IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

OWUSU (MS.) JSC

HONYENUGA JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/67/2021

2ND MARCH, 2023

DR. GILBERT ANYETEI
(SUBSTITUTED BY EMMANUEL
TAMATEY OPAI-TETTEH) ..... PETITIONER/APPELLANT/RESPONDENT

VRS

MRS. SUSSANA ANYETEI ….. RESPONDENT/RESPONDENT/APPELLANT

JUDGMENT

PWAMANG JSC:-

My Lords, on 10th June, 2009, the petitioner/appellant/respondent (the husband) commenced divorce proceedings against the respondent/respondent/appellant (the wife) in the High Court, Accra. At the time of filing the case, the parties were both

Ghanaians resident in the Republic of South Africa. The marriage itself was contracted under the Marriages Ordinance, 1951 Rev (Cap 127) on 24th October, 1990 in Accra. They have two children between them who were aged 17 years and 11 years. The husband was a medical doctor trained in Ghana and worked with the Ghana Health Service briefly before re-locating to South Africa to seek greener pastures. The wife is a biochemist by training and left Ghana to join the husband in South Africa. Initially, the husband worked as a government medical officer in South Africa. He subsequently embarked on further medical studies in South Africa and qualified as a specialist gynaecologist. After that he set up private medical practice there with a Ghanaian medical doctor as his partner. When the wife arrived in South Africa, she first worked with a brewery as a biochemist but she later resigned to operate a hairdressing saloon of her own in that country.

The grounds the husband pleaded in his petition for the divorce were that the wife had been unfaithful and was also disrespectful of him for a long time so the marriage was broken down beyond reconciliation and they could no longer live together as husband and wife. He said attempts had been made at reconciliation but all failed. The wife in her answer filed on 4th August, 2009, while denying being unfaithful and disrespectful, counter accused the husband of infidelity and mentioned the names of two women that the husband was involved with outside the marriage and stated that he had two children with one of the women. She pleaded that the husband had moved out of the matrimonial home and was living with one of the women. She also said that efforts by members of the two families to reconcile them failed even after they travelled from Ghana to South Africa to meet with both of them. She consequently counterclaimed for dissolution of the marriage, custody of the children and as follows;

(iii) That Respondent shall pray for 50% of all the properties and other items standing between them as all were jointly acquired by the Parties during the subsistence of the marriage.

After pleadings closed, the husband filed an application to set down the cause for trial and at the hearing of that application on 22nd March, 2010, the High Court judge adjourned the case to the next day, 23rd March, 2010, for the parties to attempt settlement and announce it if any. However, on the adjourned date, there was no enquiry about the settlement but the judge straight away decided to first determine the issue of dissolution of the marriage and to deal with the ancillary reliefs at a later date. On that same day, the court took down statements on oath from both parties who stated that the marriage was broken down and they did not want any reconciliation. On those statements alone, the judge dissolved the marriage, granted custody of the children to the wife with access to the husband and adjourned for the trial of the ancillary relief relating to distribution of property acquired during the marriage. Whereas in the pleadings of the parties they stated details about their marriage relationship from its blissful beginning to the difficult times, no evidence was adduced on the marriage relationship which had lasted for about twenty years.

We are not satisfied with the manner the High Court Judge dealt with the relief of dissolution of the marriage. A court ought not to appear to be in a hurry to dissolve a marriage as is evident in this case and we wonder the reasons for the haste by this judge. Secondly, the law is that the only ground on which a court would order the dissolution of a marriage is that the marriage has broken down beyond reconciliation, particulars of which are required to be specifically pleaded and proved by evidence adduced in court. It is therefore not sufficient for a judge to grant a divorce just because both parties endorsed that relief on their pleadings. Thirdly, evidence of the conduct of the parties during the marriage in most cases is relevant for deciding how any property acquired during the marriage is to be dealt with on its dissolution. Where one spouse claims that she contributed to the acquisition of property standing in the name of the other spouse, the contribution the spouse relies on may be satisfactory matrimonial services offered to the other spouse during the marriage. In such a case, the conduct of the parties in the course of the marriage and what caused

the breakdown of the marriage become relevant for a determination of ancillary relief relating to property distribution. In this case, the trial of the ancillary relief was also restricted and it consisted of the testimonies of the parties themselves without either of them calling any witness. Adduction of evidence ended on 27th July, 2010 and the case was adjourned by the judge for three days for judgment on 30th July, 2010 without an offer to the lawyers to address the court as is required by the rules of court. The evidence concerning the marriage relationship between the parties was scanty and the trial judge in his judgment resorted to subjective factors such as his personal opinion of the beauty of the wife to make some of his final orders. That was unfortunate.

At the trial of the claim of the wife for 50% of the properties acquired during the marriage, the wife was the first to testify and her evidence related to houses in South Africa and Ghana that she stated some were acquired in the name of the husband and some in the name of his company. She said she was entitled to 50% of these properties because she contributed in acquiring the properties. She said the houses in South Africa were fifteen and those in Ghana two. The record before us contains three lists of properties prepared and filed by the husband as well as what appear to be copies of documents relating to titles to some of the properties in South Africa. It is unclear as to how and at what stage of the proceedings these documents were formally tendered into evidence but they are marked as Exhibits and both parties referred to them in their sworn testimonies anyway. At page 130 of the Record of Appeal (ROA) is a list of 15 landed properties in South Africa. At page 132 is listed ten of these properties which are described as "Liabilities". Liabilities because these houses are stated to have been acquired with mortgage financing and the loans had not yet been paid off. That list also states the names of the registered owners of the ten properties; two are in the name of the husband alone; three are in the name of Kudiabor Investment Company, owned solely by the husband; one is in the joint names of the husband and Dr Apen, the doctor who is his partner; and three are in the joint names

of the husband and the wife. This list does not include the remaining five properties in South Africa which are presumed not to have any outstanding liabilities. For those properties, we are unable to easily know who their registered owners are; the husband alone or the husband and the wife jointly or Kudiabor Investment Co. We have read closely the testimonies of the parties and examined the documents on the record and there is no clear indication of the registered ownership of the properties they cover. But for the lists prepared by the husband, it would have been difficult for the court to ascertain the registered ownership status of any of the properties talked about in the evidence.

The case of the wife is that, notwithstanding the registered ownership of the properties referred to, all of them were jointly acquired by her and her husband. She offered some evidence of her contribution to the acquisition of the properties. She testified that when she first arrived in South Africa and got a job with the brewery as a biochemist, she paid her salary to her husband and from their joint money they did everything. When she later resigned from formal work, she paid her pension to her husband. She took a loan to set up a hairdressing saloon and it was agreed that she should use the profit from that business to take care of the home while the husband spent his money on acquiring properties for both of them. She said that arrangement was in place up to the time of the divorce. Part of her testimony was as follows;

"We bought a house in December, 1995 and we moved. It was Pongola Street. We stayed there till 2000. We bought another house after we sold the Pangola Street house. That one we sold. In 2004 we sold the house and bought our third house. It was No. 1 Loi-du-Toit Street. We stayed there till January, 2008. We left that house because we had a land in an executive Estate called Echo Estate. We wanted to build so we sold No.1 Loi-du-Toit. We decided to finish building in a year. So we had to move to another place. So we moved to 75 Hennie Alberts Street. No.4 in Exhibit 2. That is where I live now.In between 2000-2008 we acquired all the properties in Exhibit 2."

The respondent continued her evidence on the acquisition of the properties at 32 as follows;

"…The Loi-du-Toit property has been sold. We decided to use the money to build on the land at Echo Estate. The property is now under construction. Its almost completed. I asked where is the money from the Loi-du-Toit he said he used it to do business. But he has used the company name for a loan to build the Echo Estate and he says it's for tax purposes. The name of the petitioner's company is called Kudiabor Co. The Rose Acre property the Petitioner had 2 children with a lady called Judy Hughes and he has put them up in Rose Acre property. We bought the Rose Acre property on mortgage. 56 Hennie Albert we bought it from a business venture and on investment. It has been rented out and used for various business purposes. It's a beauty complex. The properties were jointly acquired by the parties in this suit. So I claim the relief at paragraph 22 of the Amended Answer."

In cross-examining the wife, lawyer for the husband denied her testimony that she paid her salary and pension to the husband and demanded for documentary proof but she was unable to produce any documentary evidence to support her claims. He also denied that there was an agreement for her to pay for housekeeping while the husband used his money to acquire properties.

When the husband mounted the witness box, he denied that his wife made any contribution to the acquisition of the properties. He denied that she paid her salary to him and narrated how he alone acquired the properties through the business of buying and selling houses and made profits that he added money to acquire other houses. He said he acquired the properties using mortgage financing, some in the name of his company that he used for the real estate business, and that some of the loans were still outstanding. He stated that he acquired a personal bank loan for the wife to buy her hairdressing saloon and then went for a second loan for the wife and his cousin to acquire and jointly run a second saloon and he was still servicing those loans. He explained that the respondent paid some of her pension to him only to help

defray the loans he took for her hairdressing saloons. His testimony was that the arrangement for his wife to pay for housekeeping was only for two years during which time he was in Johannesburg and his family was in Transkei.

At the close of the rather brief trial, the High Court Judge held that the wife had proved that she jointly acquired all the properties with the husband so she was entitled to 50% of the properties. The Judge further ordered, that the husband should pay off the outstanding mortgage loans on the properties to be granted to the wife. Hear the trial judge in his judgment;

"I make a positive finding of fact that from the evidence adduced before me the respondent (Sussan) the ex-wife of Dr. Gilbert Anyetei did contribute substantially in the acquisition of the properties in this case. Susan did not only contribute financially but also immense effort and time, the time of her youthful days. A most wise counsellor recently instructed me in words of wisdom which is of abiding value to me that "time is the only commodity that the richest men cannot buy."

I sat and watched Susan the ex-wife come in and go out of court. I think she is an exquisite specimen not only of womanhood but of creation itself. Twenty (20) years of her youthful and fruitful life is now wasted. To that I shall return…The Iron clad evidence and potency of the respondent's evidence is such that the petitioner cannot have his way forever. Indeed the petitioner cannot kick against the pricks of solid evidence of substantial contribution by her ex-wife. Even in the absence of Exhibit 4 or Exhibit A this court by reason of the evidence of contribution by the respondent being so substantial is enjoined to make a finding that the properties are jointly owned Kudiabor Investment Properties excepted.

By reason of the findings in this judgment I declare the respondent to be entitled to 50% of the properties the subject matter of this case."

The husband appealed against the judgment to the Court of Appeal who substantially allowed the appeal despite making certain orders for alimony and settling the two

properties in Ghana on the wife. The reasons given for the decision of the Court of Appeal were as follows;

(1) The Court of Appeal disagreed with the findings made by the trial judge on the evidence, holding that the evidence led by the wife was not sufficient to satisfy the burden of proof which was on her to establish that she substantially contributed to the acquisition of the properties. They said that from the evidence, she worked in the brewery company for only two years earning a monthly salary of R2500 [about USD132] so any terminal benefits would not have amounted to much. The court observed that, more importantly, when her claims of paying her monies to the husband were denied, the wife did not tender any documentary proof which ought to have been available in respect of payments she alleged she made by debit card and to the bank accounts of the husband.

(2) They also held that the trial judge erred in law when he assumed jurisdiction to make orders in respect of ownership and possession of immovable property situated in South Africa and that the courts of Ghana have no jurisdiction in matters relating to immovable property abroad.

(3) They further held that the trial judge erred in law by settling property belonging to Kudiabor Investment Co on the wife as being property acquired by the husband during the marriage. They maintained that since a company has a separate legal existence, its assets could not be treated as assets of the husband though he was the sole shareholder. They noted an exception where the evidence proved that a party was using the corporate shield as an instrument of fraud, but they were of the view that, in this case no such fraud was alleged nor does the evidence establish any fraud.

(4) Finally, the Court of Appeal criticised what the judge said with regard to article 22 of the Constitution, 1992 on the distribution of property acquired during a marriage on dissolution of the marriage. The trial judge stated that since he held that the properties were jointly acquired by the husband and the wife, then they were to be

shared 50-50. The Court of Appeal explained that the judge misunderstood the import of the Supreme Court decisions on article 22(3)(b) of the Constitution and stated that the sharing was required to be done equitably and it depended on the circumstances of each case.

The wife who won in the High Court in terms of the distribution of the properties has now appealed to the Supreme Court against the judgment of the Court of Appeal. While this appeal was pending, the husband died, but since the matters in the appeal relate to ownership of property, that cause of action survived him so he has been substituted in order for the case to be heard and determined. The grounds and the additional grounds of the appeal touch on each of the above stated four reasons the Court of Appeal assigned for their judgment. The parties argued all the grounds in their written statements of case but when the case came on for hearing, we considered the issue of the extra territorial civil jurisdiction of the courts of Ghana in relation to immovable property as a substantial point of law so we directed the parties to file further submissions addressing that issue which they have done. We shall start our judgment with a consideration of the issue of jurisdiction since majority of the houses involved in this case are located in the Republic of South Africa.

Fundamental as this issue of jurisdiction is, it was not raised during the trial when the wife led evidence on houses and lands located in South Africa as part of the properties she prayed the High Court in her counter-petition to share 50-50. In fact, it was the husband who is now objecting to the jurisdiction of the court who filed the details of those properties to the court. The objection was taken for the first time in the written submissions the husband filed in the Court of Appeal under the omnibus ground of appeal. In arguing the point there, counsel for the husband did well to advert to the case of **Akoto v Akoto [2011] 1 SCGLR 533,** in which our Supreme Court considered an objection to jurisdiction on the same ground that immovable properties in issue in divorce proceedings were located in the United Kingdom. Counsel for the husband submitted that in Akoto v Akoto, the Supreme Court acknowledged the rule of the

common law that courts had no jurisdiction to make orders with regard to immovable property abroad except in very limited circumstances. Counsel stated that the courts would make an exception where the conduct of the defendant was fraudulent and that in Akoto v Akoto, the court upheld the assumption of jurisdiction over immovable property abroad only because it detected fraudulent conduct on the part of the husband. He argued, that in this case fraud was not pleaded and none was proved so the jurisdiction of the High Court over property abroad did not accrue.

In answer to that point, the counsel for the wife agreed with the analysis of the decision in Akoto v Akoto and turned his argument to finding fraud in the conduct of the husband in this case. The Court of Appeal in their judgment also read Akoto v Akoto narrowly and unfortunately limited the exceptions under which a common law court could assume jurisdiction over immovable property abroad to only instances of fraud. They then said that they did not find the husband to have acted fraudulently so they concluded that the trial court wrongly assumed jurisdiction in this case over the houses in South Africa. However, in the further submissions that the parties filed in this appeal on our request, they appear to now appreciate the full ambit of the common law principle on jurisdiction over immovable property abroad and both counsel have argued the point more broadly and referred to relevant cases by courts in other common law countries.

The issue about our courts jurisdiction over immovable property abroad is a subject that has not been specifically legislated on by our legislature and it touches on the subject of private international law, also referred to as Conflict of Laws. The principles that our courts are required to apply in this area of our law are as dictated by **section 54(2) of the Courts Act, 1993 (Act 459)** which is as follows;

54(2) Subject to this Act and any other enactment, the rules of law and evidence (including the rules of private international law) that have before the coming into force of this Act been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of the rules which may occur.

The rule on the general jurisdiction of a superior court in respect of immovable property abroad that was applicable in Ghana and through out the common law world before the coming into force of Act 459 was the common law rule laid down by the British House of Lords in the case of **The British South African Co v The Companhia De Mozambique [1893] AC 602.** In that case, the respondent sued the appellants in the High Court, Queen Bench Division, and by its statement of claim, it alleged that it was in possession of large tracts of land, mines and mining rights in South Africa and that the defendant by its agents broke and entered and took possession of the said lands, mines and mining rights and ejected the plaintiff company therefrom. They therefore claimed for a declaration that the defendants had been in lawful possession of the lands, mines and mining rights and for an injunction restraining the defendant company from continuing to occupy their possessions and from asserting title to them. They also claimed for £250,000 as damages for trespass. In the statement of defence, the defendants stated that as the lands and mines were in South Africa, the court in UK had no jurisdiction to adjudicate upon the plaintiff's claims. They also pleaded that they lawfully acquired rights to those lands and mines from the local chief of the area in South Africa.

The High Court upheld the objection and dismissed all the reliefs claimed on the ground that it had no jurisdiction since the claims related to landed property abroad. The appellants appealed to the Court of Appeal and there, they limited their appeal to their claim for damages for trespass and conceded that the UK court had no jurisdiction to adjudicate its claims for declaration of title and injunction. The Court of Appeal by 2-1 majority allowed the appeal and held that the High Court had jurisdiction to adjudicate the claim for damages for trespass though it is alleged to have been committed against immovable property situated abroad. The defendant appealed against the decision of the majority of the Court of Appeal to the House of Lords who unanimously allowed the appeal, reversed the Court of Appeal and restored the position as held by the High Court.

Lord Herschell, L.C. who delivered the leading judgment stated the position of the common law as follows at pp.628-629 of the report;

"…But in respect of trespass to land situate abroad there was no right of action, for an alleged right the Courts would neither recognise nor enforce did not constitute any right at all in point of law. My Lords, I have come to the conclusion that the grounds upon which the Courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situated abroad were substantial and not technical and that the Rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before."

In arguing the appeal in the House of Lords, the lawyer for the plaintiff referred to the practice in the Courts of Chancery which, in their jurisdiction in Equity, entertained actions for damages for trespass to land abroad on basis that such actions were in personam so if the defendant was within the jurisdiction of the court, it would adjudicate such claims. The arguments however did not find favour with the Law Lords then.

However, over time, what has become known in common law countries as the **Mozambique Rule** was criticised by both judges and in academic writings and it did not take long for exceptions to the rule to be developed by judges in exercise of their rule-making powers. But, admittedly, there are formidable policy reasons justifying the rule among which is what Lord Herschell referred to in his opinion at p.624 where he said that;

"The question what jurisdiction can be exercised by the Courts of any country according to its municipal law cannot, I think, be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables or real property, in the country of another."

His Lordship expressed the difficulty of the matter in the following words;

"Supposing a foreigner to sue in this country for trespass to his lands situated abroad, and for taking possession of and expelling him from them, what is to be the means by which he could

obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value."

This Mozambique rule appears to underlie the restraint to the jurisdiction of our courts to make orders affecting foreign assets in exercise of their matrimonial jurisdiction enacted under **section 33** of our **Matrimonial Causes Act, 1971 (Act 367).** It provides as follows;

33. Additional jurisdiction relating to financial provisions

In addition to any other jurisdiction conferred by this Act the Court shall have jurisdiction, where a party who may be ordered to make financial provision has assets in Ghana, to order that party to make financial provisions not exceeding the value of those assets.

This means that the court is denied jurisdiction to make an order for financial provision that will attach to assets of a party that are situated abroad.

But starting with the English case of **Deschamps v Miller [1908] 1 Ch 856,** Parker J recognised some exceptions to the Mozambique Rule in a seminal judgment by stating as follows at pp.863-864;

'In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to that rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and so not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or

other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter."

The same position was taken in the Singaporean case of **Eng Liat Kiang v Eng Bak HernLiat Kiang [1995] 3 LRC 398** referred to by the Atuguba, JSC in Akoto v Akoto (supra). In the Singapore case, the latest position of the common law with regard to the Mozambique Rule was stated as follows in the headnote of the report;

"In general, ***except where an action was based on a contract or equity between the parties,*** *a local court had no jurisdiction to entertain proceedings principally concerned with a question of title to, or the right of possession of, immovable property situated outside of the jurisdiction. Since the appellant's claim for a declaration of an express or resulting trust arose in equity, the court had jurisdiction over the matter even though the proceedings were concerned with foreign immovable properties. In addition the respondent did not show that the Malaysian court would never recognize a trust that was declared by a court other than its own, while there was nothing in Singapore law which made it impossible or illegal for such a declaration to be made or which would be an impediment to the relief sought. The appellant's claim accordingly came within the exception and the court had jurisdiction to entertain the application (see pp 402, 403, 404 – 405, post). Cook Industries Inc v Galliher [1978] 3 All ER 945 and Webb v Webb [1992] 1 All ER 17 approved."* (Emphasis supplied).

See also **Pattni v Ali [2007] 2 AC 85.**

Thus, the current state of the common law to be gleaned from the authorities on the Mozambique Rule is, that as a general rule, a court has no jurisdiction to adjudicate claims for declaration of title, possession and damages for trespass in respect of immovable property abroad except where the claim is based on contract between the parties, on fraud or on rights accruing in Equity against a defendant who is subject to

the jurisdiction of the court. Such a case should not be premised on a claim of right that is inconsistent with and disputes the root of title or possession of the defendant, but must assume the validity of the defendant's title and only seek relief against the defendant personally. Where the claim of the plaintiff involves disputation as to the rightful acquisition of the property by the defendant in accordance with the laws of the foreign country, then a common law court ought not to assume jurisdiction.

In **Hamed v Stevens [2013] EWCA Civ 911** the English Court of Appeal observed as follows;

"Nevertheless, it has long been established that, before the Mozambique rule can apply, the proceedings must raise directly the issue of title to foreign land. Hence the Mozambique rule is now relatively narrowly confined."

Mr Thaddeus Sory, the lawyer for the husband, in his statement of case concedes these exceptions to the Mozambique rule and in fact, it was he who provided most of the foreign authorities outlining the exceptions referred to above. His point of departure from the position of wife's Counsel, Mr George Aborgah, is that the exceptions are not applicable in this case.

However, on the facts here, the wife's claim to the properties in South Africa is based on the marriage contract entered into with the husband and rights she claims to be entitled to by virtue of that relationship. She is not claiming a right that is inconsistent with the title of the husband in the properties but her claim assumes that the properties were otherwise validly acquired in South Africa. She is not contesting the claim of any third party to those properties and any relief granted to her would not be enforceable against third parties but would only affect and restrict the rights that the husband previously had in those properties and persons claiming through the husband. Consequently, the claims by the wife in this case fall well within the exceptions to the Mozambique rule so the High Court rightly exercised jurisdiction to adjudicate in relation to the properties in South Africa.

We have given thought to the fact that the exceptions made so far to the Mozambique rule do not necessarily resolve the challenge of executing a judgment for title and possession of property in a foreign land. Most countries have addressed this problem through legislation that permits the reciprocal enforcement of foreign judgments. Ghana's legislation in that regard is contained in **Part V (sections 81-99) of Act 459**. Section 81(1) provides as follows;

81. (1) Where the President is satisfied that, in the event of the benefits conferred by this Sub-Part being extended to judgments given in the superior courts of any country, substantial reciprocity of treatment will be assured in respect of the enforcement in that country of judgments given in the Superior Court of Judicature of Ghana, the President may by legislative instrument order -

(a) that this Sub-Part shall extend to that country; and

(b) that such courts of that country as are specified in the order shall be the superior courts of that country for the purposes of this Sub-Part.

Pursuant to the above provision, the President of Ghana made the **FOREIGN JUDGMENTS AND MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) INSTRUMENT, 1993 (LI 1575).** The LI lists a number of countries that Ghana has recognised for the mutual enforcement of foreign judgments. We notice that the Republic of South Africa is not on this list. That notwithstanding, it has not been shown to us that the Courts of South Africa would disregard reasoned judgment of Superior Courts of Ghana in a case where both parties were accorded a hearing on the merits after they both voluntarily submitted to the jurisdiction of the Ghanaian Court and the application of Ghanaian Law for the resolution of their dispute.

We accordingly uphold Grounds D and E of the wife's appeal stated in the Notice of Additional Grounds of Appeal.

Next, we shall consider Ground B of the appeal which is stated as follows;

The Court of Appeal misdirected itself as to the meaning and scope of marital property as defined and re-affirmed in a binding authority Arthur v Arthur [2013-2014] 1 SCGLR 543 when it held that the Respondent…was not entitled to 50% of the list of properties given in evidence at the trial even though the said properties were acquired in the course of the marriage.

This ground of appeal subsumes two issues under it; (1) whether or not the law in Ghana is that a wife is entitled on dissolution of a marriage, in all cases, to 50% of any property acquired in the course of a marriage? (2) whether, on the evidence in this case, the wife is entitled on the dissolution of their marriage to 50% of all the properties referred to in the evidence? These issues are significantly different but the lawyer for the wife in this appeal mixes them up in his arguments just as he did in the wording of the ground of appeal reproduced above. We shall however consider this ground in two parts under the two issues stated above.

There appears to be the notion that someone has said that under Ghanaian Law, following the coming into force of the Constitution, 1992, a wife is entitled on dissolution of a marriage, automatically to 50% share of any property acquired during the marriage. The impression that the law was changed in the Constitution emerged following a judgment of the Supreme Court in the case of **Mensah v Mensah [1998-99] SCGLR 350** (Mensah v Mensah No.1). After that decision, courts below the Supreme Court started sharing property on dissolution of marriages on 50-50 basis so it became necessary for the Supreme Court to clarify and restate the position of Ghanaian Law on distribution of property on dissolution of marriage. The occasion was the case of **Mensah v Mensah [2012]1 SCGLR 391** (Mensah v Mensah No. 2). Note that the parties were completely different and unrelated to those in Mensah v Mensah No. 1. Dotse, JSC, in rendering the unanimous decision of the Supreme Court in Mensah v Mensah No.2, Coram; Akuffo, Date-Bah, Adinyira, Dotse, Akoto-Bamfo, JJSC, clarified the position in the following words at p.408;

"Therefore even though Boafo v. Boafo affirmed the equality is equity principle as used in Mensah v. Mensah, it gave further meaning to section 20(1) of Act 367 and article 22(3)(b) of the 1992 Constitution. Consequently, ***the issue of proportions are to be fixed in accordance with the equities of each case.***

The court duly recognized the fact that an equal (half and half) distribution, though usually a suitable solution to correct imbalances in property rights against women, may not necessarily lead to a just and equitable distribution as the Constitution and Act 367 envisages. It is submitted that the court made room for some flexibility in the application of the equality is equity principle by favouring a case by case approach as opposed to a wholesale application of the principle." (Emphasis supplied)

This was a definite statement to dispel the notion of automatic 50% entitlement of the wife in all cases and it simply captured the plain and unambiguous language and effect of article 22 of the Constitution which provides as follows;

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

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

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

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

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

Under clause 3 of article 22 reproduced above, the framers of the Constitution chose to use the word "equal" in relation to access to property jointly acquired during the marriage but they used the word "equitably" in respect of distribution of property

jointly acquired upon dissolution of the marriage. Where the text of the Constitution is plain and unambiguous like clause 3 of article 22 is, the principles of constitutional interpretation do not permit a judge to replace the language with her opinion of what she would have said if she was the one making the Constitution. In **Republic v Fast Track High Court, Accra; Ex parte Daniels [2003-2004] SCGLR 364 at 370** Kludze, JSC warned as follows;

"We cannot, under the cloak of constitutional interpretation, rewrite the Constitution of Ghana. Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the lawgiver was mistaken or unwise. Our responsibility is greater when we interpret the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution."

So, simply put, what the Court said above in Mensah v Mensah (No.2) is that, in some circumstances, equitable distribution may end up resulting in 50-50 proportion but, in other circumstances, it would end up like 60-40 or some other proportion. Stated the other way round, 50-50 distribution in some circumstances may be equitable but in other circumstances, it may be inequitable. A distribution of property upon dissolution of marriage that is inequitable would violate the clear provisions of clause 3(b) of article 22. Therefore, the proportions of distribution shall be on a case by case basis.

This plain provision of the article 22 of the Constitution which was clarified by the statement quoted from Mensah v Mensah (No.2)(supra) has nevertheless been subjected to unending litigation, largely because lawyers of some litigants (so far, mostly those for women) usually submit and urge our Courts to replace the word "equitably" used by the framers of the Constitution in clause 3(b) of article 22 with the word "equally", which is not used by the text of the Constitution. In **Tuffour v Attorney-General [1980] GLR 637 Sowah, JSC (as he then was) at page 659-660** of the report gave the following guidelines to be followed by a court in discovering the intention of the framers of the Constitution;

"We start by reminding ourselves of the major aids to interpretation bearing in mind the goals the Constitution intends to achieve. Our duty is to take the words as they stand and give them their true construction having regard to the language of the provisions of the Constitution, always preferring the natural meaning of the words involved, but nonetheless giving the words their appropriate construction according to the context."

Accordingly, notwithstanding the relentless submissions for our courts to replace "equitably" with "equally", the Supreme Court has always used cautious language when it comes to the proportions for sharing assets acquired during a marriage on its dissolution. Even in **Arthur (No 1) v Arthur (No 1) [2013-2014] 1 SCGLR 543,** which is relied on by the lawyer for the wife in his statement of case in this case, Dr Date-Bah, JSC, delivering the unanimous judgment of the Supreme Court repeated the position as follows at p. 555;

"From Mensah v Mensah, therefore, the principle that is to be distilled is that there is a presumption in Ghanaian law in favour of the sharing of marital property on an equality basis ***in all appropriate cases*** *between spouses after divorce. What needs to be spelt out in subsequent case law is* ***the range of appropriate cases.*** *Comparative legal materials from other common law jurisdictions should be useful in helping this court to clarify this range."* (Emphasis supplied)

Though the respected jurist used words different from those used in Mensah v Mensah No. 2 supra, the effect of what he said is, that in some cases, and he uses the word 'appropriate cases', the sharing of property on dissolution ought to be equal, meaning, in other cases, it ought not to be equal. There are many other cases where the Supreme Court warned against the wrong attribution to it that it has said that sharing of property on divorce shall be 50-50 in all cases. See **Quartson v Quartson [2012]2 SCGLR 1077** and **Fynn v Fynn & Osei [2013-2014] 1 SCGLR 727.**

Section 18(1) of the Evidence Act, 1975 (NRCD 323) defines a presumption as follows;

A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.

So, for the presumption of equal sharing talked of by Date-Bah, JSC in **Arthur (No.1) v Arthur No.1)(supra)** to be made in a spouse's favour, that spouse must establish facts in the trial of the case that make his or her case fall within the range of appropriate cases.

This leads us to the second issue which can also be stated as follows; whether or not this is an appropriate case where the assets stated in the evidence ought to be shared 50-50? In order to decide this question we need to discuss some other principles that ought to guide the distribution of property upon dissolution of the marriage so as to achieve equitable distribution in fulfilment of the injunction by the Constitution. The first guide to resolve is to determine which class of properties is the constitutional provision requiring to be shared equitably? Let us repeat article 22 clause 3(b);

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

The key words are; *jointly acquired during the marriage*. Here again, an unexplained impression has been created that article 22(3)(b) refers to any property acquired during the marriage, thereby muting the word **"jointly".** There have been cases whereby a wife has relied on article 22(3)(b) and argued that since property was acquired during the course of the marriage, it ought to be shared on dissolution of the marriage and she did not need to prove anything at all by way of her contribution to the acquisition. See **Adjei v Adjei, CA;J4/6/2021, unreported judgment of the Supreme Court dated 21st April, 2021**. Thankfully, in this case, the wife's case is not based on the fact only that the properties she prays to be shared were acquired in the course of the marriage but she argues that she contributed to their acquisition and she in fact adduced evidence of her contribution. Another point worth noting is that the wife in this case has not relied on **section 20 of Act 367** as part of her case of being

entitled to properties from the husband. As such, we need not venture into the litigation mine field of definition of **marital property**, which terminology has not been used by the framers of the Constitution in article 22 that she relies on. We shall therefore proceed to examine the evidence of the wife's contribution to the acquisition of the properties and determine what would amount to equitable distribution in this case.

The evidence led in this case is stated above and our opinion of the totality of the evidence is that the wife did contribute to the acquisition of the properties. The law no longer requires a spouse to prove direct pecuniary contribution in the form of paying part of the purchase price of the property from her own money or buying part of the building materials in the case of a house. In this case, the wife testified that she was working and earning income, first as an employee and later as a business woman operating hairdressing saloons and importing goods from China for sale. From these earnings she said she maintained the home and though the husband countered that it was done for only a brief period, we are inclined to accept her testimony because if account is taken of the extra marital commitments of the husband, that would have shifted a lot of the domestic burden on the wife. Emotional support and satisfactory matrimonial services by a spouse are also elements of contribution to the acquisition of assets during a marriage. In this case, the documents filed on the properties by the husband show that he involved the wife to sign some of the documents and some of the properties were actually acquired in the joint names of husband and wife. This, for us, can only mean a recognition by the husband of the assistance, in whatever form, he got from the wife in the acquisition of the houses. We therefore disagree with the Court of Appeal's analysis of the evidence of the wife's overall contribution to the acquisition of the properties in question.

As we observed above, the evidence from both parties was terse, so it is difficult for us to assess the proportions of the contributions by each party to the acquisition of the properties. In situations such as this where both spouses jointly acquired assets during

a marriage but from the evidence it is difficult to estimate proportions of their respective contributions, courts resort to the maxim; equality is equity. We notice that in distributing the houses in this case, which are of varied estimated values, the High Court Judge was influenced by the principle of equal sharing. However, since some of the properties in South Africa were subject to liabilities in the form of loans outstanding to be paid on them, asking one spouse to pay off the loans on properties given to the other spouse while at the same time bearing the loans outstanding on the properties given to him, would likely tilt the balance against that spouse having to bear all the liabilities alone. For that reason, we do not approve of the order by the trial judge for the husband to pay off the liabilities outstanding on the properties given to the wife. Apart from that order, based on our opinion of the evidence of contribution by the wife to the acquisition of all the properties stated in the evidence, we have no reason to disturb the distribution made by the trial judge. Accordingly, the properties to be given to the respondent/respondent/appellant (the wife) are;

(i) 62 Dewaal Street Brackendowns,

(ii) 133 Dewaal Street Brackendowns,

(iii) No. 5 Chagall,

(iv) 75 Hennie Albert Brackenhurst,

(v) The first House bought by the parties at Ashongman, Accra, and

(vi) One half portion of the land gifted to the parties by the wife's father.

The wife shall however be responsible to pay off any outstanding loans/liabilities in respect of any of the above properties given to her.

The wife is also given one 4X4 Mercedes Benz ML vehicle and one KIA Rio vehicle.

The lump sum alimony to be paid to the wife is set at Fifty Thousand United States Dollars (US$50,000.00).

There have been arguments in this appeal by both parties on whether properties of a limited liability company which shares are owned by only one spouse are liable to be

shared under Article 22(3)(b) of the Constitution upon the dissolution of their marriage. On close examination of the evidence in this case, none of the properties above given to the wife have been shown to belong to Kudiabor Investment Company, whose shares were owned by only the husband. Therefore, the issue of sharing of properties belonging to that company does not appear to arise on the record before us. We are however of the view, that if a company was established in the course of a marriage and it is proved that the spouse whose name does not appear as a shareholder nevertheless contributed in its establishment, in such situation, it is the shares which would be assets jointly acquired during the marriage that may be shared between the parties and not the properties of the company. Once the shares are distributed, we believe both spouses would then indirectly thereby gain proportionate interests in the properties of the company.

In conclusion, the appeal succeeds in part and is allowed on the terms stated above.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

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

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