IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

DORDZIE (MRS.) JSC

AMEGATCHER JSC

AMADU JSC

CIVIL APPEAL

NO. J4/24/2022

25TH MAY, 2022

ERIC KOFI AGYEI ADDO …… PETITIONER/RESPONDENT/APPELLANT

VRS

SALOME ALU ALLOTEY …… RESPONDENT/APPELLANT/RESPONDENT

JUDGMENT

AMEGATCHER JSC:-

My Lords, this Appeal, like many of its counterparts which have been argued before this Court, contends one of two famed issues that arise in all matters of divorce; that is the distribution of spousal property.

Briefly, the Petitioner/Respondent/Appellant (hereafter referred to as "the Petitioner") was prompted to marry the Respondent/Appellant/Respondent (hereafter referred to as "the Respondent") under customary law sometime in 1997, when the Respondent became pregnant with the couple's first child.

Their marriage saw the birth of two children, Awo Dede Addo and Agya Kwame Addo. Their marriage saw the construction of the parties' matrimonial home at A.R.S, Ogbojo, the purchase of some vehicles, as well as the acquisition of two houses in the United Kingdom. Their marriage equally saw the creation and rise of two businesses: Atlas Pharmacy Limited, a pharmaceutical business and Stomet Company, a disk cutting business.

On 16th October 2012, the Petitioner petitioned the High Court for a dissolution of his marriage to the Respondent. He ultimately sought the following reliefs:

a) **That the marriage between the parties be dissolved.**

b) **That the Respondent be granted custody of the children of the marriage until each of them is 18 years old, access being granted to the Appellant.**

c) **That an order be made for the sale of Plot No. 10, Nii Ababio Street, Ogbojo, ARS, East Legon, Accra and the net proceeds shared equally between the parties.**

d) **Such other reliefs as may seem fit.**

As expected, the Respondent answered to Petitioner's Petition on 12th December 2012, and Cross-Petitioned as follows:

a) **Custody of the Children of the marriage.**

b) **An Order that house No. 10, Nii Ababio Street, Ogbojo, ARS, East Legon, be settled in favour of the Respondent.**

c) **An Order that house No. 218, Abecaim Road, Streathamvale, 16 SW 5 AQ, United Kingdom be settled in favour of the Respondent.**

d) **An Order that house no. 2, Stoneleigh Park Avenue, Croydon CRO 7SL United Kingdom be settled in favour of the Respondent.**

e) **An Order that the Respondent be declared a 50% shareholder of Atlas Pharmacy Limited.**

f) **An Order that the Respondent be declared a 50% shareholder of Stomet Company Limited.**

g) **An Order that the Respondent be given 50% of the underlisted vehicles.**

   i. **2 Toyota vans with registration numbers; ER 2345 – X and ER 7856 – X.**
   ii. **3 Toyota Corollas with registration numbers; GE 8246 W for the private use of the Petitioner.**
   iii. **1 BMW Saloon car with registration number GT 6363 X for the private use of the Respondent.**
   iv. **Mercedes Benz with registration number GN 7555 – 12.**

h) **An Order of account of the proceeds of sale of the black Toyota Corolla.**

i) **An Order of the court for the preservation of the accounts of the company mentioned in paragraph 23 and all assets of the parties.**

j) **An Order that the Petitioner pays the Respondent a monthly maintenance of GHS 3,000.00.**

k) **An Order that the Petitioner pays the Respondent a lump sum of GHS 500,000.00 by way of alimony.**

l) **An Order for accounts in respect of the two companies from 16th January 2011.**

m) **An Order that the one acre of land situate at Aburi be declared joint property of the parties.**

n) **An Order that the Petitioner bears the Respondent's costs to the Petition.**

o) **Any other orders the court deems fit.**

HIGH COURT'S JUDGMENT

After a full trial, the learned High Court Judge found that the parties had not lived together since January 2011. Satisfied therefore by the evidence that the customary marriage celebrated between both parties had broken down beyond reconciliation (*as indeed proceedings were halted for the parties to attempt reconciliation, but the effort was unyielding*), she decreed the marriage to be dissolved.

Custody of the two issues of the marriage was granted to the Respondent without any contest from the Petitioner. However, the Court made no provision for the care and maintenance of the issues of the marriage. According to the learned trial judge, maintenance was not in contention.

With respect to the parties' matrimonial home at Ogbojo, despite Petitioner's claim that it was acquired with his own personally earned resources and Respondent's dispute that it was rather acquired with proceeds generated from Atlas Pharmacy Limited the learned trial judge found that the property had the joint names of both parties and as such belonged to them. Consequently, she ordered that the matrimonial home be valued, and half the valued amount be paid to the Respondent.

Respondent's claim to a 50% share ownership of Atlas Pharmacy Ltd. and Stomet Company Ltd., was rejected by the learned trial judge on the basis that these claims were ill-suited against the Petitioner, since both companies from which she was claiming such ownership were legal persons against whom claims could be made. In the same vein, the learned trial judge toppled Respondent's claim to the two housed properties in the United Kingdom, which Respondent asserted were purchased with proceeds from Atlas Ltd.

The learned trial Judge equally denied Respondent's claim to half ownership of the vehicles listed in g(i)(ii) of Respondent's Cross-Petition on the grounds that they were vehicles belonging to Atlas Pharmacy Ltd. The same fate befell Respondent's claim to the Mercedes Benz listed in relief g(v) of her Cross Petition, which according to the learned trial Judge would be the property of Atlas Pharmacy Limited on Respondent's account.

Concerning Respondent's claim to half ownership of the land at Aburi, though the Respondent produced the results of a search conducted at the Land Commission disclosing that the property was that of the Petitioner, the learned trial judge decided that the Respondent had failed to discharge her burden, preferred Petitioner's testimony that the land belonged to his brother who resided in the United States of America (USA).

Finally, based on the Respondent's affidavit of means and his ability to take out a loan to satisfy the award, Respondent's prayer for financial provision for GHS 500,000 was slashed to less than a quarter, i.e. GHS 120,000.

Apart from these, every other relief of the Respondent was denied. Aggrieved with the decision of the High Court, the Respondent appealed against it by an amended notice of appeal to the Court of Appeal.

COURT OF APPEAL'S DECISION

In a judgment dated 5th March 2020, the Court of Appeal rejected the learned trial judge's order for the valuation of the matrimonial home to pay half the valued amount to the Respondent. According to the Court, having regard to the equities of the case as established by long-standing decisions of the Supreme Court, the just and equitable thing to do was to settle the matrimonial home fully on the Respondent to whom custody of the issues of the marriage had been awarded. The Court of Appeal further resorted to its power under Rule 32 of CI 19 and accordingly ordered the care and maintenance of the children.

Regarding the Aburi property, the Court of Appeal rejected the learned trial judge's preference for oral testimony over the documentary evidence on record and as such presumed it to be marital property. It then settled it in favour of the Petitioner considering it the equitable thing to do since the matrimonial property had been settled in the Respondent's favour.

The two United Kingdom properties did not escape the scrutiny of the Court of Appeal. The Court noted that the properties stood in the Respondent's name and as such constituted marital property, without more. After reviewing the evidence it settled the Streathamvale one in favour of the Respondent and the Croydon one on the Petitioner.

It, therefore, reversed the trial judge's decision that they belonged to Atlas Pharmacy Limited.

The Court of Appeal noted the learned trial Judge's failure to distinguish the legal import of Respondent's claim to a 50% share ownership in the companies from that of the Court transferring to her shares by operation of law. According to the Court of Appeal, the latter could not be carried out without the involvement of the two companies whose Regulations restricted any such transfers. Further, the Court of Appeal believed that no evidence arose to lead it to the proposition that the Respondent evinced an intention to obtain shares in the two companies. Her reliefs in this regard were therefore denied.

The court employed the company law principle of separate legal personality to deny Respondent's claim to a 50% ownership of the vehicles. Conclusively, it increased Respondent's lump-sum financial settlement to GHS 300,00.00.

PRELIMINARY OBJECTION

In this Court, the Respondent has raised a preliminary objection to the determination of the Appeal. Counsel for the Respondent submits that the amended notice of appeal which forms the foundation of this appeal breaches the Supreme Court Rules (C.I. 16)., particularly Rule 6 sub-rule 6 and 7. According to Counsel for the Respondent, the application to amend by which leave was granted to the Petitioner to amend the notice of appeal ought to have been brought before the Supreme Court and not the Court of Appeal as required by C.I. 16.

Rule 6(6) & (7) of the Supreme Court Rules, 1996 (C.I. 16) provides as follows:

(6) The appellant shall not, without the leave of the Court, argue or be heard in support of any ground of appeal that is not mentioned in the notice of appeal.

(7) Notwithstanding sub rules (1) to (6) of this rule the Court-

(a) may grant an appellant leave to amend the ground of appeal upon such terms as the Court may think fit; and

(b) shall not, in deciding the appeal, 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.

The Record of Appeal does not contain any notes on the proceedings before the Court of Appeal regarding the application to amend. We have combed through the rules and observed that while Rule 8(7) of the Court of Appeal Rules, 1997 (C.I. 19) vests the Court of Appeal power to amend grounds of appeal brought to it from the High Court and the Circuit Court, there is no provision of the rules which gave the Court of Appeal the jurisdiction to amend grounds of appeal filed and pending in the Supreme Court.

The preliminary objection raised by the Respondent to this Court entertaining the amended grounds of appeal filed without the leave of this Court is unassailable. The Petitioner has been unable to provide any response to the objection to date. Accordingly, the amended notice of appeal filed on 25th November 2020 pursuant to leave granted by the Court of Appeal on 23rd November 2020 is hereby struck out.

We do not agree, however, with the Respondent that the striking out of the amended notice of appeal will leave the Petitioner without an appeal pending in this Court. The original appeal filed on 2nd June 2020 is still valid. We shall, therefore, proceed to determine this appeal based on the grounds stated in that notice.

THE GROUNDS OF APPEAL BEFORE THE SUPREME COURT

Aggrieved by the decision of the Court of Appeal, the Petitioner has appealed to this Court on the following grounds

a) **The judgment is against the weight of the evidence.**

b) **The Court of Appeal misdirected itself in its acceptance of Appellant Counsel's interpretation and application of Article 22(1)(2) and (3)(c) of the Matrimonial Causes Act 1971, Act 367 by inter alia settling the matrimonial home (i.e., House No. 10. Nii Ababio Street, Ogbojo (ARS) East Legon) Respondent/Appellant/Respondent.**

PARTICULARS OF MISDIRECTION

i. **Failing to distribute the matrimonial home (i.e., House No. 10. Nii Ababio Street, Ogbojo (ARS) East Legon fairly and equitably and in accordance with Article 22(3) of the 1992 Ghana Constitution.**
ii. **Exaggerating the medical 'condition' of Agya Kwame Addo which is not supported by the evidence on record.**

c) **The Court of Appeal erred in law in awarding that the Respondent/Appellant/Respondent be paid a lump sum of GHS 300,000.00.**

PARTICULARS OF ERROR OF LAW

i. **Failing to take account of the income/standard of living of the parties and their circumstances as mandated by the Matrimonial Causes Act 1971, Act 367, the High Court Civil Procedure Rules C.I. 47 and the Children's 1988, Act 560.**
ii. **Taking undue account of the Petitioner/Respondent/Appellant's paternal inheritance in arriving at the sum awarded.**

d) The Court of Appeal misdirected itself in setting aside the order by refusing the Respondent/Appellant/Respondent an interest in the Streathamvale House.

PARTICULARS OF MISDIRECTION

i. Failing to rely on the evidence on record which put beyond doubt the fact that the London properties were purchased solely from the funds of Atlas Pharmacy Limited.

e) Further grounds of appeal will be filed upon receipt of the full record of appeal.

The Petitioner did not file any other grounds of appeal. After reviewing the grounds, it is our opinion that the appeal could be disposed of by considering the following grounds:

a. Whether or not the Judgment is against the weight of evidence?
b. Whether or not the Court of Appeal misdirected itself in its acceptance of Petitioner Counsel's interpretation and application of Article 22(1)(2) of the Constitution and Section (3)(c) of the Matrimonial Causes Act 1971, Act 367 by settling the matrimonial home on the Respondent?
c. Whether or not the Court of Appeal erred in law in awarding that the Respondent/Appellant/Respondent be paid a lump sum of GHS 300,000.00?
d. The Court of Appeal misdirected itself in setting aside the order by refusing the Respondent/Appellant/Respondent an interest in the Streathamvale House

THE JUDGMENT AGAINST THE WEIGHT OF EVIDENCE

In ascertaining the weight of evidence given at trial, a trial court is enjoined, by law, to consider whether the evidence is admissible, relevant, credible, conclusive, or more probable than that given by the other party. Thus, where an aggrieved party cries out to an appellate court that the judgment against which he appeals, is against the weight of the evidence, he implies that there were certain pieces of evidence on the record which, if applied could have changed the decision in his favour, or that there are certain pieces of evidence that had been wrongly applied against him.

This Court's jurisprudence on the omnibus ground and the legal principles governing its duty as an appellate court when such a ground is raised is commonplace. It is that where in an appeal, a judgment is said to be against the weight of the evidence, it is imperative on the appellate court to study the entire record of appeal, consider the entire testimonies and all documentary evidence adduced at the trial before arriving at its decision. See cases of **Akufo Addo v Catheline [1992] 1 GLR 377, Achoro v Akanfela [1996-97] SCGLR 209, Tuakwa v Bosom [2001-2002] SCGLR 61, Ackah v Pergah Transport Ltd. [2010] SCGLR 891, Aryeh & Akapo v Ayaa Iddrissu [2010] SCGLR 891,Oppong Kofi& Ors v Attibrukusu III [2011] 1 SCGLR 176** etc.

It is instructive to note that this omnibus ground does not only bestow a duty on an appellate court. A duty is simultaneously placed on the appellant canvassing such a ground to demonstrate to the appellate Court the lapses clearly, and properly in the judgment being appealed against. Such appellant has a duty to demonstrate that the trial judge failed to consider adequately the evidence placed before it; further, the appellant must properly demonstrate the lapses he complains of, which lapses if corrected would cause the scale of justice to tilt favourably towards him. See cases of **Abbey & Ors v Antwi [2010] SCGLR 17** and **Djin v Musah Baako [2007-2008] SCGLR 686.**

In **Atuguba & Associates v Scipion Capital (UK) & Anor [2019-2020] SCLRG 55** this Court had the occasion to admonish at page 61 that **"though the rules allow the omnibus ground to be formulated as part of the grounds of appeal, it will greatly expedite justice delivery if legal practitioners formulated as part of the grounds of appeal specific grounds identifying where the trial judge erred in the exercise of discretion"**. The Petitioner in this appeal has done exactly that. To determine this ground then would respectfully require a consideration of the other listed particulars to an extent, some of which may be discussed and determined under this umbrella ground.

To begin with, the starting point to the ascertainment of what property can be considered during property settlement in the dissolution of marriage is the 1992 Constitution, where Article 22(1) provides that a spouse shall not be deprived of reasonable provision out of the estate of a spouse whether the spouse died having made a will. Article 22(3) provides further that spouses shall have equal access to property jointly acquired during the marriage and those assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon divorce.

This Court in a plethora of cases has laid down the governing principles in the determination of property jointly acquired during marriage as envisaged by the 1992 Constitution. These decisions have been chronicled in **Mensah v Mensah [1998-99] SCGLR 350**, **Boafo v Boafo [2005-2006] SCGLR 705**, **Mensah v Mensah [2012] 1 SCGLR 391**, **Quartson v Quartson [2012] SCGLR 1077,Arthur v Arthur (No. 1) [2013-2014] SCGLR 543** and **Fynn v Fynn [2013-2014] 1 SCGLR 727**

There is therefore no ambiguity as regards the law on the matter. In this appeal, counsel for the Petitioner submits that the conclusions arrived at by the Court of Appeal are not supported by the evidence on record because the Court allowed itself to be unduly

influenced by the Petitioner's paternal inheritance in arriving at its decision. He quotes the Court of Appeal as follows:

"***Second**, there were other properties acquired in the sole name of the Respondent during the subsistence of the marriage as well as properties that Respondent testified as having come to him through his father's Will*".

Counsel then concludes that because of the above excerpt, the Court of Appeal erred because it settled Petitioner's paternal inheritance as the matrimonial home on the Respondent and also refused the Petitioner an interest in the Streathamvale house in the United Kingdom. Counsel for the Respondent in response labels as counterintuitive and false, Petitioner's contention that a disposition under his father's Will influenced the Court of Appeal to settle the matrimonial home on the Respondent.

At the High Court, the learned trial judge in determining the fate of the matrimonial home ordered it to be valued not for sale but for half the valued amount to be paid to the Respondent. In essence, the matrimonial home had been impliedly settled on the Appellant. Whether in correcting this order the Court of Appeal was right in also settling the same property absolutely on the Respondent would be analysed shortly below.

ABURI LANDED PROPERTY

In the case of the Aburi property, the Court of Appeal settled it on the Petitioner. The Petitioner's testimony regarding the Aburi property was that he was not the owner. Rather, he bought the land for his brother who lives in the United States of America. Under cross-examination, the following evidence was elicited at page 153 of the ROA:

Q: it is your evidence that you do not have any land at Aburi. Do you still stand by that piece of evidence?

A: Yes I purchased the land for my brother.

Q: Can you mention the name of your brother?

A: He is Frank Anim Addo who is a card's [SIC] in the United States.

Q: The documents on the said land will bear the name of Frank Anim Addo.

A: The documents are in my name even though he sent the money and I bought it for him, which will be transferred to him whenever he comes home. My siblings are aware that the property belongs to Frank Anim Addo.

While asserting under oath that the property belonged to his brother, the Petitioner provided no evidence to confirm that fact. No testimony was elicited from the brother to even corroborate Petitioner's assertion when video testimony was a possibility. None of Petitioner's siblings whom he asserted to be in the know about the real owner of the Aburi property was presented to offer corroborating testimony. All that the Petitioner relied on was his testimony. Consequently, the evidence was insufficient to establish that truly the property was for his brother. In **Ackah V. Pergah Transport Limited & Ors, [2010] SCGLR 728** this Court stated at page 736 that:

> "... **It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence**..."

Quite apart from this, it is important to denounce harshly the practice of preferring contradictory oral testimony in the face of conclusive documentary evidence on any object in contention. This protects the sanctity of the evidentiary rules. In **Ofori**

Agyekum vs. Madam Akua Bio (Dec'd) (Civil Appeal No. J4/59/2014) (unreported) this Court highlighted the potency of conclusive presumptions when a witness attempted to resile from the content of a document he had signed. Section 25(1) of the **Evidence Act, 1975 (NRCD 323)** provides that:

Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest.

On the strength of the **Agyekum's case (supra)** and Section 25 of the Evidence Act, the Search report from the Lands Commission which alluded to the existence of a Deed of Conveyance dated 2nd December 2011 and bearing the Petitioner's name as a party raised the conclusive presumption that the property was that of the Petitioner. Since it was acquired during the pendency of the marriage, it was accurately presumed to be marital property. The Petitioner at the trial court focused all his effort on putting across his assertion that the property was that of his brother and that he did not allow himself the opportunity to lead any evidence in rebuttal i.e., that the property even if his was his personally acquired property and not one intended to be a marital property.

In our opinion, the settlement of the Aburi property as a marital property on the Petitioner was in accord with the evidence on record and ought not to be disturbed.

THE SETTLEMENT OF THE MATRIMONIAL HOME ON THE RESPONDENT

The evidence led in respect of the Ogbojo house commences from Petitioner's Petition, where he stated, at page 5 of the ROA that even though the Respondent did not contribute financially towards the construction of the matrimonial home, he ensured that the title deed in respect of the property bore the names of the parties as joint owners. Consequently, there was no dispute whatsoever regarding the issue of whether

the matrimonial home was marital property as having been acquired during the subsistence of their marriage. The Court of Appeal reviewed the evidence presented on this fact and placed the matrimonial home squarely within the basket of marital property which had to be distributed in accordance with Article 22(3)(b) of the 1992 Constitution.

As a marital property for that reason, the guideline for distribution is the just and equitable principle fashioned in several decisions of this Court already referred to above unless the equities of the case would render its application unfair.

It appears that the Petitioner's dissatisfaction is with the Court of Appeal's exercise of discretion to settle the matrimonial home on the Respondent and not so much of any interpretation and application of Article 22(1)(2) and 3(c) of the 1992 Constitution. The Petitioner is aggrieved by being denied a share of the matrimonial home by the Court of Appeal. The Petitioner would instead prefer that half the valued amount of the property be settled on the Respondent. To support his contention, he refers to the oft-quoted principle postulated by this Court in **Fynn v Fynn** (**supra)**, where this Court stated that spouses may acquire property as is their guaranteed fundamental right.

Counsel for the Petitioner submits that the fact that the Petitioner inherited property and assets through his father's Will should not deprive him of his equal access to the matrimonial home acquired during the marriage. He believes that this fact was the major influence in the exercise of the court's discretion.

The basis for the final decision of the Court of Appeal settling the Ogbojo property on the Respondent is summarized in the following dictum in the judgment at page 351 of the ROA:

> *"I will start with the Ogbojo house. There was no quibble between the parties that the Ogbojo house stood in the joint names of the parties and was the matrimonial home.*

Further, it was acquired during the subsistence of the marriage... This placed the Ogbojo house squarely within the basket of marital property that the court had to distribute in accordance with Article 22(3)(b) of the 1992 Constitution and Section 20 of the MCA cited supra.

…The Trial judge's reasoning seemed to be that if the house was bought with proceeds from Atlas Pharmacy Ltd. then it is owned by the Company, and this seemed to have guided her decision to leave the property in the hands of the Respondent and order him to pay the value of half of the property to the Appellant. However, the only uncontroverted evidence presented to the court by the parties was that the house stood in the joint names of the parties and was acquired during the subsistence of the marriage. ***Thus, in considering how to distribute the Ogbojo property as marital property, the relevant factors that the court should have taken note of was whether it was more just and equitable to give it to Appellant than to leave it in the hands of Respondent and order him to pay her off with his access to cash.***

My view is that the circumstances show that it would have been just and equitable to settle it fully on the Appellant*. First, she was given custody of the children, one of whom was supposed to have a medical condition. Now, whenever orders are made which would affect a child, the legal direction is that a court ought to consider the 'best interest of the child'.*

There can be no ambiguity in the interpretation of Article 22. The provisions are clear and provide as follows:

22 (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 realization 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.*

As highlighted, Clause (b) opens with "***assets"***; obviously indicating that the Constitution anticipates occasions where the spouses may jointly acquire two or more properties. The Article further provides that these assets shall be distributed equitably between the spouses. As stated by Date-Bah JSC in **Boafo V Boafo (supra) pages 711 and 714**:

> ***"Equal sharing was what would amount to a 'just and equitable' sharing…... The question of what is 'equitable', in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact dependent purely on the particular circumstances of each particular case*****. The proportions are, therefore, fixed in accordance with the equities of any given case"**

The evidence adduced revealed that apart from the properties acquired in the name of the companies, the immovable properties jointly acquired during the marriage were the Aburi land and the Ogbojo matrimonial house in Ghana and the United Kingdom, the Croydon and the Streathamvale houses.

In determining the just and fairness principle the dilemma any court would face is the proportion to settle on one or the other spouse. The value of the properties in many cases may not be the same but the court must decide one way or the other. That is not to say that the court must be mathematically exact in settling marital properties on the spouses. This is where the court must examine the facts and circumstances of each particular case. Factors such as the parties' income, earning capacity, the age of each party and the duration of marriage are relevant. Other factors include the lifestyle of the spouses during the marriage, the skill, professional qualifications and the business

experiences of the parties to the marriage, the contribution of the spouses toward the acquisition of the properties, the power imbalances and which party has made more sacrifices to enable the marriage to achieve the standard or level of success it has attained and which of the spouses is more likely to be financially independent or acquire more wealth and assets after the marriage.

The Court of Appeal exercised discretion to settle the matrimonial home at Ogbojo on the Respondent and the land at Aburi on the Petitioner. Was this discretion exercised justly and fairly? It is recognised by this Court in the case of **The Church of Apostles Revelation Society & Ors vrs. Tehn-Addy & Ors [2006] 2 MLRG 226**that the exercise of discretion should not be interfered with unless the exercise is seen to be perverse. In so far as interfering with the exercise of judicial discretion by an appellate court is concerned, the legal position is that the appellate court interferes only in exceptional circumstances. Thus, the Supreme Court in the case of **Crentsil v Crentsil [1962] 2 GLR 171 @ 175** emphasized the point in the following words:

> "**As to appeals from the exercise of the courts discretion, it is a rule of law deeply rooted and well established that the Court of Appeal will not interfere with the exercise of the court's discretion save in exceptional circumstances.**"

Again, in **Ballmoos v. Mensah [1984-86] 1 GLR 724 at 730** the Court in endorsing the holding of the House of Lords in Blunt v Blunt [1943] AC 517 maintained the position of the law that

"**An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account …"**

In this appeal, we do not find the discretion exercised by the Court of Appeal regarding the partitioning of the immovable properties in Ghana just and fair compared to the how the discretion was exercised regarding the United Kingdom properties. Since the evidence establishes a one-acre plot of land at Aburi and one fully built matrimonial home at Ogbojo in Accra, the just and fairness rule requires that the same yardstick be applied to the distribution of the United Kingdom properties should be applied as well to the Ghana properties. Accordingly, we confirm the settlement of the Aburi land on the Respondent but vary the equities in the Ogbojo matrimonial house by settling 30% of the house on the Petitioner in addition to the Aburi property and 70% on the Respondent. We order the Respondent to buy out the Petitioner's 30% interest in the Ogbojo matrimonial property.

PROPERTIES ACQUIRED IN THE NAME OF COMPANIES

The other properties, though acquired during the subsistence of the marriage were acquired in the names of the two limited liability companies i.e. Stomet Company Limited and Atlas Pharmacy Limited. The Respondent had cross-petitioned for 50% shares in the two companies. This request was declined by the trial High Court and on appeal did not find favour with the Court of Appeal. This is what the Court of Appeal said at pages 366-367 of the ROA:

"So while the shares in a company are the property of the shareholder, the assets of the company are the property of the company, and not its shareholders. In this regard, no one can lay claim to assets of a company unless they do so on the basis of a transaction with the company itself. A claim against a shareholder cannot translate into laying claims to the accounts of the company and cars of the company as done in Appellant's various reliefs. In order to lay a claim to any assets of a company, including its income, the proper person to sue is the company. It is only the company

that can determine to whom its assets should be released, or defend its assets from being transferred to another person. This is a fundamental position that cannot be compromised unless evidence exists to show that it is appropriate to lift the veil off the company to deal with the Respondent in whatever capacity he functioned in the company. I find no such situation in this case…….. We also have a situation where one spouse is asserting that her contributions to a company whose shares are owned by the other spouse should entitle her to half of those shares. That is a hurdle that I hold the appellant is unable to jump over as a matter of public policy given the nature of control that companies have over the transfer of shares and the circumstances of this divorce. So to the extent that the claims for cars and money from the accounts of Atlas Pharmacy Ltd were made against the Respondent and on the premise of matrimonial settlement, the Appellant's claims are unsustainable."

The Respondent did not appeal against this part of the decision by the Court of Appeal so it is binding on her. The legal position expressed by the Court of Appeal is not different from that taken by this Court in previous marital cases involving claims for settlement of shares in and assets of limited liability companies acquired during marriage but registered in the name of such companies.

While this position of the Court would appear to be ammunition in the hands of smart spouses to deny the other spouse interest in such properties acquired in the name of limited liability companies, one cannot entirely blame the courts. The court's hands are tied up by the provisions of the law regulating company shares and assets. It is up to Parliament to gather the courage, comply with the constitutional edict, intervene and cure this mischief by passing the law regulating property rights of spouses. Until then, these reliefs endorsed in petitions and cross-petition by feuding spouses for right to shares and assets held or acquired in the names of such companies will continue to elude them. Perhaps a later day family law giant will arise to tweak the English

Supreme Court decision in **Prest v Petrodel [2013] UKSC 34** into the Ghanaian marital property settlement context and put to rest a right which has dribbled the courts in this country for decades. For now, as we have said earlier, our hands are tied up.

However, legal ingenuity on the part of counsel representing feuding spouses in the contest for such marital property could save the situation in the interim. Consideration could be had to Order 4 rules 1-4 of the High Court Civil Procedure Rules, 2003, C.I. 47 on joinder of parties and causes of action. Under this rule, the limited liability companies could be made parties to the divorce proceedings and reliefs made against it in the same way as an adulterer may be made co-respondent or an intervener under Order 65 Rule 7.

PAYMENT OF THE LUMP SUM OF GHS 300,000.00

The Petitioner submits that the Court of Appeal took into consideration irrelevant matters in arriving at the lump sum settlement of GHS 300,000.00 in the Respondent's favour. Unsurprisingly, it is the Petitioner's case that the Court of Appeal was heavily influenced by the fact of the Petitioner's paternal inheritance. Further, he submits that the Court failed to consider the circumstances of the Petitioner i.e., taking care of the medical bills of and school needs of the children, in making the award. Respondent combats this assertion and submits that it is false. According to the Respondent, the Court of Appeal considered a whole lot of factors in arriving at its conclusion.

It is important to examine the factors considered by the Court of Appeal to ascertain whether collectively they warrant an increase in the lump sum settlement awarded in the Respondent's favour.

Any determination on this issue would commence with Section 20(1) of the Matrimonial Causes Act, 1971 (Act 360). It provides as follows:

Section 20—Property Settlement.

(1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks ***just and equitable.***

(2) Payments and conveyances under this section may be ordered to be made in gross or by instalments.

The above section gives the court discretion, in settling property rights upon divorce, to award financial or property relief or both. First, the court is authorised to make a "financial provision" for either party to a divorce suit and this end, the court can order the conveyance of property, movable or immovable, as part of the financial provision. Second, the provision authorises the payment of money or the conveyance of property, movable or immovable to either party to the divorce suit as settlement of property rights. These awards are to be made as the court thinks just an dequitable. This Court, therefore, is enjoined to consider parties' income, earning capacity, other financial resources each party has or is likely to have in future, the parties' standard of living and their life circumstances in determining what would be just and equitable. The realities of such an award cannot be lost on the court as it can direct the beneficiary to invest it and use the income to continue life. The beneficiary may then be able to meet any liabilities as expenses already reasonably incurred in maintaining herself or any child of the marriage.

Just a little over forty years ago, Ormrod, L.J in the English case of **S v. S (1977) 1 AER, 56** enumerated the factors to be borne in mind in arriving at the quantum of the lump-sum award in the following dictum:

> **"I think it is of importance, with these short marriages, particularly where the people concerned are not young, to look very closely to see what the effect of the marriage has been, mainly on the wife, but of course also on the husband.**

There is no doubt that the fact of this marriage has been unfortunate as far as this wife was concerned. Had she not married, she would presumably still have been in her own house; she would probably still have been doing her full-time job; she would undoubtedly have earned a larger pension than she will now get, although she would not of course have enjoyed the very much higher standard of living that her husband could offer her in his house. But the result is that she has lost, as a result of the marriage, her house in circumstances which I think quite reasonable; she must be worse off pension-wise than she would have been.

While there is no question of putting her back into the position in which she was before the marriage, or performing any hypothetical task of that kind, these are all factors which are to be borne in mind in making an order which is just in all the circumstances of the case, which is the primary requirement of the 1973 Act. As a result of the breakdown of the marriage, she has lost substantial prospects of, at any rate, a comfortable old age which she would have had, had the marriage subsisted. That is not a question of whose fault it is; it is a fact that she has lost that.

So, the court has to do the best it can to do broad justice between these two parties, bearing all of the relevant circumstances in mind and trying not to take account of a lot of irrelevant matters which irritated the parties during the process of the hearings, the trial and so on, and to try and look at the whole thing in a detached kind of way."

Guided by this persuasive English authority, the award of the lump sum cannot amount to an error in law when the statutory provisions of Section 20 are clear and pristine on the court's authority to award financial settlement. How much money is awarded is within the court's discretion and it is the exercise of that discretion that can

be impeached. At page 367 of the Record of Appeal, the Court of Appeal stated as follows:

> **"From what the evidence revealed, the Appellant contributed significantly to establish Atlas Pharmacy Ltd. and the pharmaceutical distribution business conducted through the businesses standing in Respondent's name. Although Respondent made much of an effort to belittle her contribution to the businesses, we see that her effort in making sure that he was physically well looked after at home and the children were looked after, constituted taking of the best of her life during the fifteen years of marriage. Further, her overseeing presence in the business amounts to providing a service."**

How fair and equitable is the decision of the Court of Appeal on the lump sum payment? The evidence concerning the Respondent's housekeeping skills is uncontested. The Petitioner wholly admits this during his cross-examination at page 147 of the Record of Appeal

> **Q: You would agree with me that for the sixteen years that you have been married to the Respondent, you have had moments to sing her praise.**
>
> **A: Yes my lord.**
>
> **Q: These moments include her contributions to the business of Atlas.**
>
> **A: No, my lord. I have not praised her on her role at Atlas but on her housekeeping and her culinary skills.**

It is indisputable there, the importance that Respondent's efforts in this regard have played in the Petitioner's life.

Concerning the Respondent's earning capacity, Petitioner admitted that Respondent was on an allowance and not a salary. On the contrary, Respondent was bombarded

with questions by Petitioner's counsel to establish that as of 9th December 2010, Respondent was an employee of Atlas Pharmacy Ltd. Despite all these, no pay slips, or any evidence of salary payment to the Respondent was presented to corroborate the assertion except a preprinted contribution report from SSNIT, which Respondent explained was used mainly for regulatory compliance purposes. Again, from the evidence, Respondent has been kicked out of Atlas Pharmacy Ltd. where on Petitioner's testimony she earned an allowance. Impliedly, she is no longer a beneficiary of this allowance as she no longer works at the company nor is it discernable that she will ever work there in the future. The Petitioner tried to establish that the Respondent was gainfully employed with a company named Beaufort but the evidence in that regard came up short.

On the other hand, the Petitioner by his testimony is a director of several companies aside from the significant role he plays at Atlas Pharmacy Ltd. All things considered; the Respondent should be compensated for the role she played during the fifteen years of marriage. This Court has stated in **Obeng V Obeng [2013]63 G.M.J 158** as follows:

> **"Ordinarily a court should only order a lump sum payment when the husband has capital assets out of which to pay without crippling his earning power. When he has available assets sufficient for the purpose the court should not hesitate to order him to pay a lump sum. The payment should be outright and not subject to conditions except where there are children, when it may be desirable to make it the subject of a settlement. (See Wachtel v Wachtel (1973) 1 AER, 829 at 830)"**

From the foregoing, it is our considered opinion that the lump sum settlement of Ghs300,000.00 awarded by the Court of Appeal is justified and ought not to be disturbed. We, accordingly dismiss this ground of appeal.

PARTITION OF INTEREST IN THE STREATHAMVALE & CROYDON HOUSES

First and foremost, there is no dispute regarding the issue of whether any of the UK properties were acquired during the subsistence of the parties' marriage. The issue of whether they were acquired with funds from Atlas Pharmacy Ltd. or money from the Petitioner's father, respectfully is irrelevant to the determination of their ownership because the properties still stood in the name of the Respondent and not Atlas Pharmacy Ltd. or Petitioner's late father.

Presumably, therefore, they constituted marital properties and became subject to the principle of equitable distribution as envisaged under Article 22 of the 1992 constitution unless, of course, Petitioner presented clear evidence to the contrary why the Streathamvale house could not be settled on the Respondent as ordered by the Court of Appeal.

The Petitioner here argues that the presumption of Joint ownership was rebutted in this case. In our opinion, the Petitioner woefully failed to adduce any evidence to dispel the presumption. All he did was deny that the properties were jointly acquired by the parties when evidence of his sole and personal acquisition was crucial. The Petitioner in his Evidence in Chief stated as follows:

> **"House No. 218Abercain Road, Streathamvale vole [SIC] UK we cannot be settled on the Respondent as stated in paragraph 41(c) of her cross petition. It is a mortgaged property and I have used it as collateral to take money from my family…**
>
> **No. 2 Stoneleigh Park Avenue; Croydon UK mentioned in paragraph 41(d) of the cross-petition is also on mortgage."**

The Petitioner offered so little material information regarding these two properties. His main opposition to their shared distribution was that they were mortgaged properties;

and that they were acquired with funds loaned from his late father, hence they were his own personally acquired property. Under cross-examination, the following information was elicited and here the Petitioner was found contradicting himself at page 164 of the Record of Appeal.

Q: It was your evidence before this court that the property you have in England were acquired by mortgage.

A: Yes, my lord.

Q: I am putting it to you that the two houses were not acquired by mortgage facility.

A: It is not true. They were acquired by mortgage.

Q: You have been able to remortgage them because there is no mortgage on them i.e., the mortgage has been paid off.

A: I have not said so. I do not own the title to be able to remortgage.

Q: ***You told the court that you have used it as collateral to take money from friends.***

A: ***I have not said so. I have not said I have taken money from a friend.***

It is instructive to note that no documentation was provided by the Petitioner to corroborate his testimony that the properties were mortgaged properties. All that the Court had on record to support his assertion was his oral testimony and nothing else.

This Court has stated in the case of **Dzaisu v Ghana Breweries Ltd. [2007-2008] SCGLR 539** at holding (1) that

> **"It is trite law that a bare assertion by a party of his pleadings in the witness box without proof did not shift the evidential burden onto the other party."**

Section 14 of **NRCD 323** provides as follows:

> **Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.**

Consequently, as the burden was not discharged by the Petitioner, the need did not even arise for the Respondent to lead any evidence of her contribution to the acquisition of the properties, though, in her case she had sufficient evidence on record to support her non-pecuniary contribution.

CONCLUSION

The decision one makes who to marry, like most ventures undertaken by human beings is a calculated risk. It may or may not prove successful. Where the marriage enterprise is successful the parties usually take the credit and enjoy all the perks that go with successful matrimony. Failure, however, can be devastating and the consequences dire. Parties to an unsuccessful marriage may live in denial and continue for the sake of appearances as if everything is alright. Others may not be so charitable and worsen an already volatile situation by downplaying their role in the marriage breakup and proceed to paint their spouses as the worst thing that ever happened to them.

Feuding spouses then selfishly claim to have been the sole financier of the properties acquired during the subsistence of the marriage and proceed to petition for the award of all marital property to the exclusion of their estranged partners. This winner takes all attitude in prosecuting divorce proceedings has inundated the courts with several petitions and appeals for the determination of what is just and equitable for the parties after the divorce.

It is about time brave and level headed spouses negotiated and resolved marital property disputes peacefully without the intervention of third parties. We recommend

such peaceful negotiations and settlement approach for marital disputes to all who intend to tie the nuptial knot unbeknownst to what the future holds.

In the result, apart from the variation of the equity settled by the Court of Appeal in the Ogbojo matrimonial home by awarding 30% interest to the Petitioner, the appeal fails and is accordingly dismissed.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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