IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL

CORAM - OWUSU ANSAH [PRESIDING]
PIESARE, JA
APALOO, JA

HI/207/2005
3RD NOVEMBER, 2006

JANET OWUSUA …. PETITIONER/APPELLANT/RESPONDENT

V E R S U S

THEOPHILUS AKOTUA … RESPONDENT/RESPONDENT/APPELLANT

J U D G M E N T

APALOO, JA - This is an appeal and cross appeal from the decision of the High Court Koforidua presided over by Marful-Sau J. The judgment is dated 30th July 2004.

The facts and area of contention are simple and straightforward. The parties were married under customary law on 9th September, 1984 at Moseaso Akyem in the Eastern Region. They had one issue and at the time of the petition was aged 16 years. The Petitioner alleged that the respondent committed adultery and for which reason she refused to have anything to do with him. The marriage broke down beyond reconciliation and accordingly this suit for divorce and consequential reliefs were brought at the instance of the Petitioner.

Marful-Sau J in a well reasoned judgment granted the relief for divorce but refused the claim that Petitioner had interest in the matrimonial home constructed during the early stages of the marriage. The court however ordered that a vacant piece of land owned by the respondent be given to the Petitioner in addition to a lump sum of ¢10.0 million. The Petitioner being dissatisfied by the award appealed to this court. The respondent also cross appealed.

The first ground which was common to both appeals was similar ie. the judgment being against the weight of evidence. Whereas the Petitioner's position was that the lump sum of ¢10.0 million was inadequate the respondent was of the view that the trial

Judge erred in law when he granted the piece of land to the Petitioner in the face of the evidence that the land was acquired by both parties. No additional grounds were filed by the two appellants.

I have no doubt in my mind that where an appellant contended that a judgment is against the weight of evidence, he assumed the burden of showing that it was in fact so. The Supreme Court in **Bonney Vrs. Bonney {1992-93} GBR 779** reiterated that position and went further to state that

> "…….An Appeal Court ought not under any circumstances interfere with the findings of fact by the trial judge except where they were clearly shown to be wrong, or the judge did not take all the circumstances and evidence into account or had misapprehended some evidence or had drawn wrong inferences without any evidence in support or had not taken proper advantage of his having seen or heard the witness."

The case of **Zanyo Vrs. Fofie** {1992-93} GBR 1353 delivered by the Supreme Court is explicit about the function and role of the appellate Court. The view of the Supreme Court is that:

> "Where a trial judge arrives at a conclusion based on the advantage of seeing and hearing witnesses at first hand, the appellate court should be very slow to form a contrary view….{the appellate court} reviewing the exercise of discretion by a lower court should not interfere unless the court below had applied wrong principles in arriving at the result or taken into account matters which were irrelevant in law or had excluded matters which were crucially necessary for consideration, or had come to conclusion which no court properly instructing itself on the law could have reached."

In respect of the acquisition of the matrimonial home, the trial judge made certain findings of fact which went to the root of the petitioner's claim concerning her interest in that house. It was the finding of the court below that by evidence the petitioner established that;

(1) She arranged for documentation of the land on which the house was built.

(2) She was visiting at all times the building site and cooking for the workers.

(3) She at all times accompanied the Contractor to buy building materials so as to ensure accountability.

(4) The Petitioner was representing the respondent in court when litigation arose on the land on which the building was constructed.

There is no doubt that these services rendered by the Petitioner during the construction of the house were very essential in the life of a family as also found by the judge, but the court went further to conclude that these services did not crystallize into a share or interest in the property.

Counsel for the Petitioner had argued that the court below misunderstood her claim for a declaration that the "the Petitioner be declared as having an interest in the property known as House No. ADW 271/A Adweso – Koforidua." He argued that the prayer was not the same as a claim for settlement of property rights as found by the trial judge. What the Petitioner sought, according to counsel was for a declaration that the petitioner had an interest in the property, be it legal, equitable or beneficial. Counsel insisted that if the court found as a fact that the petitioner catered for the home whilst the respondent built the house, then the petitioner could be said to be a beneficial owner of the property and then, the court would be enjoined to take that into consideration in making a financial provision for the petitioner.

I find counsel's submissions to be quite illogical and the conclusion preposterous. The trial judge no doubt found as a fact that the petitioner catered for the home as well as doing certain extra things in aid of the respondent during the construction of the building. These activities according to the trial judge did not crystalise into a share or interest in the property. Interest in law means "A legal share in something; all or part of a legal or equitable claim to or right in property." This is the meaning of interest as defined in Black's Law Dictionary, 7th Edition.

The law as it is now, does not recognize the activities of a spouse such as currently under consideration, to mature into any interest whether legal, equitable of beneficial in the construction of a matrimonial home.

As noted by the trial judge if the courts are at liberty to quantify domestic service and other activities performed by a spouse in the acquisition of property into monetary

equivalence outside legislation, there will be judicial chaos in matrimonial suits. The current legal position no doubt appears to be that such spousal domestic services however important they are, cannot amount to a contribution by the other spouse in a property solely funded by the other.

Having recognized this lacuna in our law the framers of our 1992 Constitution by Article 22 provided as follows:

Art. 22(2) Parliament shall, as soon as possible after the coming into force this Constitution, enact legislation regulating the property rights of spouses.

Article 22(3) With a view to achieving the full realization of the rights referred to in Clause (2) of this article;

(a) Spouses shall have equal access to property jointly acquired during marriage;

(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage;

As observed by the trial Judge, Parliament has not been able to enact the appropriate legislation on the matter and therefore "without any legislation, domestic services rendered by wives will continue to lack the commercial value they deserve."

What then is the prayer of the Petitioner in the court below? The trial Judge found that by law the Petitioner's prayer was for the court to settle her property rights as regard to the acquisition of the matrimonial home. The two current cases on the subject were fully analysed by the trial judge after having come to the conclusion that the issue is governed by Section 20 of the Matrimonial Causes Act, Act 367 which I reproduce hereunder;

> "S. 20(1) The court may order either party to a marriage to pay to the other party such sums of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof as part of financial provision as the court thinks just and equitable."

Counsel for the cross-appellant interpreted Section 20(1) supra, as giving the court power "to do one of two things ie. to pay a sum of money **or** convey to the other party movable or immovable property **and** not both. For his authority counsel cited the

Supreme Court case of **Ribeiro Vrs. Ribeiro {1989 – 90} GLR 88** where Wuaku JSC (dissenting) said that;

> "In my opinion it would be wrong to construe Section 20(1) to mean that the court may order either party of the marriage to convey movable or immovable property to the other party as to give title to the beneficiary independent of financial provision. The rule of construction to be applied in S. 20(1) ……is the cardinal rule that words are to be construed in their natural and grammatical sense. The word "or" in the section must be read as disjunctive and not as "and"…….this section shows that the court cannot under Section 20(1) order a party to convey title."

Wuaku JSC's dissenting dicta is profound and fundamental to property settlement under the Matrimonial Causes Act. The learned Supreme Court Judge appears to be saying that under S. 20(1) the court cannot order a party to convey property in addition to an award of any sum as part of financial provision.

The majority decision read by Amua Sekyi JSC (as he then was) was emphatic that the opposite view was the correct law. In his words the Judge stated that:

> "[The words used in the Section] satisfy me that not only is there power to vest immovable property as settlement of property rights, or in lieu thereof, but as part of financial provision."

Obviously the preferred view of Section 20(1) is the majority view with respect to Wuaku JSC. An attempt by our courts to apply the dissenting view will no doubt lead to a judicial limitation of the courts powers conferred by Section 20(1) of the Matrimonial Causes Act.

It is my view therefore that the trial judge acted within the purview of the law when he awarded the lump sum in addition to the order that the piece or parcel of land be conveyed to the Petitioner.

The question of ownership of the undeveloped piece of land was settled by the trial judge by evidence and his finding of fact on the issue. He indeed noted that the conveyance to the Petitioner was to be part of the financial provision awarded to the petitioner and as already discussed that award is legitimate.

The trial judge took the opportunity to discuss fully the misconceptions associated with the decisions in **Achiampong Vrs. Achiampong {1982 – 83}GLR 1017** and **Ribeiro Vrs. Ribeiro** (supra). It will be instructive to quote at length the reasoning and conclusions of the judge.

He stated as follows:

> "In Ribeiro Vrs. Ribeiro (supra) the argument put up by counsel for the husband was that since the wife failed to prove that she contributed substantially to the acquisition of any of the ten houses, it was wrong for the trial court to award the wife a house. Counsel for the husband relied heavily on the Court of Appeal decision in Achiampong Vrs. Achiampong (supra). In that case the Supreme Court……..held that the trial court had power to make the award it made under Section 20(1) of Act 367. The Court found and held that the principle in **Achiampong Vrs. Achieampong** that, a spouse will have to prove substantial contribution to be entitled to a declaration of joint ownership did not apply in the **Ribeiro Vrs. Ribeiro** case because in that case the wife prayed only for financial provision and accommodation. The wife did not claim to be declared a joint owner in any of the houses on the basis that she had contributed."

Again arising out of the decisions in the two cases certain principles emerged as case law in Ghana and he proceeded to summarise the applicable principles as follows:-

1. Where a party to divorce proceedings seeks a prayer for the settlement of property rights, the court is then called upon to determine the share in any property which belongs to one or the other…… under this head the question of contributions of either party substantial or otherwise towards the acquisition of the property is relevant.
2. Where a party…….seeks financial provision, the court in making the award could also order the conveyance of a property from one spouse to the other depending on the justice or equities of the case. This can be awarded, in addition to financial provision or in lieu of

financial provision. The award under this does not depend on contributions of the party whether substantial or otherwise. The only guiding principle is justice and equity."

Having applied the above principles to the instant case the trial judge cannot be faulted for his decision. The regularity in which the two cases are cited by counsel in matrimonial causes and the diverse opinions expressed as to their application will no doubt come to an end when these principles are critically examined.

The appeal against the award of ¢10.0 million as financial provision deserves to be considered. The amount is said to be inadequate. It is the view of the appellant that having regard to the various findings of fact made by the trial judge particularly that, the parties have been married for over 18 years and that the petitioner until the break down of the marriage had rendered invaluable service to the respondent both domestic and otherwise, the amount is inadequate on the balance of the equities and the justice of this case.

After carefully considering this ground of appeal and Rule 8(1) of the Court of Appeal Rules C.1. 19 which notes that an appeal is by way of a re-hearing, I shall consider this appeal as a re-hearing and vary the award as the amount is woefully inadequate in view of present day economic factors or trends. The purchasing power of ¢10,.0 million today cannot be seriously contested. The award will accordingly be varied in view of the facts and the evidence peculiar to this case. It is accordingly ordered that the respondent shall pay to the petitioner the lump sum of ¢15.0 million to enable her resettle in life. All other orders made by the lower court remain undisturbed. To that extent the appeal partially succeeds and the cross-appeal fails.

R.K. APALOO
JUSTICE OF APPEAL

I agree. **P.K. OWUSU ANSAH**
JUSTICE OF APPEAL

I also agree. **E.K. PIESARE**
JUSTICE OF APPEAL

STEPHEN ASANTE BEKOE, ESQ., FOR KWASI AMOAKO ADJEI, ESQ., FOR PETITIONER/APPELLANT/RESPONDENT.

R.B.K. ABOAGYE, ESQ., FOR RESPONDENT/APPELLANT.

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