IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: BAFFOE-BONNIE JSC (PRESIDING)
DORDZIE (MRS.) JSC
AMEGATCHER JSC
LOVELACE-JOHNSON (MS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/73/2021

4TH MAY, 2022

KOFI AMOFA KUSI ..... PETITONER/APPELLANT/APPELLANT

VRS

AFIA AMANKWAH ADARKWAH ..... RESPONDENT/RESPONDENT/ RESPONDENT

JUDGMENT

KULENDI JSC:-

INTRODUCTION

This is an appeal against the judgment of the Court of Appeal dated 29th April, 2021 by which judgment the learned Justices of the Court of Appeal affirmed in part, the

judgment of the High Court dated 8th July, 2020. The Petitioner/Appellant/Appellant (the Appellant), dissatisfied with the judgment of the Court of Appeal, invokes the appellate jurisdiction of this Court pursuant to a Notice of Appeal filed on 24th May, 2021.

BACKGROUND:

The parties who on 16th January, 2002 married under the ordinance, commenced divorce proceedings at the High Court, Kumasi to untie the marital knot and go their separate ways. Therefore, by a petition filed on 9th November, 2015, the Appellant prayed for the dissolution of the marriage on account of alleged unreasonable behaviour of the Respondent/Respondent/Respondent (the Respondent). The Appellant's contention of unreasonable behaviour was premised on allegations of Respondent's disrespect and neglect of the children of the marriage, among others.

The Respondent entered an appearance to the petition and thereafter filed her answer on 3rd December, 2015. The Respondent denied that the marriage had broken down beyond reconciliation. She alleged that "judging by the love and undying emotion that she has for the Petitioner and has consistently shown during the duration of the marriage it stretches credulity to say that this happy union has broken down beyond reconciliation." The Respondent further claimed that even after the Appellant left the matrimonial home, the parties have engaged in consensual love-making whenever the Appellant visited the matrimonial home. Consequently, the Respondent prayed that the "petition be dismissed as wholly unmeritorious and irreparably misconceived".

Following this answer to the petition, and the apparent reconciliatory posture of the Respondent, the parties sought and obtained a series of adjournments to enable them attempt an amicable resolution of their differences. As a result, it was not until 20th January, 2017 that the Court commenced trial due to a breakdown in the efforts at a settlement.

In the course of the trial, the Respondent changed her lawyer, sought and obtained leave and amended her answer to the petition and cross-petitioned on 13th June, 2018 for the following reliefs:

"1. An order of the Honourable Court dissolving the marriage celebrated between her and the Petitioner.

2. That the Petitioner provides the Respondent with a lump sum of THREE HUNDRED THOUSAND GHANA CEDIS (GH₵300,000.00) as alimony.

3.An order granting the Respondent half (½) of their joint properties below:

a. One (1) storey building at Apramang H/No. Plot 12 30th street Apramang-Kumasi.

b. Four (4) estate houses situate on Plot Nos. 15, 28 and 30 Block "B" Apramang Ext. Patuda and Old Anyinam.

4. Two (2) cars with registration nos. GN-902-13 and GT 3468-11 one (1) out of the fleet of five cars jointly acquired during the subsistence of the Respondent's marriage with the Petitioner.

5. One (1) storey shop at Suame Magazine garages zone."

These reliefs sought per the Respondent's cross petition appear at page 57 and 58 of the Record of Appeal.

After trial, the High Court on 8th July, 2020, gave its judgment whereby it dissolved the marriage between the parties and made the following consequential orders:

"i. The petitioner shall pay a lump sum of GH¢ 200,000.00 as financial settlement to the respondent herein;

ii. The matrimonial home at H/No. Plot 12, 30th Street, Apramang, Kumasi be and is hereby granted to the respondent for her use and as accommodation for the children of the marriage;

iii. Vehicle with registration number GN 902-13 be and is hereby also granted to the respondent;

iv. Another vehicle or in the alternative, the specific vehicle presently used for transporting the children to and from school is also hereby granted to the respondent for the use of the children of the marriage;

v. Custody of the four children of the marriage be and is hereby granted to the respondent with reasonable access to the petitioner herein;

vi. The petitioner shall pay monthly maintenance of GH¢ 2,000.00 for the upkeep of the four children of the marriage;

vii. The respondent to register the children of the marriage with the NHIS and in the event of any grave medical condition, both parties to equally bear the cost.

viii. The petitioner shall maintain and ensure the general welfare and upkeep of the children of the marriage."

Dissatisfied with the judgment of the High Court, the Appellant lodged an appeal to the Court of Appeal on the 29th April, 2021. The Court of Appeal dismissed the appeal, save for a variation whereby it set aside the order that Respondent be given another vehicle for the purpose of transporting the children of the marriage to school.

Aggrieved again with the decision of the Court of Appeal, the Appellant has lodged the present appeal to this Court.

GROUNDS OF APPEAL:

The following grounds of appeal were set out in the Appellant's notice of appeal filed on 24th May, 2021, which can be found at pages 719-720 of the Record of Appeal:

i. *The Court below erred in law when it failed to set aside a portion of the judgment of the trial Court which was based on the Respondent's void Cross Petition.*

Particulars of Error of Law

a. *Failing to set aside processes and representations of Counsel for the Respondent as void despite having knowledge of a search results from General Legal Council showing that Counsel for the Respondent did not have a valid annual licence when he filed his Notice of Change of Solicitor at the trial Court;*

b. *Failing to set aside Written Submissions of Counsel for the Respondent filed in the Court below as void despite having knowledge of a search results from General Legal Council showing that Counsel for the Respondent did not have a valid annual licence when he filed his Written Submissions at the Court below;*

c. *Failing to set aside the decision of the trial Court as void which was based on the void Cross-Petition;*

d. *Determining the Appeal before it by relying on the decision of the trial Court based on the void Cross-Petition.*

e. *Determining the Appeal before it by relying on the void cross-examination conducted by Counsel for the Respondent when he lacked locus to conduct same;*

f. Determining the Appeal before it by considering the void Written Submissions of Counsel of the Respondent.

ii. The Court below erred in affirming the order of the trial Court granting the vehicle with registration number GN 902-13 to the Respondent.

iii. The Court below erred in affirming the order of the trial Court for payment of a lump sum of GH¢ 200,000.00 as financial settlement to the Respondent.

iv. The Court below erred in law when it affirmed the order of the trial Court granting H/No. Plot 12, 30th Street, Apramang, Kumasi to the Respondent.

We shall address the grounds of appeal as set out in the preceding sequence.

RESOLUTION OF GROUNDS OF APPEAL:

The Appellant's contentions under the first ground of appeal even though set out as i. (a), (b), (c), (d), (e) and (f) are all intended to impeach the validity of the Respondent's counsel's right to act in the proceedings and for that matter, impugn all steps he took as counsel. It is thus contended by the Appellant that Counsel who conducted the trial on behalf of the Respondent at the High Court, did not have a valid license to practise and consequently, all processes filed, and proceedings conducted by him for and on behalf of the Respondent should be deemed null and void. The void processes, according to the Appellant, include the amended answer to the Petition and the cross-petition. If the Appellant's contentions were to be sustained by this Court, it would mean that there was no valid cross petition and therefore all reliefs granted the Respondent consequent upon the cross-petition would be set aside.

It is significant to note that the above contention or objection was never raised before the High Court. It was only in the Court of Appeal that an attempt was made to introduce the evidentiary basis of these contentions by way of an application to adduce fresh

evidence on appeal, which application was refused. This can be seen at page 593 of the Record of Appeal. By this application, the Appellant sought leave to introduce fresh evidence to the effect that counsel for the Respondent did not have a valid license to practise in the year 2017 and therefore all processes filed and proceedings conducted by the Respondent's Counsel in the said year ought to be declared null and void. The belated attempt to adduce fresh evidence on appeal by the Appellant was dismissed by the Court of Appeal. In dismissing the application for leave to adduce fresh evidence on 26th April, 2021, the Court of Appeal at page 683 of the record of appeal concluded as follows:

> "The application is refused. The information relied on by Counsel for the Applicant for the leave to file fresh evidence has been available since the inception of this case. If Counsel for the Applicant is only now discovering same, it demonstrates lack of diligence on his part which disqualified him from the rules of procedure he seeks to rely on. The correct position on allegations of lack of valid solicitor's license is for Counsel to raise the issue timeously enough for an opportunity to be given to the affected lawyer to demonstrate that he has a valid license so as not to visit the sins of the lawyer on the client. If Counsel for the Applicant seriously believes in the allegations against Counsel for the Respondent, he knows what to do going forward…"

There is no evidence before us to show that after the Court of Appeal dismissed the application for leave to adduce fresh evidence, the Appellant appealed the said decision or ruling. That being the case, the allegation and/or evidence that the Respondent's Counsel did not have a valid license to practice in 2017 is not properly before this court and consequently does not form part of the evidence on record to be considered in the determination of the appeal. The alleged disqualification did not pass the procedural prerequisites to become part of the record of appeal, properly speaking, before us. The Appellant's attempt to be permitted to adduce these matters in evidence was denied by the Court of Appeal and there is no evidence of a protest of this refusal before us by way

of an appeal from the refusal of the Court of Appeal to grant the appellant leave to adduce fresh evidence at that stage in the proceedings. In the circumstances, it is our considered opinion that there is no judicial justification for us to consider grievances grounded on the disallowed evidence in this appeal.

We are mindful that authorities abound on the principle that a point of law can be raised for the first time on appeal provided that the facts that may help in the resolution of the point of law are part of the evidence already on record. Otherwise, it will be unwarranted, impermissible and to no avail for want of the necessary evidentiary bases to ground the point of law. See the cases of: Ama Serwa Vrs Gariba Hashimu and Another [Civil Appeal No.: J4/31/]2020], judgment dated 14 April 2021; Tamakloe & Partners v. GIHOC Distillaries [Civil Appeal No. J4/70/2018], judgment dated 3rd July 2019; and Fattal vrs. Wooley [2013-2014] 2 SCGLR 1070. Accordingly, there being no facts which form part of the evidence already on the Record in this appeal, a point of law as to the validity and/or propriety or otherwise of the Respondent's Counsel's license to practice in 2017, cannot be raised for the first time in this appeal.

It is also trite that objections must be raised timeously and a litigant who neglects, fails and/or refuses to raise an objection timeously risks being held to have forfeited the opportunity or the right to object. In our view, the proper time to have raised an objection to the processes filed by counsel for the Respondent for want of a valid license was during the trial in the High Court when counsel first entered the proceedings on behalf of the Respondent. A party cannot fold his or her arms, go to sleep or look on when an objectionable issue arises in the Court of first instance and hope to use the right to raise the objection as a fall-back to challenge future proceedings.

Ground one of the appeal and the particulars thereto, which essentially seeks to rely on evidence extrinsic to the record and appeal, as a basis for contending that counsel for the Respondent did not have a valid license to practise at the time he filed his notice of

change of solicitors, Respondent's answer to petition, and cross-petition, is untenable and is accordingly dismissed.

The Appellant also contends under ground two (2) of his appeal that the Court below erred in affirming the order of the trial Court granting vehicle with registration number GN 902-13 to the Respondent.

It must be emphasized that the Respondent contended in her cross-petition and answer to petition that the vehicle with number: GN 902-13 is a matrimonial property.

She pleaded in paragraph 23 of her answer to petition and cross-petition as follows:

> "23. The Respondent states that the Petitioner acquired 5 vehicles with the following registration nos. GN-902-13, GC-1844-13 GT 3468-16, GN 8383-13 and GN 8333-16 during the subsistence of their marriage"

The Respondent then cross-petitioned for an order that the vehicles with registration number: GN 902-13 and GT 3468-11 out of the fleet of cars acquired during the marriage be settled on her.

The Appellant did not dispute that the above vehicles were acquired during the pendency of the marriage. The Appellant's contention in a reply filed to the answer to cross-petition was that the said vehicles were needed for the running of his business and that they were acquired from the proceeds of the Appellant's business and loans.

We are of the view that, of course, the mere fact that a property is acquired during the pendency of marriage does not automatically make it a matrimonial property liable to equitable disbursement upon the dissolution of the marriage. However, the fact that a property was acquired during the pendency of a marriage raises a presumption, albeit rebuttable, in favour of the property being matrimonial property. Once a party leads evidence to establish that the said property was acquired during the subsistence of the

marriage, the burden would shift to the other party to adduce enough evidence to dispel the presumption that the said property, having been acquired during the marriage, is not a joint property or matrimonial property.

It is not in all instances that a property acquired during marriage could be said to be a joint property or matrimonial property. This Court speaking through His Lordship Appau, JSC affirmed this position in the Supreme Court case of **PETER ADJEI V MAGARET ADJEI CIVIL APPEAL NO. J4/06/2021 (21st April, 2021)** as follows**:**

> "The combined effect of the decisions referred to supra (first Mensah case, then to Boafo v Boafo (supra); then the second Mensah v Mensah, (supra) per Dotse, JSC; Quartson v Quartson (supra); Arthur v Arthur (supra) and Fynn v Fynn (supra),) is that; <u>any property that is acquired during the subsistence of a marriage, be it customary or under the English or Mohammedan Ordinance, is presumed to have been jointly acquired by the couple and upon divorce, should be shared between them on the equality is equity principle. This presumption of joint acquisition is, however, rebuttable upon evidence to the contrary – {See the Arthur case supra, holding (3) at page 546}.</u> What this means, in effect is that, it is not every property acquired single-handedly by any of the spouses during the subsistence of a marriage that can be termed as a 'jointly-acquired' property to be distributed at all cost on this equality is equity principle. Rather, it is property that has been shown from the evidence adduced during the trial, to have been jointly acquired, irrespective of whether or not there was direct, pecuniary or substantial contribution from both spouses in the acquisition. <u>The operative term or phrase is; "property jointly acquired during the subsistence of the marriage"</u>. **<u>So where a spouse is able to lead evidence in rebuttal or to the contrary, as was the case in Fynn v Fynn (supra), the presumption theory of joint acquisition collapses</u>**."

In the instant case, it was not disputed that the two vehicles, one of which the court settled in favour of the Respondent, were acquired during the pendency of the marriage

between the parties. The Appellant contended that the vehicle was purchased with loans and the said vehicle was purchased for the running of his business.

The Appellant did not specifically dispute the allegation by the Respondent in the pleadings that the vehicles were acquired during the pendency of the marriage and therefore matrimonial property. Further, notwithstanding the Appellant's claims to have purchased the vehicles with loans and for his business, he failed to tender the evidence of the loan contracted for the purchase of the vehicles. He did not even lead the slightest evidence to substantiate his contention that the cars were acquired with a loan. The only evidence proffered by the Appellant in respect of the vehicles is at page 44 of the Record of Appeal during the cross examination of the Appellant on 20th April, 2018. The following ensued:

"Q: You owned five vehicles

A: That is true

Q: Four of the cars are currently in your possession

A: Yes"

The trial court and the Court of Appeal cannot be faulted for granting vehicle with registration number GN 902-13 to the Respondent. The Appellant failed to lead any evidence in court to rebut the presumption that these vehicles, having been acquired during thee subsistence of the marriage were jointly by the parties.

In the circumstances, we therefore think it fair that out of the five vehicles acquired during the pendency of the marriage, the Respondent be given one vehicle for her contribution to the marriage, same having been established to be matrimonial property. Ground two of the Appeal is therefore dismissed as being without merit.

The Appellant's third ground of appeal is that the Court below erred in affirming the order of the trial Court for payment of a lump sum of Two Hundred Thousand Ghana Cedis (GH¢ 200,000.00) as financial settlement to the Respondent.

The jurisdiction to make an award of financial provision is provided by sections 19 and 20 of the Matrimonial Causes Act, 1971 (Act 367). The said sections state as follows:

"19. Financial provision for spouse

The Court may, whenever it thinks just and equitable, award maintenance pending suit or *financial provision to either party to the marriage*, but an order for maintenance pending suit or financial provision shall not be made until the Court has considered the standard of living of the parties and their circumstances.

20. Property settlement

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

It is evident that financial provision contemplated in the provisions above is not gender restrictive, either party to a marriage may pray and be granted financial provisions whenever in the opinion of the Court, it is just and equitable to do so. The use of the phrase *"financial provision to either party to the marriage"* in section 19 is in itself an attestation of the fact that the legislator did not intend the provision to be an unswerving entitlement of a specific gender to the exclusion of the other. The provisions in sections 19 and 20 above are not to be resorted to in all instances, especially where the circumstances of the case does not warrant such a recourse. It is a discretionary jurisdiction that may be resorted to out of necessity, justice and equity. The grant of any financial provision being in itself discretionary, and this discretion, being borne out of statute, must not be resorted to arbitrarily, capriciously, with prejudice, bias or personal

dislike. It must be exercised fairly and reasonably and in accordance with the statute granting the discretion.

It is mandatory that a judge who exercises the discretion under sections 19 and 20 of Act 367 to award a party financial provision takes into account the circumstances of the parties. These circumstances may include the financial standing of each party as borne out of the evidence led at trial, the ages of the parties and ability to remarry, the balance of dependence that existed among the parties during the marriage, the employment status and the professional standing of each party, the income earning capacity of each party, the duration of the marriage, the contribution of each party towards maintaining the marriage, sacrifices made or opportunities forgone due to the marriage, among others.

In the instant case, the Appellant is clearly of a greater financial means. He owns a one (1) storey building at Apramang-H/No. Plot 12, 30 Street Apramang- Kumasi, four (4) estate houses at Plot No. 15, 28 and 30 Block "B" Apramang Ext. Patuda old Anyinan. A four (4) bedroom house at Sokoban and one (1) storey shop at Suame magazine.

From the evidence on record, the Respondent owned plastic chairs which she used for rental. The evidence on record clearly shows that throughout the marriage, the Respondent has relied heavily on the financial provision of the Appellant. These considerations necessitate the award of financial provision in this instant case in favour of the Respondent to cushion her up, for the time being, for the hardship that may be occasioned by the dissolution of this marriage.

The Respondent asked for a lump sum of three hundred thousand Ghana Cedis (GH¢ 300,000) as alimony or financial provision. The trial High Court awarded the sum of two hundred thousand Ghana Cedis (GH¢ 200,000) as financial provision. This was affirmed by the Court of Appeal. We deem the award appropriate, just and equitable, given the circumstances of this case and would not interfere with same.

The last ground of appeal that we shall consider is whether the Court of Appeal erred in law when it affirmed the order of the trial Court settling H/No. Plot 12, 30th Street, Apramang, Kumasi on the Respondent in property settlement.

An Appellant who challenges the concurrent findings of the two lower courts must demonstrate with absolute clarity and certainty that the two lower courts in coming to the said findings committed apparent errors resulting in a miscarriage of justice. The said errors could be errors of law or fact. Where for example it is demonstrated that the two lower courts erred in the face of crucial evidence which error when corrected would result in contrary findings, we will be inclined to set aside such concurrent findings.
Wood, C.J. in MONDIAL VENEER (GH) LTD v AMUA GYEBU XV [2011] 1 SCGLR 466. , cited with approval the dictum of Acquah, JSC (as he then was) in the *Achoro case* on the position of the law as follows: *"In an appeal against findings of facts to a second appellate court like… (the Supreme Court), where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject-matter of which was peculiarly within the bosom of the two lower courts or tribunal, this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparent in the way in which lower tribunals had dealt with the facts. It must be established; e.g. that the lower courts had clearly erred in the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied; or that the finding was so based on erroneous proposition of the law that if that proposition be corrected, the finding would disappear……It must be demonstrated that the judgments of the courts below were clearly wrong".*

In her pleadings, the Respondent listed the following as matrimonial properties to which she deserved half-share:

1. One (1) storey building at Apramang H/No. Plot 12 30th street Apramang-Kumasi.

2. Four (4) estate houses situate on Plot Nos. 15, 28 and 30 Block "B" Apramang Ext. Patuda and Old Anyinam.

In respect of the four estate houses situate on Plot Nos.: 15, 28 and 30, the evidence of the Respondent at trial contradicts her own claim of joint acquisition or matrimonial property.

When asked about the ownership and acquisition of the four estate houses during cross examination, the Respondent testified at pages 83 and 84 of the Record of Appeal as follows:

"Q: The properties, the four estate houses, were acquired in 1998.

A: I have known the Petitioner since 1997 and so the land was purchased after I had gotten into a relationship with the Petitioner in 1997.

Q: I am putting it to you that the property you call four estate houses are not at Petuda.

A: That area is called Konkomoase but the Lands Commission calls it "Petuda-Anyinam Extension".

Q: Take a look at Exhibit "E". Tell the court the "heading".

A: Respondent reads it out.

Q: So you will agree with me that the property you are talking about is at Konkomoase.

A: That is so, my Lord.

Q: Tell the Court the date of the Allocation Note.

A: September 17, 1998.

Q: But you did not contribute to the acquisition of the property at Konkomoase.

A: At that time, yes. I did not contribute.

Q: In much the same way he used his own money to acquire the property at Apramang without your contribution.

A: That is true, at the time, without my contribution."

The above evidence by the Respondent corroborated the Appellant's contention that the four estate houses were indeed acquired before the marriage and therefore not joint property.

The Appellant tendered documentary evidence of the year of acquisition of the Four Estate houses as well as the Apramang House. Various deeds, allocation papers etc, demonstrated that the said Houses were acquired prior to the marriage. Exhibit B, was the allocation paper for the Apramang House which showed that it was acquired by the Respondent in the year 2000 whilst the parties married in the year 2002.

In respect of the house in contention, the trial court made the following findings:

> *"It thus appears that the properties listed were mainly acquired by the petitioner before the marriage. The answers of the respondent as below shows same.*
>
> *Q: Those four estate houses described were also acquired before your marriage and so you are not entitled to any half share.*
> *A: We purchased the land while we were in the relationship and when we got married the property was developed.*

The evidence adduced clearly shows that the respondent was not in any meaningful employment as she got married while she was in the university. The properties listed by the Respondent can therefore not be declared by this court to be jointly acquired properties.

There is also ample evidence to establish that she has been at all material times, solely dependent on the Petitioner for her upkeep...

The Respondent also lives in the matrimonial home with the children of the marriage and so for the Respondent dedicating eighteen years of her life and also for decent accommodation for the children of the marriage, ***the property <u>in the form of the matrimonial home at Apramang, H/No. Plot 12, 30th Street shall also be granted to the Respondent herein, solely</u>****, as the Petitioner has moved out and he has since occupied another property. The children of the marriage are to be accommodated in the matrimonial home until such a time until they are in gainful employment after they finish school or are ready to leave home."*

The Court of Appeal wholly affirmed the above findings of the trial judge.

We shall consider whether or not despite a finding that the property in contention was not jointly acquired, having been acquired prior to the marriage, the court nonetheless rightly settled the house solely on the Respondent.

It is to be noted that prior to the 1992 Constitution, the jurisdiction to settle property on a spouse upon the dissolution of a marriage derived from section 20 of the Matrimonial Causes Act (supra). The Constitution in Article 22(3) provided for the equitable distribution of property jointly acquired among spouses upon the dissolution of marriage. The said Article states as follows:

"22. PROPERTY RIGHTS OF SPOUSES

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

2. Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
3. **With a view to achieving the full realization of the rights referred to in clause (2) of this article-**
    1. **spouses shall have equal access to property jointly acquired during marriage;**
    2. **assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."**

Section 20 of Act 367 also 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 installments."

From a combined reading of Article 22(3) of the Constitution and section 20 of Act 367, the following are deducible in relation to property settlement upon the dissolution of a marriage:

1. The Court may, in the settlement of property rights of spouses, order the payment of a sum of money or the conveyance of a property.

2. The Court may, in satisfaction of financial provision, order a payment of money or a conveyance of property or both to a spouse upon the dissolution of a marriage.

3. Property, irrespective of **how and/or when** acquired, may be conveyed to a spouse in lieu of money in satisfaction of financial provision.

4. It is only property **jointly acquired**, **during the subsistence of a marriage,** that may be conveyed to a spouse in satisfaction of property settlement upon dissolution of a marriage.

Article 22 (3) of the Constitution deals with property jointly acquired during marriage or matrimonial property. It is in respect of properties acquired during marriage that a spouse may have a right to a share. We use the word "may" cautiously since the law does not leave out the possibility of a spouse acquiring property independent of each other and in respect of which the other spouse may not have made any contribution. Needless to say whether or not property acquired during the subsistence of a marriage will escape the character of being jointly acquired will depend on the preponderance of the evidence in rebuttal of the presumption of joint ownership of property once it is acquired during the subsistence of the marriage. Therefore, the term "settlement of property rights" as used in section 20 of Act 367 is referable to those properties acquired during the pendency of marriage which are termed matrimonial properties because those properties are presumed to have been acquired by the spouses through their joint efforts, including cash, kind or service contribution. Significantly, the range of activities that were previously regarded as routine services of a good wife or husband now counts as contribution under our law.

A court, in exercise of the jurisdiction deriving previously from statute and subsequently from the Constitution, may make orders for a spouse to convey to the other, any property that is proven and adjudged to have been jointly acquired and therefore matrimonial property. The proportions in which such property may be ordered to be shared will be determined by the equity of each case having regard to the relative contributions of the spouses. It is therefore not the case that equality is always equity.

Unless the Court finds that a property was acquired during the subsistence of a marriage, and through the joint efforts of the spouses, such property will not be jointly owned and

therefore matrimonial property so as to be amenable to the jurisdiction of the Court in property settlement.

The Court also exercises jurisdiction under section 20 of Act 367 to make financial provision for a spouse of the marriage. As has been espoused in this judgment, the considerations for financial provision are diverse and the scope of the courts jurisdiction in terms of pecuniary assets and property is wider. In determining financial provision for a spouse, the Court may order the payment of money, the settlement of property, however or whenever acquired, in lieu of money, or both the payment of money and settlement of property. In the case of settlement of property as part of or in lieu of financial provision, it is immaterial whether the said property is a matrimonial property. In other words, the mere fact that a property was acquired prior to marriage or acquired single-handedly by a spouse during the subsistence of a marriage, is not a bar to the jurisdiction of the court to settle such a property on a spouse as part of or in lieu of money in satisfaction of financial provision. The guiding legal consideration is the justness or equity of each case, having regard to all circumstances.

The term "just and equitable" used in section 20 of Act 367 as well as the term "equitable" in Article 22(3) of the Constitution connotes considerations of fairness and not arbitrariness, capriciousness or bias either by resentment, prejudice or personal dislike. Consequently an award of financial provision or property settlement is not intended by either the framers of the Constitution and/or parliament to unjustly, unfairly and/or inequitably enrich a spouse.

We note that the children of a marriage are by law entitled to reasonable provision and care from their parents. The children of a marriage are however not parties in a divorce proceeding and do not themselves make claims of entitlement to property upon the dissolution of marriage. Therefore, a court must be careful not to solely vest a property in a spouse in a divorce proceeding only because the children live with the said spouse.

In the instant case, the trial Court categorically found on the evidence as recounted above, that House No. Plot 12, 30th street, Apramang-Kumasi was acquired before the

marriage and that the Respondent did not contribute to its acquisition. Indeed, the evidence led at the trial showed that the property was acquired in the year 2000 and the Respondent expressly admitted under cross-examination that she did not make any contribution towards its acquisition. In the circumstances, the High Court was in grave error which has occasioned the Appellant a substantial miscarriage of justice when it nevertheless purported to settle H/No. Plot 12, 30th street Apramang-Kumasi, on the Respondent in satisfaction of property settlement. This conclusion and award is clearly inconsistent with the evidence on record and the Court's own findings. The Court of Appeal also fell into the same error when it affirmed such a conclusion and award by the High Court which flies in the face of the evidence and the record. Consequently, we have no difficulty in setting aside the award of H/No. Plot 12 30th street Apramang-Kumasi in order to render the outcome consistent with the evidence and the record.

We note however that in the course of trial, it was discovered that the Appellant, in 2013, purchased a plot of land and started constructing a house on it. This evidence came to the fore during cross-examination of the Respondent by the Appellant's counsel. The said plot of land was not pleaded nor requested to be shared as a matrimonial property. Yet the evidence that same was acquired during the pendency of the marriage and thus matrimonial property cannot be ignored.

At page 100 of the Record of Appeal, the following ensued during the cross-examination of the Respondent.

"Q: You know H/No. Plot 1, Kwame Dwumfour Street Oti Wood Village.

A: Yes, I do.

Q: This property was acquired by the Petitioner in March 2013.

A: I know we bought a plot of land at Kokobeng but I have not gone to see it, the house is under construction now."

It is curious that even though the Respondent was aware of the House No. *Plot 1, Kwame Dwumfour Street Oti Wood Village,* and knew that it was acquired during the in 2013, during the subsistence of the marriage, she did not make any mention of this property in her cross-petition, let alone seek a settlement of the whole or part of this property in her favour.

Further, the parties concede in their submissions before this Court that the house at Kokobeng is now completed. The Appellant also says in his submissions that he has no objection to the Respondent being awarded the said house at Kokobeng. Indeed, being the only property proven to have been acquired during the subsistence of the marriage and therefore amenable to the presumption of joint ownership, in the absence of any evidence in rebuttal, we are of the opinion that the said Kokobeng House ought to be shared between the parties in a it just and equitable proportion.. In the absence of evidence in rebuttal of the presumption of joint ownership, we would ordinarily have made an award of half-share for the Respondent, because equality will be equity in this case. However, given the Appellant's unequivocal indication in the Statement of his case before us that he is willing to have the entire *H/No. Plot 1, Kwame Dwumfour Street Oti Wood Village* settled on the Respondent in satisfaction of property settlement, we hereby order that the said *H/No. Plot 1, Kwame Dwumfour Street Oti Wood Village* be and is hereby settled on the Respondent in property settlement.

In the light of our setting aside of the order granting H/No. Plot 12, 30th Street, Apramang-Kumasi to the Respondent, and our the further order settling *H/No. Plot 1, Kwame Dwumfour Street Oti Wood Village,* on the Respondent solely, the appeal succeeds in part only.

E. Y. KULENDI

(JUSTICE OF THE SUPREME COURT)

B. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

A. LOVEACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

AMOAH ENOCH KWABENA ESQ. FOR THE PETITIONER/APPELLANT/ APPELLANT.

KWASI AFRIFA ESQ. WITH HIM AMA ASENSO ESQ. FOR THE RESPONDENT/RESPONDENT/RESPONDENT.