**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE COURT OF APPEAL**
**ACCRA-GHANA, A.D. 2006**.

Coram: - Akamba, J.A. [Presiding]
Dotse, J.A.
Apaloo, J. A.

H1/152/2005
18th May, 2006.

**ALHAJI ABUBAKARI : PLAINTIFF/RESPONDENT/APPELLANT**

**VERSUS**

**ADISA ABUBAKARI : DEFENDANT/APPELLANT/RESPONDENT**

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**J U D G M E N T**

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**DOTSE, J.A.:-** This is an appeal by the Plaintiff/Respondent/Appellant, hereinafter referred to as Plaintiff against the Judgment of the High Court, Sekondi dated 23rd day of July, 2004. The grounds of appeal are:-

1. The Learned trial Judge erred when he held that Plaintiff pays ¢5 million.

2. The learned trial Judge ought to have adequately considered the relative incomes of the Parties before making the awards.

3. The awards were not justified.

4. The Learned trial Judge erred when he indicated that the trial judge was wrong to have considered the evidence of PW2, Abubakari Gariba.

**BRIEF FACTS**

The Plaintiff initiated this suit in the District Court, Sekondi and claimed against the Defendant/Appellant/Respondent, hereinafter referred to as Defendant the following relief:-

"Plaintiff claims from the defendant recovery of possession of rooms occupied by defendant in H/No. 16/19 Sekondi Zongo for occupation by Plaintiff."

Leave was subsequently granted the Defendant to file a counterclaim against the Plaintiff seeking the following reliefs:-

[a] Dissolution of the marriage.

[b] Custody of the children.

[c] Financial provisions be made in favour of the Defendant.

After hearing evidence in the suit, the District Court Sekondi, in a judgment delivered on the 30th day of September, 2003 held on the essential issues before the Court as follows:-

1. "Since the parties have proven themselves irreconcilable, there is nothing to salvage, and accordingly, the Court hereby issues its decree for the dissolution of the marriage. Ref. Page 42, lines 40-44 of the appeal record.

2. "It is my view that in the circumstances where the Plaintiff was the one who sought the divorce, it is fair and equitable that the defendant is "sent off". PW2 said that whereas the defendant asked for ¢1,200,000. the Plaintiff offered ¢150,000.00. In my view the ¢1,200,000.00 is fair and I order the Plaintiff to compensate the defendant by way of send off with the sum of ¢1,200,000.00" Ref. Pages 42, line 45 and 43 lines 1-8 of the appeal record.

3. On custody of the children the court grant granted joint custody to the parties, with an order that the children stay with their mother the defendant during school term and with their father, the Plaintiff during holidays. Ref. Page 43-33 of the appeal record.

4. On the substantive issue of recovery of possession the court ordered as follows :-

> "I hereby order the defendant to vacate the room by 31st of December, 2003". Ref. Page 44 lines 20-21 of the appeal record.

Aggrieved and dissatisfied with the said judgment, the Defendant then appealed to the High Court, Sekondi on the following grounds of appeal.

1. The financial provision awarded was meager, taking into consideration the circumstances.

2. Additional grounds will be filed upon receipt of the record of proceedings.

No additional grounds were added, and the High Court, Sekondi on 23rd July, 2004 delivered Judgment in favour of the Defendant in the following terms:

1. "In the circumstances I will order the respondent (i.e. the plaintiff) to pay to the appellant (i.e. Defendant) the sum of five million cedis to secure alternative accommodation. The appellant will have three months from the date of receipt of the money to vacate the present premises"…..Ref page 62, of the appeal record.

2. "In addition to the provision of alternative accommodation I will order the respondent to pay to the appellant ¢5,400,000.00 as part of the financial provision. Also subject to the appellant's right to apply for increment with the years the respondent will continue to provide the ¢100,000.00 a month as maintenance to the children until they reach age 18. This will be in addition to payment of school fees and provision of school uniforms. Since the respondent herself is an income earner, she will take charge of

> the other needs of the children. The appeal is allowed and the financial provisions of the Court below varied accordingly". Page 64, of appeal record.

This is the Judgment that has been appealed against by the Plaintiff to this Court. We have already referred to the grounds of appeal that have been filed and argued before us in this Court.

It will be seen that, whilst grounds 1, 2 and 3 supra all dealt with the awards that were made by the Learned High Court Judge, it is only ground 4, which dealt with the wrong evaluation of evidence led by one Abubakari Gariba described therein as PW2.

We will therefore deal with the issues raised in grounds 1, 2 and 3 of the appeal as one ground.

We have read the statements of case submitted by both Learned Counsel in this case.

However, before we proceed with the determination of this appeal, a preliminary issue raised by learned Counsel for the Plaintiff, Mr Eustace Haizel, has to be considered in some detail.

Mr. Haizel has contended that, under section 41(2) of the Matrimonial Causes Act, Act.367 a party who seeks the provisions of the Law must have done so by application to the court. Learned counsel therefore contended that once there was no such application before the court for provisions of the Matrimonial Causes Act to apply, the awards made by the District Court and the High Court are all wrong and therefore not justified.

On his part, learned Counsel for the Defendant, Mr. Kofi Diaba submitted that there is nothing in the Matrimonial Causes Act, Act 367 to merit the type of interpretation being put on it by the Plaintiff.

Under the circumstances, the only useful exercise to undertake is to consider the provisions of the law itself vis-à-vis the procedure adopted in the instant case.

Section 41 (2) of the Matrimonial causes act, Act 367 provides as follows:-

"On application by a party to a marriage other than a monogamous marriage, the Court shall apply the provisions of this Act to that Marriage, and in so doing, subject to the requirement of Justice, equity and good conscience, the court may,

(a) Have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements.
(b) Grant any form of relief recognized by the personal law of the parties to the proceedings, either in addition to or in substitution for the matrimonial reliefs afforded by this Act."

By the clear provisions of the section, it is meant that any party to a marriage other than a monogamous marriage can take advantage of the provisions of the law. An undisputable fact is that, the marriage contracted by the parties in this case is customary marriage, which is a form of marriage that is potentially polygamous and therefore not monogamous.

It therefore means that, that form of marriage qualifies the parties to come under the provisions of section 41(2) of Act 367.

Again, it must be noted that, the relevant words read as follows :-
"on application by a party."

How does one apply in order to qualify to invoke the provisions as stipulated in the law.

What this means is that a party in order to be entitled to invoke the provisions of the law must take steps indicating that provisions or reliefs envisaged in Act 367 are being applied for.

In the instant case, we must not lose sight of the fact that the action was initially commenced in the District Court, Sekondi, from where it has traveled up to the Court of Appeal

The recognized methods of initiating actions in the District Court are the following:-

(1) Writ of summons and this is always upon application by a party to the Court, whereupon the writ of summons is issued. In some instances, the Defendant upon being served with the writ of summons also applies for a counterclaim. This is also upon application to the Court.
(2) Motion and this could be Ex-parte or by Notice.

In the present case, there is no doubt that the Defendant applied to the court for leave to issue a counterclaim in terms already referred to supra. Ref. Page 11 lines 12 to 20

There is also a notation on page 13 lines 10-13 indicating that the District Court, Sekondi on 3rd September, 1999 granted leave to the defendant to counterclaim against the plaintiff as per the counter claim filed by the defendant.

The effect of all these processes is to be taken as enabling the defendant to take advantage of the provisions of Act 367. This is because all the reliefs under the counterclaim are cognizable under section 41(2) of the Matrimonial causes Act, Act 367. i.e. dissolution of Marriage, custody of children and financial provisions to be made in favour of the defendant.

We are therefore of the opinion that, once the defendant clearly invoked procedure that is cognizable and recognized under the rules applicable in the district court, a valid

application had been made pursuant to the Matrimonial Causes act, Act 367, section 41 (2) which enabled the court to have made a valid and justifiable order therein.

In the absence of any clearly stated, defined and circumscribed procedure for invoking applications under section 41(2) of Act 367, it should be taken as sufficient the steps embarked upon by the defendant in this case – See Minister of Home Affairs vrs. Fisher & Anor [1979] 3 A.E.R.21, (2) Peoples Popular Party vrs. Attorney General [1971] 1 GLR.138, per Hayfron-Benjamin where he held as follows, holding 1.

> "Where a statute, in this case the Constitution article 28(2) provides for an application to the court without specifying the Form in which it is to be made and the normal rules of court do not expressly provide for any special procedure, such an application may be made by an originating motion"

To that extent, the preliminary issue raised by the Learned Counsel for the Plaintiff, Mr. Haizel is hereby dismissed, since the steps taken by the Defendant in this case amply satisfy what was required of her.

Having held that the defendant validly applied to the court for the financial provision to be made in her favour, let us consider the evidence that has been led in support of the case.

On page 21 lines 21-23, of appeal record are the first impressions of what the financial encumbrances of the parties in this case are likely to be.

PW1 Atta Hussein, testified that the defendant demanded compensation of ¢1,200,000.00 but the plaintiff offered ¢100,000.00 which he later raised to ¢150,000 and was alleged to have paid through the defendant's counsel.

By far the most cogent and direct evidence on the financial provisions came from the defendant herself. On page 20, lines 5-8 the defendant testified in chief as follows :-

"The plaintiff has not been maintaining me since he left. Before that, he was giving me between ¢15,000.00 and ¢20,000.00 a day."

The defendant thereafter reiterated the fact that she was claiming as per her counter claim and denied the allegations of adultery against her.

It must also be noted that the plaintiff did not deny the evidence of the defendant to the effect that before the impasse between them which led to the breakdown of the marriage, the plaintiff was maintaining her at the rate of ¢20,000 per day.

Again, there is evidence from the Social Enquiry Report, page 33 to 36 of appeal record that it was only quite recently, infact four [4] months that the plaintiff increased the feeding grant of the two infant children from ¢50,000 to ¢100,000 per month. This seems to tally with the defendant's counterclaim that since the breakup of the marriage, the plaintiff has not been maintaining her and the children.

The Law is fairly well settled that it is the responsibility of both parents to cater for their infant children. Where both parents, as in the instant case are all working in the informal sector, it is difficult to determine exactly what their income levels are in order to fix their levels of responsibility towards the children

In this case, no evidence whatsoever has been led to give an inkling of the income levels of the parties save what is contained in the Social Enquiry Report about the defendant that she earns ¢150,000 net from her bread sales. The report is however silent as to whether this amount is daily, weekly or monthly. Under the circumstances that part of the report is of no use in determining the issues germane to this case.

There clearly does not appear to be any sound and acceptable basis for the trial District Magistrate's award of ¢1,200,000.00 compensation to the defendant. What must be noted is that, the said figure was what was mentioned by PW.1 as the defendant's figure.

This PW.1 although claimed to have stood in loco parent is for the defendant during the marriage of the defendant, infact, testified for and on behalf of the plaintiff. The plaintiff himself did not testify on this very material evidence and the defendant did not testify either. Instead, she stated that the plaintiff used to maintain her and the children at the daily rate of ¢15,000 or ¢20,000 already referred to supra.

It appears the trial Magistrate was carried away by the role PW.1 played during the marriage of the parties to accept his evidence on the matter as a fact.

On the contrary, this court is of the view that the analysis by the learned High Court Judge on the daily maintenance rates of the defendant and the children makes more sense, is sound and in consonance with present day economic realities.

We will therefore confirm the award of ¢5,400,000.00 which the learned High Court Judge ordered the plaintiff to pay to the defendant.

In coming to this conclusion, we have not lost sight of the fact that no findings were made on the earning capacities of the parties.

However, the fact remains that both parties are working and the plaintiff is reputed to be a khebab seller as he himself testified. Again from the Social Enquiry Report, it is evident that the Plaintiff has been able to build some Zongo type of Houses in which he lives with his other wife and children. Infact, the house described as a rented room for the defendant is reputed to belong to the Plaintiff as well.

In view of the above, we are of the opinion that there was sufficient evidence on record upon which the learned High Court Judge could have made his award.

This court is also of the view that the award of ¢5,000,000 to defendant to enable her secure alternate accommodation is sound and should not be disturbed.

In respect of the other awards on maintenance, we think that the monthly maintenance allowance of ¢100,000.00 for the two children is woefully inadequate in view of present day economic factors.

Rules 8[1] of Court of Appeal Rules 1997, C.I. 19 states that any appeal to the court shall be by way of re-hearing. We will therefore consider this appeal as re-hearing and vary some of the awards accordingly.

We have accordingly taken judicial notice of the present day economic realities and will enhance this amount to ¢200,000.00 monthly. This is to ensure that the interest's and welfare of the children are adequately catered for. This is the only way effect and meaning can be given to sections 2[1] and [2] of the children's Act, 1998 Act.560.

The Plaintiff will also continue to be responsible for the payment of the school fees, school uniforms and provision of other school materials as well as medical care of the children until they are of age, that is 18 years when still in school or undergoing some form of training. See sections 53 and 54 of the Children's Act, 1998 Act 560.

We now come to the last ground of appeal. This is to the effect that the learned judge erred when he indicated that the trial judge was wrong to have considered the evidence of PW.2 Abubakari Gariba.

From the appeal record, it is clear that the suit in this case was filed on or about 4th November 1998. PW.2 Abubakari Gariba, testified in court on 28th May 2002, almost three and half years after the suit was filed.

In answer to a question during cross-examination, PW.2 stated that the incident he referred to in his evidence in chief happened about a year now. What was this evidence? PW.2 testified that on an occasion, the plaintiff invited him to accompany him to the defendants room and when they went, he claimed to have seen the defendant sitting on

the lap of another man. On seeing the incident, according to PW. 2, the plaintiff wanted to react, but he advised that, once the case was already in court, he should exercise patience.

What should be noted is that, it is therefore clear that the case was in court before the said incident happened, if at all.

Secondly, the plaintiff himself in his testimony never mentioned the said incident, let alone mention the PW.2 as ever accompanying him to the defendant's room in the night.

Thirdly, PW.2 is only a witness supposed to buttress the evidence of the party who called him.

For example, even though PW.2 is by virtue of sections 58 and 59 of Evidence Decree, 1975 NRCD.323 a competent witness, it appears sufficient introduction has not been laid for him to have given the type of evidence he led.

Section 60[1] of the Evidence Decree NRCD.323 provides as follows:-

> "A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter".

We are also aware of the provisions contained in 60 sections [2] and [3] of the same Evidence Decree which permit evidence to be led with or without such an introduction of personal knowledge.

However, it is our considered view that the nature of the evidence which PW.2 put in the public domain were such that the plaintiff whom he alleged was the person who invited him to accompany him to his wife's residence ought to have led an introductory evidence by which the said PW.2 would then be deemed to have had sufficient personal knowledge.

This is especially crucial as can be seen from the testimony of the plaintiff that he mentioned the name of one KOJO with whom he once went to the residence of the defendant in the night but met her absence.

Since PW.2 himself introduced the plaintiff as the source of the evidence, the failure by the plaintiff to have led such an evidence which would have formed the basis for the supporting evidence to be led by PW.2 is fatal.

Aside this, once the case was already in court, conduct which occurred during the pendency of the suit should not be taken into consideration the way the learned trial Magistrate did.

Further more, we must not lose sight of the fact that the sole relief which the plaintiff claimed before the court was for recovery of possession of rooms rented for the defendant.

The plaintiff never claimed for divorce and never made adultery as one of the grounds why the marriage had broken down. The trial magistrate was clearly in error when he sought to read deep meanings into the careless and unsubstantiated evidence of PW.2 on the matter.

Our view of the matter is that the learned High Court Judge was right when he held that the evidence of PW.2 on this matter should not have been considered.

On the whole therefore, the appeal fails and is accordingly dismissed.

Save for the variation in the monthly maintenance awards from ¢100,000 to ¢200,000 the orders of the High Court Judge, Sekondi are affirmed.

**J. DOTSE**
**JUSTICE OF APPEAL**

AKAMBA, J.A.:- I agree.

**J. B. AKAMBA**
**JUSTICE OF APPEAL**

**APALOO, J.A. :-** I also agree.

**R. K. APALOO**
**JUSTICE OF APPEAL**

Mr. Kofi Diaba for Defendant/Respondent.

Mr. E.K.S. Haizel for Plaintiff/Appellant.

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