exceptions set down in the *Owusu-Domena* v *Amoah* (supra) as follows: -

> *"Based on the exception given by the court in the Owusu- Domena v Amoah case (supra) the current position of the law may be stated that where only ground of appeal filed is that the judgment is against the weight of evidence, parties would not be permitted to argue legal issues if the factual issues do not admit of any. However, if the weight of evidence is substantially influenced by points of law, such as the rules of evidence and practice or the discharge of the burden of persuasion or of producing evidence, the points of law may be advanced to help facilitate a determination of the factual matters.* ***The formulation of this exception is not an invitation for parties to smuggle points of law into their factual arguments under the omnibus ground. The court would, in all cases, scrutinize such points so argued within the narrow window provided****".*(emphasis supplied).

Was the instant case a proper occasion for the application of the *Owusu-Domena* v *Amoah* (supra) exception, or a proper case for scrutinizing the "points so argued within the narrow window provided"? Is the rule equally applicable to when a single ground has been pleaded; as when multiple grounds defining the scope of the disagreement with the court below have already been pleaded? Those two circumstances are not the same, and so should not be treated the same. Therefore, the rule about sticking to pleading facts only under this ground as established by the old authorities, is preferable when multiple grounds have been already pleaded. A contrary position would undermine the import of Rule 6(7). It would seem that this instant appeal is a classic case for the latter since the defendant had pleaded eleven other grounds of appeal, subsequent to the omnibus ground pleaded.

The plaintiff in her statement of case to the Supreme Court has complained that defendant had argued points of law not contained in Notice of Appeal without seeking leave of the Court of Appeal and that this contravened Rule 8(7) of CI 19. At paragraph 23 of the statement of case plaintiff contended that the issue of the legality or otherwise of prostitution, now commonly referred to as "commercial sex work", was never an issue before the trial court. Again, when the defendant, then Appellant filed Notice of Appeal, he did not raise this matter of legality of prostitution in Ghana "*Nowhere in the Notice of Appeal did the defendant herein raise any point relating to the legality of the cause of action pursued by the plaintiff at the trial Court*", counsel for the plaintiff submitted.

In paragraph 3.2.1 she particularized her complaint thus:

> "*A fortiori … the point which was argued in the written submission of the Respondent without leave of court was to the effect that since prostitution is illegal in Italy and hence the Respondent*

could not enforce a right to properties acquired from such illegal trade, this point is a mixture of law and fact which cannot be raised and argued on appeal for the first time"

In paragraph 17 of defendant's statement of case, he submitted in response,

Prostitution being a criminal offence in Ghana contrary to Section 274 of the Criminal Offences Act 1960 (Act 29), a cause of action founded on proceeds of same could not be used to mount an action and same will not cloth the court with jurisdiction to entertain any action therefrom. Being jurisdictional in nature based on a challenge to the cause of action and the admission of illegal evidence, the Court of Appeal was right in allowing such points of law revolving around same to be argued. Granted without admitting it to be so a claim by the Plaintiff founded on a cause of action being the existence of just an amorous relationship implying contribution to acquisition of properties without legal evidence is too trivial and elementary for the Trial Court to have relied on in granting the reliefs.

This was preceded by paragraphs 15 and 16 in which the defendant submitted that *"The Court of Appeal rightfully allowed submissions on legal points following from the facts and evidence since they went to the jurisdiction of the court and the competency of the Plaintiff's cause of action at the trial court"; and* reinforced the basis of the application of foreign law thus: *"It is submitted that the presumption that the law of a foreign jurisdiction is the same as the law of Ghana was rightfully applied and that no court should lend its aid to the enforcement of a contract founded on illegality"*

Should defendant have asked for Leave before arguing the points of law? He certainly needed leave to amend the grounds, as provided under Rule 8 (7) of C.I. 19, and was obliged to ask for same.

The relevant rules in respect of the procedure for such amendment are as set down under Rule 8 (7) and (8) of C.I.19 which provide as follows:

> *8(7) "The Appellant shall not, without the leave of the court, urge or be heard in* ***support of any ground of objection not mentioned in the notice of appeal,*** *but the court may allow the Appellant to amend the grounds of appeal upon such terms as the court may think just.* (emphasis supplied)
>
> *(8) Notwithstanding sub rules (4) to (7) of this rule, the court in deciding the appeal shall not be confined to the grounds set out by the Appellant but the court shall not rest its decision on any ground not set out by the Appellant unless the respondent has had sufficient opportunity of contesting the case on that ground*.

From these provisions it is clear that it is not permitted for an appellant to argue a ground of appeal that is not set forth in his notice of appeal when the precondition for arguing such ground has not been fulfilled. In *Sandema-Nab v Asangalisa* [1966- 1997] SCGLR 302, the Supreme Court, per Acquah JSC (as he then was), stated at p.307

> *"Now it must be appreciated that an appeal is a creature of statute and therefore no one has an inherent right to it. ... [w]here a right of appeal is conferred as of right or with special leave, the right is to be exercised within the four corners of the statute and the relevant procedural regulations, as the court will not have jurisdiction to grant deviations outside the parameters of the statute".*

Therefore, an appeal must be prosecuted within the Rules, or "four corners of the statute" set down to govern it, and by no other mode.

The Court of Appeal accepted the mode that the defendant adopted. Was it open to the Court of Appeal to overlook a well-known principle held by the Supreme Court in *The Republic* v *Central Regional House of Chiefs Judicial Committee: Ex parte: Aaba* (2001-2002) 1 GLR 221 where provisions in Rule 6(8) of C.I. 16 similar to Rules 8(7) and (8) of C.I.19 were interpreted and applied? The Supreme Court stipulated, per Adzoe JSC, at pp 229-230 thus;

> *" The rules of the Supreme Court (and all other Courts) are there to be observed. They form an important component in the machinery of the administration of justice and the courts must not, as a general rule, take lightly any non-compliance with them, even though technicalities are not to be permitted to undermine the need to do justice. The Supreme Court Rules, C.I. 16, set out the appeal procedure. Rule 6 deals with notices of Appeal in a case of this kind. It provides: —*
>
> *"6(2) A notice of civil appeal shall set forth the grounds of appeal and shall state……*
>
> *(b) whether the whole or part of the decision of the court below is complained of and in the latter case the part complained of;*
>
> *6(4) The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal, without any argument or narrative and shall be numbered seriatim; and where a ground of appeal is none of*

law the appellant shall indicate the stage of the proceedings at which it was first raised.

6(5) No ground of appeal which is vague or general in terms or discloses no reasonable ground of appeal shall be permitted, except the general ground that the judgment is against the weight of evidence;……

These rules do not permit an appellant to argue a ground of appeal that is not set forth in his notice of appeal. Of course, there is rule 6(7)(b) which enjoins the court not to "confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant; but that rule is subject to rule 6(8) which provides that "Where the court intends to rest its decision on a ground not set forth by the appellant in his notice of appeal or on any matter not argued before it, the court shall afford the parties reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal.

I understand rule 6(8) to mean no more than that decision to rely on a ground not set forth by the appellant rests solely with the court when in any particular appeal before it, the justice of the case requires the court to rest its decision on a ground not relied on by the Appellant in his notice of appeal. The rule should not be taken as granting an Appellant a general license to abandon his obligations under the rules."

This means that it was not open to the Court of Appeal to overlook what it acknowledged itself as the mandatory requirement for amendment, yet it stated that

> *[W]hile we agree with the position of the law with respect to the mandatory requirement of Rules 8(5) and (6) of the rules of this Court, there is now established judicial precedent which permits the consideration of legal issues relative to the credibility, legality and probative value of evidence adduced by determining whether or not the Trial Court had properly applied the relevant law in the reception of the evidence and placing value on it. based on the authorities cited by the 2nd Defendant there has been sufficient notice to the Plaintiff to answer legal issues which are inextricably connected with the evidence adduced by the Plaintiff to determine whether or not it is founded on law or that the evidence of a business undertaken outside the jurisdiction is consistent with the law of the local jurisdiction." These are species of the allegation arising from the omnibus ground of appeal that the judgment is against the weight of evidence and as the authorities have now established in the determination of the omnibus ground, legal issues relative to the evidence and its proper evaluation must necessarily arise….".*

Could the grant of this Leave have been done by the Court's "tacit agreement" as the Court of Appeal appeared to suggest? Again, this has to be answered in the negative. What, then, does 'Leave' entail? 'The concept of 'Leave' has been defined in *Brown* v *National Labour Commission* [2018-2019]1 GLR 592. The Supreme Court, per Amegatcher JSC, explained what 'Leave' means. At p. 610 of the case, the Court stated that "In ordinary parlance, leave implies praying to the court to grant permission to file the appeal", and clearly this must involve a formal step of "praying to the court to grant

permission", prior to arguing the ground and not simultaneously with submissions on that ground. Therefore, one who requires leave of the court in order to argue grounds not set down in the Notice of Appeal must take a formal step to ask that permission of the court; and the step must be taken prior to arguing the point and not simultaneously with it. This is because the appellate court is within its rights to refuse the Leave., and there being a possibility that it could so refuse, a positive answer to the application could not be presumed.

Such prior step taken to seek leave, serves more than one purpose. It enables the court to request to be addressed on the specific point, while putting the plaintiff on notice as to the direction of the defendant's claims, since the common law disapproves of surprises in litigation. Such step would also have served as an opportunity for the plaintiff to be heard on the matter. Thus, when a party argues the legal points in the written submissions under the guise of the judgment being against the weight of evidence without asking for leave of the court, such party imposes a risk of breaching the rules, upon the appellate court.

Under this ground of appeal, the plaintiff further contends that she was not given opportunity to respond when defendant put forward points of law in his written submissions that had not been part of either his notice of appeal or the proceedings at trial court. Nowhere did defendant raise this point that he introduced on appeal without leave of the Court of Appeal, and upon which the Court of Appeal based its decision. Yet, the court went on to conclude that the plaintiff had had an opportunity to respond to the inclusion of those points in the written submission but had failed to do so, in "like manner" in her statement of case. If a person leads evidence as to her source of income underlying her claim to property, does that imply notice that she would be required to demonstrate the legality of her source of income under the laws of Ghana? Thus, not only does such a misstep have the effect of stampeding the court into accepting the say so of

that party in respect of the issues raised, it also deprives the court of the opportunity to be addressed on the law regarding the new issue raised. Further, it denies the other party an adequate opportunity to respond to the issues as she or he is entitled to, as prescribed by law. Was the Court of Appeal right to overlook the fact that the defendant had not asked for leave prior to raising and arguing the legal points, as happened in the instant appeal? No, it was not.

On the basis of the rules and authorities expounded above, it is our opinion that the Court of Appeal erred and occasioned a grave miscarriage of justice when it considered and ruled on legal issues raised by the appellant before it as part of the written submissions under the guise of the judgment being against the weight of the evidence without giving the plaintiff an opportunity to respond to same. We, accordingly, allow this ground of appeal and set aside that part of the Court of Appeal judgment which dealt with whether the legality of prostitution or commercial sex trade in Ghana could be argued without leave.

Ground (c)

that the Court of Appeal committed error of law when it held that the Plaintiff/Respondent/Appellant had admitted the points of law raised by the 2nd Defendant/Respondent/Appellant by not responding to them. .

The plaintiff in this ground contends that when defendant failed to state those points of law on his Notice of Appeal to the Court of Appeal, but only put them in his written submissions; she was right to respond by merely raising objection to same early on; and that sufficient response had thereby been made. The reaction of the Court of Appeal to this mode of proceeding was that: *"[W]e are of the view that issues of law raised*

by the 2nd Defendant are relevant as they go to the root of the Plaintiff's action not having responded to them, we hold that those submissions by the 2nd Defendant were "unanswerable."

Further, on the point of whether the plaintiff's posture was the appropriate one to adopt to such pleadings made without leave of the court, the Court of Appeal held that:

> *"[T]here is to our mind always on (sic) inherent risk in not responding to issues of the law argued by the Appellant in any appeal. For, where the issues or point of law are glaring fundamental and go to the root of the action notwithstanding any objection raised in the written submission of a Respondent, it would be prudent for the Respondent to respond to them. This is because should the Appellate Court favourably consider the submissions, the Respondent like the Plaintiff in this appeal would have thrown away the opportunity to respond. Indeed, it is not for a Respondent to determine for this Court grounds that it considers inadmissible and unarguably by reason of its vagueness. Where the grounds of law set out reveal sufficient material for comprehension by the Court, they will be considered and the Respondent who had the opportunity to respond but failed to do so would have abandoned his right …….. It would be prudent for a Respondent in the appeal notwithstanding any preliminary objection on any non-compliance to respond to all submissions and leave the issue of the propriety of the submissions for the Court to determine …"*

The Court, thus, stated that in choosing merely to object to same and praying the Court of Appeal to strike out those portions of the written submissions, rather than

making a response, the plaintiff had assumed a risk since the legality or otherwise of her cause of action was fundamental to the issues before the Court. Thus, the response of the Court of Appeal to the plaintiff's "failure to respond in kind" to the matters in the defendant's written submission was to state that she had taken a risk which had materialized and to blame her for taking such risk. This posture of the Court of Appeal raises the following questions: "Was the plaintiff obliged to respond to points of law she believed to be incompetent, having been raised without leave of the court?"; and "Did she, in fact, assume an unjustified risk that the court would agree with her strategy, when she failed to respond "in kind" to the points of law raised for the first time on appeal? We think she was not so obliged; nor did her lack of response amount to a failure to provide a reasonable answer to the points raised. In our opinion, her insistence on operating within the "four corners" of the Rules was supported by law, and cannot be held against her.

The law in respect of new grounds raised on appeal is that, as first stated above, the grounds on the Notice of Appeal must be amended; that leave to do same must be sought; and the other party must be given a chance to respond to same, see, *Akufo-Addo* v *Catheline* [1992] 1 GLR 377. The Court of Appeal backed defendant on this posture, holding that "*As a court of law, we are enjoined by our judicial oaths to uphold the constitution and the laws of Ghana and not to gloss over clear violations of statute which we have the power to raise suo motu provided the parties "are given the opportunity to address same*"

Having correctly stated the law, however, there was no opportunity given for plaintiff to address the court on the issue. Not having given the plaintiff an opportunity to respond, the Court of Appeal was wrong in basing its judgment on that point. Indeed, when the Court of Appeal thus disabled itself from being addressed on the issues, it was left with no recourse but to rely on defendant's rendition of the law on the supposed crimes involved. Again, the result of upholding the defendant's argument would be to accept

the proposition that a person who acquires property by means of sexual immorality should not be allowed to keep it, but that one who was complicit in that immoral lifestyle was so morally superior that he had a better right to keep the "unclean property".

In the written submissions of counsel for defendant to the Court of Appeal filed on 2nd May, 2019, he stated in paragraph 18 that the Trial Judge had failed to uphold the law because,

> *"By her own pleading the Plaintiff is a self-confessed offender who founded a cause of action on illegality. The practice of prostitution and the use of proceeds or income generated therefrom is a criminal offence in this jurisdiction under Sections 274 to 276 of the Criminal Offences Act, 1960 (Act 29) as amended……Consequently once the Plaintiff herself asserted that the monies she allegedly transferred to the 2nd Defendant and used to purchase cares and machines for his benefit though he denied, were proceeds of her practice of prostitution, the Trial Court had a duty to have rejected her entire claims and dismissed her action on grounds of illegality and public policy".*

He then cited Section 40 of the Evidence Act 1975 (NRCD 323) in paragraph 19 of the Addresses that

> *"The law of a foreign country is presumed to be the same as the Law of Ghana" therefore, if prostitution and the earnings plaintiff allegedly denied therefrom is not unlawful in Italy where the Plaintiff admitted she practiced the immoral trade and earned substantial income from, she had a duty to prove the law in Italy in*

> *the local jurisdiction and further produce evidence that she was duly licensed to practice prostitution because it is regulated by the law of the foreign jurisdiction. Beyond that, the Plaintiff carried the burden of proving her daily or weekly earnings in order to discharge her statutory burden. In all these respects, it is respectfully submitted that the Plaintiff blew a muted trumpet and the Trial Court had no jurisdiction to accept Plaintiff's case founded on earnings from illegality contrary to the law and public policy of the jurisdiction".*

He then landed into an excursus on the law on illegality and Public Policy in paragraph 20 "*The Defendants submit that proceeds generated from prostitution could not be relied on to found an action for any alleged monies Plaintiff claimed to have earned and learned to the 2nd Defendant and purchased other properties which she alleged the Defendants converted*".

Counsel did not go further to discuss the morality of asking to retain property acquired by illegal or immoral means and whether such conduct would amount to "living wholly or partly on the earnings of prostitution". Therefore, from a position of flat denial that these facts ever occurred, defendants now state that a woman who uses immoral means to acquire property has no right to the property because the means offends public conscience in Ghana. The effect of this position is that the man who becomes the beneficiary of the immoral means should be allowed to keep it.

In an interesting twist, counsel stated

> "*We have already submitted, the Plaintiff did not prove her case. We further submit that, prostitution within the jurisdiction of Ghana which a court cannot lend its hand in the enforcement of proceeds generated therefrom consequently, there is insufficiency of*

facts and evidence and legal standing to justify a right or enforcement against the Defendants based on such speculative income".

Proceeding, he argued on the law of contract and its attitude to contracts founded on illegality and public policy. Raising it as an issue of jurisdictional competence, he stated "Defendant boldly urges on the court that the issue of the illegality of prostitution in Italy should become one on which the Trial Court's jurisdiction turned." What was the purpose of this line of argument except to shoot himself in the foot? If the Plaintiff did not prove her case, then why should her source of income, which she openly admits, was from prostitution, become the source of succor for the defendant who is seeking to hold onto properties said to have been partly funded from that source? If the Plaintiff has no claim to the property then the morality or otherwise of her source of income is of no consequence, but if it would be of some consequence, then her claim has some merit, hence the effort to undermine the court's ability to intervene, and do right by her. One cannot blow hot and cold at the same time.

We agree with counsel for the plaintiff's submission that plaintiff by objecting to the written submissions of the defendant on the legality of prostitution in Ghana did not admit to the points of law so raised by the defendant. We allow this ground of appeal as well and set aside the decision of the Court of Appeal on ground '**c'**.

Ground (a)

The plaintiff further urged on us the submissions contained in ground (a) that the Court of Appeal erred when it held that the plaintiff did not discharge the burden of proof on her. The Court of Appeal stated that there was no evidence at all to back Plaintiff's claims, holding that,

> *"[T]here was nothing of evidential value adduced by the plaintiff in her testimony to entitle her to the reliefs granted in her favour by the Trial Court against the 2nd Defendant"…*
>
> *Whereas the findings of the Trial Court are clear that the Plaintiff failed to prove her case, the Trial Court nevertheless granted substantially all the reliefs sought by the Plaintiff. This in our view amounts to an aberration which provokes the interference with those findings and conclusions which are not consistent with the relevant law, established facts, and the evidence on record".*
>
> *"The logical question is that if the Trial Court has by its own findings determined that the Plaintiff had failed to discharge her burden of proof. … the conclusions and eventual orders which granted the Plaintiff monetary award and substantial part of the reliefs claimed is glaringly perverse and not supported by the evidence on record and the Trial Court's own finding".* Citing Zabrama v Segbedzi (1991) 2 GLR 221 at 246 per Kpegah JA (as he then was).

After reviewing the entire record, we, with regret, respectfully disagree with those findings by the intermediate appellate court.

At this point it would be appropriate to analyse the claims that the Plaintiff made, and the evidence that was proffered. The plaintiff had no receipts or other documents in her name to support her story, though it must be noted that over the decade in which the case had travelled through the courts, she has been fairly consistent in her accounts. The defendant, on the other hand, has created a track record of initially denying every assertion, though eventually admitting the fact when confronted with some evidence

which he could not deny. The plaintiff based her claim of a half share of properties acquired in the name of defendant during the period of the relationship, by leading evidence as to her source of income and the lifestyle of the couple both in Italy and in Ghana, insisting that she had contributed substantially to the acquisition of the property from the money she made as a commercial sex worker in Italy. She indicated that all the properties had been acquired between 2002-2004, and none since, because the funds for the acquisition were from her.

BREACH OF PROMISE TO MARRY

This is a finding of fact which featured strongly in the judgment of the court below. The celebrated professor of Family Law in Ghana, Professor W. C. Ekow Daniels, has stated emphatically that "*it is now beyond question that actions for breach of promise of marriage under customary laws are maintainable*" See W. C. E. Daniels. *The Law of Family Relations in Ghana*, Black Mask Ltd Accra, 2019 at p. 102. In *Donkor* v *Ankrah* [2003-2005] GLR 125, Dotse J A (as he then was) upholding the cause of action and citing the article by H.J.A.N. Mensa-Bonsu "The action for Breach of Promise to Marry in Ghana : New life to an old rule." (1993-95) Review of Ghana Law 41 at p.67, stated at p.138-139

> *"The circumstances under which a promise of marriage would be inferred must also be given considerable thought in order to solve two problems: forestalling the situation of blackmail which have discredited this action, and discouraging unscrupulous persons from taking advantage of others. … On the whole it is better for society to hold people to promises made – even of marriage - and to declare the parameters within which one may change one's mind without causing hardship to another."*

In that case, the plaintiff and defendant had been in relationship. A "knocking" ceremony had been performed before the relationship broke down. A baby was subsequently born and named by defendant. However, the defendant had by that time, married somebody else. The Court of appeal was not in doubt that the action could be maintained. In the article by H.J.A.N. Mensa-Bonsu "The Action for Breach of Promise to Marry in Ghana: New life to an old rule." (supra) the learned author states the law at p.44 as follows.

> *"An action for breach of promise to marry arises when a person makes a promise to marry another, and refuses to perform. The refusal could be by conduct… or by an express refusal upon a request for performance. Unchastity does not operate as a defence unless it is unknown to the defendant. Otherwise it only goes in mitigation of damages."*

It is thus the case that where a man or woman makes a promise of marriage to another and then fails to carry it through, it is a cognizable wrong for which the court would give a remedy.

The question for resolution in this case is whether there was a promise to marry the plaintiff and on which she relied to "invest her earnings" to secure their future life together; and whether there had been a failure to honour the promise. The plaintiff claimed that she was based in Udinese, Italy, where she was involved in the carpentry business; and that in about 2001 she met and fell in love with the defendant who advised her to move to Napoli where she could get a more lucrative job. The "more lucrative job" turned out to be prostitution (or 'commercial sex work' as it is now commonly called in those countries where it has been legalized, or at least considered acceptable work). She also stated that she and defendant cohabited in Napoli where he acted as her "pimp", dropping her off at the point where she plied her trade in the morning and picking her up in the evening. The defendant did not contradict any of this evidence although he

denied being the one who put her in the business of prostitution; and that the decision of plaintiff to move to Napoli from Udinese, had nothing to do with him. The defendant also denies that any promise of marriage was made to plaintiff, contending that the plaintiff was already married to one Kwame with whom she had children so how could he contemplate marriage to one who was already someone else's wife? His denials have been difficult to credit as he had first denied there was any relationship at all between them; and also the time period when they first met. He contended that they met in Udinese in 2003 and that if the plaintiff moved to Napoli, he had nothing to do with it. For the first time, the defendant admitted on cross-examination on 2nd February, 2018, he grudgingly admitted that he met plaintiff "between 2000 and 2001", and not in 2003 as he had always insisted. He also admitted that they were "in love for an indefinite period", much as the plaintiff had always maintained; and that although they met in Udinese, they carried on a relationship beyond Udinese to Napoli. Although he denied cohabiting with her, he admitted that she was visiting him and he, her. Since he lived in Napoli, where the plaintiff admitted she had re-located as a commercial sex worker, their interaction must have been in Napoli. This is the exchange that took place during cross-examination of the plaintiff. Thus, however grudgingly, the defendant had admitted the version of events surrounding their meeting in Italy as the plaintiff testified. What is the evidence supplied by the plaintiff that would lead a court to believe her version of events?

> *Q. In the course of your evidence you were asked about [sic] your lawyer how well you knew 2nd Defendant and you said he was your husband. Do you stand by that?*
>
> *A. When we returned to Ghana we could not perform marriage rites so he is not my husband.*
>
> *Q. Are you saying you have never been married to him*

A. When we lived abroad, we were married. We came to Ghana to confirm the marriage but it could not come off and my properties are with him.

…

Q. I put it to you that you have never been married to 2nd Defendant either by the Moslem Tradition or Christian Tradition

A. ***By marriage, I mean that the 2nd Defendant and I while broad cohabited and lived in the sight of the whole world as man and wife but did not go through any formalities*** (emphasis supplied)

What this exchange confirms is that indeed, the plaintiff and defendant were never formally married. However, in Italy, they carried on as if they were, and it was when they came to Ghana to prepare for their life together that the relationship began to unravel. What was the nature of their relationship, such that an adult woman who had migrated from Ghana in 1992 to live and work in Italy, would return home to live, with no indication of how she planned to survive for the future? How did it happen that her decision to return home coincided with the defendant's decision to also be in Ghana at the material time? Would a woman with that kind of travel history return home empty handed, following a man with whom she alleged she was cohabiting in Napoli, Italy? What drew her home and what was the nature of their interaction when she returned to Ghana? For a defendant who has consistently denied everything and only gradually admitted when he could no longer deny, one must examine the conduct in order to ascertain its import.

When counsel for defendant submitted,

> *"My Lord on the 1st Relief of breach of promise to marry, the record of 4th July 2017 did not establish that the Defendant's family went to ask the hand of the Plaintiff customarily and proceeded to perfect any marriage in the Ordinance of Islamic Way" and concluded that the Plaintiff was NOT MARRIED to the 2nd Defendant*.

He was only confirming the basis of the action, for had they been married, there would have been no need to bring such an action. In fact, it is precisely because they were not married, as she claims she had been led to expect, that the action had been brought. It is not the law that for an action for breach of promise to marry to succeed, there must be a subsisting customary marriage, whose failure to be converted to an ordinance marriage, grounds the action. Although that was the fact-situation in *Afrifa* v *Class-Peter* [1975] 1 GLR 359, that the defendant cited, it was not the case in *Donkor* v *Ankrah* (supra).

The plaintiff stated that when they arrived in Ghana they co-habited at Tantra hills in Accra for a short period in rented accommodation because the defendant told her that the Madina House was not ready for occupation. The defendant denies that they ever co-habited at Tantra hills. The plaintiff tendered a Hospital Record from 37 Military Hospital in the name of the defendant, and Identity Card with his picture. Asked how she came by them, the plaintiff's quite reasonable explanation was that defendant sustained a minor road accident and was taken to 37 Military hospital for treatment so he must have brought the Record with him home; and that she found the items when she was packing her personal effects from the Tantra Hills accommodation. The defendant denied that the documents had anything to do with him. His unconvincing explanation was that the hospital record belonged to a 'Mr Hashim, Issaka' while his name was 'Mr Issaka Hashim'. He had a good reason to deny that the Hospital Record was his. On the Record, the person had given his wife's name as 'Yaa Akyaa', which appears to be an alias of the Plaintiff's judging by the name on a Ghana passport with her picture she exhibited, in

which her name is given as 'Yaa Achiaa'; and the ID card supposedly of defendant with a different first name. but with defendant's picture. The court has taken judicial notice of the fact that 'Yaa Akyaa' or 'Yaa Achiaa' is a common name among the Asante ethnic group in Ghana. Like many a local name which is spelt differently by different people, if the owner does not insist on a particular spelling, 'Akyaa' is essentially the same name, as its anglicized spelling, 'Achiaa'. The hospital record has 'Yaa Akyaa' as the name of the wife of 'Mr Hashim, Issaka'. He denies that the record has anything to do with him because as he claimed in the teeth of evidence to the contrary, the plaintiff was not known by an alias of 'Yaa Achiaa' or 'Yaa Akyaa'. The plaintiff claimed that Yaa Achiaa' or 'Yaa Akyaa' was a reference to her and that it was the name given to her by the 1st defendant as an agent who prepared the passport for her. It must be remembered that the plaintiff was making arrangements to return to Italy when she lost her documents and was refused a visa. The plaintiff's story sounds credible. It is not an uncommon practice in the migrant-worker community for people to adopt new names and new documentation when there have been circumstances, including issues with their immigration status, necessitating the acquisition of for fresh documentation. It is a highly deprecated practice, but it goes on nevertheless. It must be added that owning multiple passports in different names, though not permitted, nor approved of, by law, is not an uncommon practice, and this has led to various attempts by the State to reform the regime for granting Ghanaian passports.

The plaintiff also alleged it was when she heard stories of how the defendant was carrying on with other women at the Madina House that she insisted on moving there. She further alleged that she left her household goods there when she had to leave the place due to ill-treatment by defendant, coupled with the abuse by his mother and sisters. The defendant claimed that she stayed briefly at the Adjiriganor house and left of her own accord, but subsequent evidence showed that she was never let into the Adjiriganor

house so if she ever stayed in the defendant's house, even for the brief period defendant was willing to admit to, it must have been at the house at Madina.

The Plaintiff also claims she had a still-born child at 37 Military hospital using the name of 'Yaa Akyaa' sometime in 2006. This is a fairly serious allegation but the defendant says nothing about having fathered a baby at all. Between 2007 and 2008 when the plaintiff suffered mental illness, her sisters approached the defendant to give them Ghc3,000 to support her treatment. After some pressure, the defendant gave Gh¢2,800 to help treat her. He says he gave the money on compassionate grounds, but he is now counterclaiming for the amount. From the totality of the life they led in Ghana, the relationship between the plaintiff and defendant went beyond mere acquaintances in Italy. It would not be unreasonable to find that the plaintiff's expectation of marriage had good basis.

Another piece of revealing evidence is the issue of the Mercedes Benz which the defendant admits he gave to the plaintiff to be used as collateral to raise a loan at Unique Trust (UT) Financial services. The question that readily comes to mind is "What would make a businessman give his Mercedes Benz Kompressor vehicle to a stranger of no visible means, to collaterise for a loan for her own purposes; for which loan he also signs as 'guarantor'?" There is absolutely no good reason, unless there is a relationship of some kind between the parties. As there was no blood relationship between them, what other kind of relationship could there be, to elicit such "philanthropy"? All of these events are pointers to the fact that the plaintiff was led into believing that she was considered a "wife" to the defendant, hence her reliance on that belief to act to her detriment. Having led her to believe she was considered a wife, would it be unreasonable for her to seek compensation when between the defendant and his family she was chased out of his life empty-handed?

The fate of Mercedes Benz Kompressor vehicle has other significance in this whole saga. The defendant now makes a counterclaim for it, complaining that it was the plaintiff's failure to service the loan that has led to it being lost to UT Financial Services. The situation bears closer examination: the plaintiff had come on a visit to Ghana but having lost her documents in Italy, was stranded in Ghana and was presumably unemployed. If she had no means of income, then how did the defendant come to give his Mercedes Benz Kompressor vehicle to her to collateralize for a loan, if he had no belief she could repay the loan? How was he expecting her to repay the loan if she had no income while in Ghana? Either the plaintiff's story that she brought second-hand shoes to sell in Ghana was true, or else she had a source of income known to the defendant.

There is yet another angle that bears exploration. The ownership of the vehicle was disputed between the parties, but the documentation on the vehicle was not put in evidence. The plaintiff insisted the vehicle was hers, whilst the defendant maintained that it was for him, and counterclaimed for its return. In assessing the evidence in order to do justice as between the parties, banking industry practice would have to be resorted to for assistance to resolve the question of whose name must have been on the documents. Would a financial institution processing an application for a loan grant the loan with a vehicle as collateral, if the vehicle was in another's name, without any evidence of the applicant's connection with the name in which the prospective collateral is registered? The evidence is clear that the loan was granted to the plaintiff in her own name, because she was the one to whom a letter was written by UT Financial Services, by way of final notice that the vehicle was going to be sold if the loan was not repaid. Again, if the vehicle was registered in the name of the defendant, why was the notice to sell the vehicle not addressed to him, or even copied to him, unless, the vehicle was really registered under plaintiff's name, as she has consistently maintained? It seems more likely than not, that

the vehicle was registered in the plaintiff's name, as she claims, than otherwise. The defendant is counterclaiming for the vehicle, and he must prove his claim.

Another finding made by the Court of Appeal had to do with the question of the 'seven cars'. The Plaintiff made a claim for seven vehicles she allegedly shipped to Ghana in 2002. She exhibited a bill of Lading covering two vehicles and Household goods. On the Bill of Lading the 'shipper' or 'consignor' is set down as 'Sawah Ama' after the fashion of continental Europeans who tend to put the last name first. It is thus no surprise that the consignee thereon is stated as 'Hashimu Garba' instead of 'Garba Hashimu'. The Plaintiff was examined on her statement on 21st March, 2017, and defendant's counsel tried to get her to agree, without success, that as the Bill of Lading was in the name of "Garba Hashimu" and not "Hashimu Garba", that had no reference to 1st Defendant. The 1st Defendant, himself, denied being the person on the Bill of Lading provided by plaintiff because the name on it was 'Hashim Garba' when his name was 'Garba Hashim'; but a Tenancy Agreement for ten years for a shop at Okaishie dated 11th August, 2003 tendered by the defendants and marked as "EXH HAS 5" has the tenant's name as Hassoumi Garbah of PO Box 335 Accra New Town (p45) – the same address as 'Garba Hashimu' on the Bill of Lading. Yet the defendant supported his father's story that the consignee of the vehicle and household goods had to have been someone else, because he did not answer to that version of his name. The cross-examination went as follows:

> *Q. I am suggesting to you that you intended the cars to go to Hashimu Garba and not Garba Hashimu?*
>
> *A: My Lord, I sent the car to Garba Hashimu being the father of 2nd Defendant.*

Q And I am suggesting to you that the 1st Defendant has not received any such bill of lading from you and for this reason you cannot claim that he has your cars?

A My Lord, the 1st Defendant received the bill of lading. My lord the bill of lading were more than this but because I was moving from one place of abode to the other, I lost some of the documents.

Q: I am suggesting to you that this Exhibit "E" is a forged document?

A: My lord, it is a genuine document. When I was working in Italy, the 2nd Defendant called the 1st Defendant and informed him that he has gotten a woman to marry and as a result of that all the goods I sent to Ghana bears [sic] the name of 1st Defendant. When I came to Ghana and was looking for the whereabouts of the cars from the 1st Defendant, I couldn't trace the cars so I went to license office and realized that 1st Defendant has sold the cars to someone and has prepared documents to that effect and also forged my signature.

Q Did you report what you are saying to the Police?

A: No my lord, I informed the 2nd Defendant of what had happened."

These were the denials the Court of Appeal believed and dismissed this evidence on the cars as false, because the bill of lading mentioned 2 cars while she was claiming seven. However, in Paragraph 7 of the Statement of Defence filed in the suit BMISC 1013/2014, on 20th November 2014, the defendant thus pleaded:

> *" the 2nd Defendant contends that all properties acquired by him as well as the 7 used cars referred to, were financed by himself and it was logical that the used cars shipped to Ghana were consigned to his father, the 1st Defendant and no one else"*

This admission was confirmation that, indeed, 7 cars had been shipped to 1st defendant (2nd defendant's father) as plaintiff had contended. Yet, in a Witness Statement filed by defendant in reaction to plaintiff's Witness Statement served on him on 5th July, 2016, defendant stated, "*I am not aware the Plaintiff shipped two cars and Household goods and personal Effect to the 1st Defendant*". When 1st defendant was cross-examined on 23rd March, 2018, he flatly denied that any seven cars had ever been shipped to him from Napoli. Indeed, he denied ever hearing of, or knowing plaintiff before they met at the "Circuit Court" [sic] at Cocoa Affairs in 2008.

The question of which of the two parties was speaking the truth about the "*7 cars shipped to 1st Defendant from Napoli*" as plaintiff claimed, had been previously answered on pleadings filed on 23rd June, 2009, when the 2nd defendant swore to an Affidavit in opposition to an affidavit in support of a motion for Interim Preservation which had been filed by counsel for plaintiff on 5th June, 2009. He averred as follows,

> *Para 14: "In answer to paragraph 15 of the affidavit in support I am advised to say that in paragraph 9 of the statement of defence and counterclaim the 2nd Defendant denies the plaintiff's claim of ownership to the seven (7) cars as the owner of the said cars. I am further advised to say that the 7 cars mentioned in paragraph 15 of the affidavit in support are cars purchased by the 2nd Defendant and shipped to his father 1st Defendant. It is unimaginable that plaintiff will acquire her cars but will decide to ship the said cars to 1st defendant with whom the plaintiff has no relationship at all.*

> *There is no evidence on the face of the Bill of Lading referred to in paragraph 15 that the Consignor was the plaintiff. There is however evidence on the face of the Bill of Lading which established the CONSIGNEE named HASHIMU GARBA, the 1st Defendant* ***with his particulars P.O. Box K 335 Accra New Town, Accra Ghana.*** *I am further advised to say that the 7 cars imported into the country and consigned to 1st defendant are the sole properties of the 2nd Defendant. The 1st Defendant owes no duty to account for the sale proceeds of the cars to the Plaintiff since Plaintiff did not consign the cars to 1st defendant.* (emphasis supplied)

Yet the Court of Appeal had dismissed the plaintiff's evidence as false because the one bill of lading she had managed to hold onto, all these years mentioned 2 cars, while she was claiming seven.

Again, on 9th Feb, 2009 Additional issues for trial were filed on behalf of the 1st and 2nd Defendants. Paragraph 4 set down as issue for trial

> *"whether or not the alleged 7 cars specified as 1 BMW 2 Golf saloon cars; 1 Toyota; 1Hyundai; 1Nissan Bus; 1 Fiat Pravo [sic] are the self-acquired properties of 2nd Defendant and which 2nd Defendant shipped to the 1st Defendant his father"*

On the record, the existence of the vehicles was a claim that both the 1st and 2nd defendants had disputed on more than one occasion. Indeed 1st defendant flatly denied that any cars had been shipped to him by plaintiff or indeed, by his son, from Napoli. On this one bill of lading dated 29th September, 2002, there was on the goods listed, a 'Golf vehicle and Fiat Bravo' as well as Household items. Is it a coincidence that the list of seven vehicles

provided by defendant included "2 Golf vehicles and 1 Fiat Pravo [sic]"? It would seem that after defendant admitted to the vehicles, and even provided the brands of vehicles whose existence he had previously denied, this was a binding admission against him, and there was no need for plaintiff to provide proof of same. Therefore, at a minimum, her claim to two of the cars had been proved. Yet the Court of Appeal said there was no evidence backing her claim. Her explanation as to why she had only a bill of lading covering two vehicles when she was claiming seven, was perfectly reasonable. She stated that having had to move from place to place, she had lost some of her papers. As there is evidence on the record that she even became homeless at a point in time, the wonder is that she was still able to hold onto one, and produce it as evidence of her claims.

On the whole, the plaintiff held up very well under extensive cross-examination across many days. The defendant appeared to use other spellings of his name, rendering them aliases. Receipts of installment payments for Adjiriganor property bear the name "Issak Ashimu", dated 17th March, 2004 No 100055; 6th April 2004 no 100056 and final payment of 15,000000 undated 100060. From the record, it would appear that the defendant uses a number of spellings of his name depending upon the circumstances. With this number of aliases, or different spellings of his own name, why would he insist that 'Yaa Akyaa' could not be the plaintiff's alias "Yaa Achiaa", even though a Ghana passport with Plaintiff's picture proves that she uses that alias? All the discussion above goes to show that it was not quite accurate when the Court of Appeal stated that it could find no evidence to support the Trial judge's conclusions, and ruled those conclusions "perverse".

From all the evidence available, the plaintiff has suffered some wrong, but does not have receipts and other documentation to back her claims. The Plaintiff has asked for a share of properties she contributed to acquire. Her answers to the questions put to her under cross examination on 4th July 2017 strengthen this conclusion.

Q. I am suggesting to you that you are not a wife to Issaka, both of you have not acquired property jointly

A. The properties belong to me. 2nd Defendant came to meet me abroad already working and we decided to get married upon our return to Ghana and because of that relationship I did not see it necessary to request for documents in respect of monies given to 1st Defendant to build the house for ourselves

"The things we do for Love", is really the imagery that this whole sorry event evokes. Fortunately, the courts cannot, and do not, throw their hands up in despair when an issue of such difficulty arises. "Equity will not suffer a wrong to be without a remedy" so the equitable maxim goes, and so to equity we turn for assistance.

CONSTRUCTIVE TRUST

On the evidence, plaintiff had a beneficial interest in the property held in the name of the defendant. This is when constructive trust arises. The reliance on constructive trust further commends itself as it has been the subject of scholarly discussion by Ama Fowa Hammond in an erudite article titled "*What man has put together: Recognizing the rights of "Spouses" in de facto Unions*" (2008-2010) XXIV University of Ghana Law Journal 231. In this article, she discusses the status and rights of women in consensual unions who contribute to property acquired during the relationship in circumstances which had they been formally married, would have put their entitlement beyond dispute. At p.254 she expounds on the law thus of Constructive Trust thus:

> *"Collectively these definitions (of constructive trust) reinforce the fact that whenever the trustee conducts himself in a manner that it would be inequitable to allow him to deny the cestui que trust a beneficial interest in the property acquired the Trustee will be held to have so conducted himself if by him words or conduct he could be said to have induced the cestui que trust to act to him own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the property. It should be noted that constructive trust may arise irrespective of the intention of the settlor. The courts are not primarily concerned about direct financial contribution to the acquisition of property in imposing a constructive trust."*

The learned authors, Michael Haley and Lara Mc Murtry in *Equity and Trusts*, Sweet and Maxwell, London 2017, at p.372 expound on the law on Constructive Trust. At p.445 they define the concept of Constructive Trust, quoting from *Lloyds Bank PLC* v *Rosset* [1991]1 AC 107, as follows:

> *"A constructive trust arises in order to prevent one party from resiling from an understanding as to the beneficial entitlements in circumstances where it would be unconscionable to do so. This will occur primarily where the estate owner has by words or conduct induced the claimant to act to his detriment in the reasonable belief that, in so acting, he will obtain a beneficial interest in the properties*

Again, in the English case of *Westdeutsche Landesbank Girozentrale* v *Islington LBC* [1996] AC 669 Lord Browne-Wilkinson stated the law on this equitable concept at p.705 thus:

(i)Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)

(ii) Since the equitable jurisdiction to enforce trust depends upon the conscience of the holder of the legal interest being effected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust or in the case of constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to his rule is a constructive trust imposed on a person who dishonestly assists in the breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has in equity a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property …other than a purchaser for value of the legal interest without notice."

From this statement of law, the authors opine that two key ingredients must be established to show there was a common intention as to what to do with the property.

Where there is no evidence of an express discussion having occurred between the parties, the court must examine the conduct of the parties into some detail "with the prospect of presuming a common intention to share beneficial ownership."

1. The plaintiff must convince the court that there was a common intention to share the property beneficially.
2. The claimant must demonstrate that he changed his position because of the unexpressed common intention. The court may look at conduct both prior and subsequent to the acquisition of the property"

In the Ghanaian case of *Soonboon Seo* v *Gateway Worship Centre* [2009] SCGLR 278, a Korean missionary announced that he was going to Korea to raise money in Korea for the benefit of a church based at Ashaiman near Tema in the Greater Accra Region. Upon his return, he announced in church that he had raised money, but did not disclose how much. Subsequently, he bought land with some of the money. The church brought action against him for *inter alia*, declaration of title to the land. The Supreme Court held, per Akuffo JSC (as she then was) at p. 296 *"The facts clearly support the creation of a constructive trust (an implied trust*). Basing her decision *on* Taylor JSC in *Saaka v Dahali [1984-86] 2 GLR 774 at 784* who in turn had cited *Halsbury's Laws of England (3rd ed) vol 14 para 1155,* which defined constructive trust as follows:

> *"A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another. This happens, for instance, when one who is already a trustee takes advantage of his position to obtain new legal interest in the property as where a trustee of leaseholds takes a new lease in his own name. The rule applies where a person although not an express trustee, is in a fiduciary position …"*

She concluded that *"Consequently, in the instant case the defendant-appellant held the funds in question on a constructive trust for the second plaintiff church"*

The instant case is a classic situation of a constructive trust. At the time of the acquisition of the properties, there was sufficient understanding that he and the Plaintiff were preparing for a life together back home in Ghana, and so the beneficial interest in the property he holds in his name was intended to be for the benefit of both parties. As to their weight on the morality scale, neither tilts the balance. The words of Millett LJ in *Paragon Finance Plc* v *Thakerar & Co* (1999) 1 All ER 400 at p. 408 close this difficult case

> *"the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is colored from the first by the trust and confidence by mean of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.".*

As the facts of this case show, there is sufficient evidence on record that the plaintiff, on a balance of probabilities, proved her claim against the defendant. He had led her to believe they were on the verge of getting married and that led the plaintiff to turn her earnings over to the defendant to do what they needed to do to secure their future together back home in Ghana. On the whole, "*the circumstances in which the defendant obtained control [of the properties] make it unconscionable for him*" to be permitted to enjoy the fruit of their common endeavor alone, while the plaintiff loses everything she had

worked to acquire. On the part of the defendant, he could not prove his entitlement to the vehicle.

Based on the Court of Appeal's failure to uphold mandatory provisions in CI 19, as well a consideration of the evidence available on the record, there is sufficient cause to set aside the decision of the Court of Appeal. We do so accordingly, and with the exception of the Ghc 5,000 costs paid to 1st defendant, restore the judgment of the High Court.

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

THE CONCURRING OPINION WAS DELIVERED IN THE COURT BY KULENDI JSC

KULENDI, JSC:-

I have read the thorough and well reasoned opinion of my esteemed learned sister and I agree with her analysis and conclusions. However, I would like to make a brief contribution by way of a concurring opinion in relation to whether or not the issue of the legality or otherwise of prostitution and moreover under the laws of Italy could have been argued before the Court of Appeal not having been brought up in the trial court, nor settled as a ground of appeal.

This Court in its first holding in the case of **FATAL VRS WOLLEY [2013-2014] 2 SCGLR 1070**, held as follows;

"(1) *The legal question of capacity, like other legal questions, such as jurisdiction may be raised even on appeal. But it is trite learning that the principle is clearly circumscribed by law. The right to raise legal issues even at such a late stage is legally permissible* ***only*** *if the facts, if any, upon which the legal question is premised, are either undisputed; or if disputed, the requisite evidence had been led in proof or disproof of those relevant facts, leading to their resolution by the trier of facts; failing which the facts could, and based purely on the evidence on the record, and without any further evidence, decidedly be resolved by the appellate court*."

In a judgment dated the 3rd day of July 2019 in civil suit No. J4/70/2018 intituled **TAMAKLOE & PARTNERS v. GIHOC DISTILLERIES,** this Court commenting on the above dicta in Fatal vrs Woolley per Amegacher JSC said as follows:

"*From the above dictum, it is clear that while the question of legal capacity can be raised at any stage, it can only be properly raised before the Supreme Court if this Court can decidedly resolve the issue of the appellant's capacity to sue for recovery of its legal fees purely on the evidence on record. Failing that, the court is required to dismiss any allegation of lack of capacity at the last stage*."

The logical inference from above, in my opinion, is that while questions of law may be raised at any stage, even on appeal, the raising of a question of law at an appellate stage, may be permitted only in the following circumstances:

1. Leave of the Appellate Court ought to be sought to introduce the question of law for appellate consideration;
2. The facts upon which the legal question is premised must be undisputed;
3. Or if the facts are disputed, the requisite evidence to determine those facts has already been led and determined at the trial court stage and

4. Or if not determined, the determination of those facts could be made by the evidence on record without further evidence.

In any other case, a legal question being brought up at so late a stage in a case ought to be dismissed.

The grounds of appeal filed before the Court of Appeal are found on page 339 of the Record of Appeal.

As is manifestly clear from the grounds of appeal filed by the Respondent in the Court of Appeal, absent from these grounds is a ground of appeal expressly asserting that prostitution is illegal in Ghana or in Italy and therefore that the Appellant could not found her action on the purported illegality. As a matter of fact, the Respondent does not attempt to bring this issue up until at page 24 of his written submissions filed at the Court of Appeal (page 361 of the Record of Appeal). This is tantamount to arguing a ground of appeal not contained in the Notice of Appeal. The courts must not entertain such late surprises as was done in the instant case. The purpose of a notice of appeal is to give parties and the court ample notice of an appellant's contentions on appeal. Allowing Appellants to deviate from their grounds of appeal in such a wanton manner will lead the courts on unchartered paths that will defeat the raison d'etre of notices of appeal. Litigants and their counsel may often throw in any argument that in their opinion may support their case. It is the duty of an appellate court to ensure that appellants and their counsel do not deviate from their stated grounds of appeal and smuggle in novel arguments through the proverbial back door on the blind side of their opponent, especially where the opposing party does not have a right of response to such spontaneous arguments.

In his written submission, counsel for the Respondent, for the first time in the life of the case, introduced the issue of the legality or otherwise of prostitution in Italy. He opined that prostitution is illegal in Italy and referred to **Section 40 of the Evidence Act, 1975 (NRCD 323)** which says that the law of a foreign country is presumed to be the same as the law of Ghana, in support of his spontaneous assertion.

Respondent's counsel further asserted that rostitution is illegal in Ghana. In paragraph 45 of the Respondent's submissions to the Court of Appeal counsel argued as follows:

> "*Her other claims were simply founded on a cause of action for money had and received she described as a loan she gave to the 2nd Defendant being proceeds from* ***a trade which by law of the court's jurisdiction is unlawful.***"

For his authority on this subject, the Respondent quoted **Section 274(1)(a) of the Criminal and Other Offences Act 1960 (Act 29)**. For clarity, Section 274(1)(a) is reproduced as follows;

> "*(1) Any person who—*
>
> *(a) knowingly lives wholly or in part on the earnings of prostitution; shall be guilty of a misdemeanor*"

The Respondent argued therefore that the Trial Court Judge had the obligation to dismiss the entire claim on grounds of illegality and public policy.

It is trite learning that the question of the law of Italy, being the law of a foreign country, is a question of fact, which unlike a question of law, cannot be brought up at any stage of a case.

Section 1(2) of the Evidence Act, 1975 (NRCD 323) says as follows, "*The determination of the law of an organisation of states to the extent that such law is not part of the law of Ghana, or* ***of the law of a foreign state*** *or sub-division of a foreign state,* ***is a question of fact****, but it shall be determined by the court.*" See also the cases of **In Re Canfor (Decd.) Canfor v. Kpodo (1970) GLR 177** and **Davies v. Randall (1962) 1 GLR 1**.

Foreign law, is a question of fact ought to be pleaded and proven at the trial stage. The method of proving foreign law, is by offering expert witnesses. Merely presenting a lawyer with the text of a foreign law will not be sufficient. Although the question of who is an expert witness would be decided by the Court. See the cases of **Godka Group of Companies v. P.S. International [1999-2000] 1 GLR 409** and **Khoury v. Khoury [1958] 3 WALR 52.**

As a question of fact, the question of the law of Italy cannot be brought up on appeal for the first time. Much less without notice and leave of the Court.

For the above reasons, I am of the humble view that the Court of Appeal erred when it allowed the issue of the legality or otherwise of prostitution as a profession in Italy to be brought up at an appellate stage.
I therefore agree with my esteemed and respected colleagues in allowing the appeal.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE–JOHNSON (MS.)

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