CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 12TH JANUARY, 2023

SUIT NO. C5/16/22

STEPHEN MENSAH - PETITIONER/RESPONDENT

VRS

JULIET GIFTY ATTOH - RESPONDENT/APPLICANT

JUDGMENT

On the 20th day of September, 2013, this Court differently constituted entered a decree of dissolution to dissolve the marriage celebrated between the parties herein on the 6th day of May, 1992. Almost five (5) years later, the respondent therein filed this instant application for ancillary reliefs with leave of the Court. It is premised on ***order 65 rule 23 of the High Court Civil Procedure Rules, (C.I.47).***

She deposed that in the course of their marriage, they acquired two houses; house number S 31, Community 8, Tema and a house located at Newland Afienya. That the petitioner stopped working during the subsistence of the marriage and she made all financial provision for the upkeep of the home.

That she solely paid for house number S.31 when TDC offered same for sale as the respondent was not working at the time. That she made renovations to the property and built more rooms in addition to the original rooms.

That the respondent acquired a piece of land at Afienya during the subsistence of the marriage and built on same whilst she used her money to run the house.

She prayed the court to grant her the sum of fifty thousand Ghana cedis (Ghs 50,000) as financial provision and share the two houses acquired in the course of the marriage equally.

The respondent opposed the application and filed an affidavit setting out the full particulars of income, assets and liabilities. He deposed that he acquired the house at community 8 from his own resources under a hire purchase scheme. That he paid by instalment from 1998 to 2001. That the house at Afienya is a rented premises which he pays an annual rent of three thousand, six hundred Ghana cedis (Ghs 3,600) for.

Further that he is a former employee of VALCO, now on pension and he earns four hundred Ghana cedis (Ghs 400) a month as pension pay. That he also receives a pastoral allowance of two hundred Ghana cedis (Ghs 200) a month thus making his yearly income seven thousand, two hundred Ghana cedis (Ghs 7,200). That he owns an Opel Omega vehicle which registration number GT 3238-S.

That he pays two hundred Ghana cedis (Ghs 200) per month as utilities making an annual total of two thousand, four hundred Ghana cedis (Ghs 2,400). That be buys fuel and pays medical fees of four hundred Ghana cedis (Ghs 400) each per month making a total of nine thousand, six hundred Ghana cedis (Ghs 9,600). That he now lives by the grace of God.

The applicant in setting out her income said she is a medical technologist who earns an income of USD 1,200. She set out her expenditure as totaling USD 1040. She did not indicate whether the said income and the expenditure were yearly or monthly.

The issues for the court to determine are;

1. Whether or not the parties acquired two houses in the course of their marriage
2. Whether or not same should be shared equally between them
3. Whether or not the applicant is entitled to financial provision of fifty thousand Ghana cedis (Ghs 50,000).

THE CASE OF THE APPLICANT

The case of the applicant is that she and the respondent married under customary law in 1978 and under the ordinance in 1992. After their marriage, they cohabited in the respondent's house at community 8 which he was then renting.

That in 2013, the respondent obtained a divorce of their marriage without notice to her whilst she was in the U.S.A. That in the course of their marriage, the respondent who was a worker with VALCO retired voluntarily in 1987 and left the maintenance of the home solely to her.

That she sold empty bottles, palm kernel and later had a shop from a friend and used the proceeds to maintain the home. That when their matrimonial home became available for sale, she paid for same under hire purchase. That she obtained a loan for that purpose. Before then, she was the one responsible for paying the rent of the matrimonial home.

That when she asked the respondent to have the documents covering the house changed into their joint names, he said it was not necessary. Further that she and the respondent later acquired a house in Afienya which forms part of the matrimonial property. She called one witness. Applicant attorney and the witness tendered in evidence EXHIBIT A, B and C series.

THE CASE OF THE RESPONDENT

Respondent's case is that he was a worker of VALCO until 1987 when he voluntarily retired. That he made provision for his retirement and set up a company by name Mensbro Castings. That he also had vehicles which worked commercially and the applicant received the proceeds to manage the home.

Further that he acquired the matrimonial home solely without any contribution from the applicant who did not mostly work in the course of their marriage. That he maintained the home and the applicant.

He continued that upon the orders of the Court, the applicant was served with the divorce petition in the U.S.A but she failed to appear in Court and the Court accordingly decreed a dissolution of their marriage.

Also that he has not acquired a house in Afienya. That although he lives there with his new wife, it is rented premises. He is currently on pension allowance and also receives allowances from his church where he is a pastor.

That he no longer runs the company and neither does he work with any lathe machine. He called no witness and tendered in evidence EXHIBIT 1,2,3,4,5,6,7 and 8 series.

CONSIDERATION BY COURT

I would consider issues one and two together.

1. Whether or not the parties acquired two houses in the course of their marriage
2. Whether or not same should be shared equally between them

The Supreme Court in reliance on ***Article 22 of the 1992 Constitution*** has held that any property acquired by spouses during the course of their marriage is to be presumed (rebuttably) to be jointly acquired. In other words, property acquired by the spouses during marriage is presumed to be marital property unless contrary evidence is led. See the case of ***Arthur (No 1 v. Arthur No 1) [2013-2014] SCGLR 543, Vol. 1*** which re-affirmed the decision in the oft cited case of ***Gladys Mensah v. Stephen Mensah [2012] 1 SCGLR 391*** in which the veritable Dotse JSC in delivering the judgment of the court, gave effect to the provision in ***Article 22 of the Constitution, 1992***.

The principle to be applied in the distribution of marital property is that of equality is equity. See the majority decision in the Supreme Court case *of* ***Peter Adjei v. Margaret Adjei [Civil Appeal No.J4/06/2021) delivered on the 21st day of April, 2021***. *Pwamang JSC* in reading the majority decision held that "property acquired by spouses during marriage is presumed to be marital property. Upon dissolution of the marriage, the property will be shared in accordance with the "equality is equity'' principle except where the spouse who acquired the property can adduce evidence to rebut the presumption''.

In order for the equality is equity principle to be applied, a party must first lead evidence to establish that the property(s) in question is matrimonial property.

There is no dispute that the house at community 8, Tema was the matrimonial home of the parties and same was acquired during the subsistence of their marriage. This was after the parties had lived in same from the inception of their marriage as rented premises around 1980 or thereabout until they purchased same on hire purchase in the year 2002.

The offer to purchase was made to the respondent and the documents covering the house are in his name. Applicant says she paid for the house but the documents were prepared in respondent's name whereas the respondent denies and says he paid for same. The law is settled that it is he who asserts who bear the burden of proof.

In the case of ***Ankomah v. City Investment Co. Ltd. (2008) 19 MLRG 83; (2013) 43 MLRG 36,*** Dotse JSC decided: "*It is a cardinal rule of evidence that whoever asserts must prove. In other words the burden of proving an assertion is on the person who makes the positive*." See the case of ***In Re Wa Na; Issah Bukari & Anor. v. Mahama Bayong & Ors. [2013-2014] 2 SCGLR 1590 at holding 2.***

Such proof in law, was succinctly discussed in the case of ***Emmanuel Osei Amoako v. Standford Edward Osei [2016] DLSC 2830.*** The venerable Appau JSC speaking for the Supreme Court held: *"It is trite learning that a bare assertion by a party of his pleadings in the witness box without more is no proof. Proof in law has been authoritatively defined as the establishment of facts by proper legal means. As the celebrated Ollenu, J (as he then was) stated in his judgment in the case of Khoury and Another v Richter, which he delivered on 8th December 1958 (unreported), on the question of proof, which he repeated in the case of* ***Majolagbe v Larbi & Anor [1959] GLR 190 at 192****; "where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things,*

reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true …". See also the cases of ***International Rom Ltd. v. Vodafone Ghana Ltd. & Another [2016] DLSC 2791***.

Applicant claimed that she acquired the matrimonial home which the respondent had been renting since 1970 when same was offered for sale in the 2000's. Her evidence is that she paid fully for the cost of the house through a loan she contracted. At page 21, 25 and 26 of the record of proceedings, her attorney had answered *under cross examination:*

Q: *I put it to you that he took occupancy of the said house as a rented unit in 1970.*

A: That is so.

Q. I put it to you that it is not true that the applicant purchased house no. S/31/ Community 8.

A. Not correct. My principal procured a loan to buy the house and there are documents to that effect.

Those documents were tendered in evidence by PW1 as EXHIBIT C and C1. They are booklets of the North Tema Co operative Credit Union Limited. The entries for EXHIBIT C are from November, 2009 till December, 2009. Those for EXHIBIT C1 are from 1999 to 2007.

Under vigorous cross examination by learned counsel for the respondent, it became evident that EXHIBIT C series are evidence of loans that the applicant contracted long after the matrimonial home had been paid for. For EXHIBIT C, some of the periods of the loan contracted were for the period when the house was being paid for but the

booklet indicated that the loans were paid off in little time. PW1 finally had to admit that the applicant paid part and not all of the amount used in acquiring the matrimonial home.

At page 62 of the record of proceedings, PW1 had answered;

Q: I put it to you that if rent from the new house was being used to pay for the old house, then by the time the old house had been paid for, the new one must long have been ready.

A: She is not saying she paid entirely for the old house but she paid for part and the receipts have been given to the lawyer.

Although the applicant had sought to put across the case that the respondent was not working when he came on pension and so she had to maintain the home and also pay for the house, she appeared to be inconsistent with her evidence.

On one hand, the respondent was not working as he was on pension and so she had to pay for the matrimonial home from 1998 until she completed payment, on the other hand, he was working as he had established a company with which he acquired contracts from Unilever and other companies and on the other hand, more than twenty (20) years after the respondent had retired, they agreed that he would use proceeds of his business to acquire the house at Afienya whilst she maintained the home. That she also supported the respondent to acquire lathe machine to work.

At page 30 of the record of proceedings, applicant attorney had answered;

Q. In 2011, was the respondent on pension or not.

A. He was on pension.

Q. So, you want this court to believe that the respondent on pension had enough money to purchase land and a house but when he was working, he did not have money to purchase the house in dispute in Community 8.

A. He came on pension before the first house was bought. The first issue of the marriage was born in 1980.

Q. When did the respondent go on pension?

A. He came on voluntary retirement in 1988/1989.

The matrimonial home was acquired in 2002. At the time, per the letter from TDC, the purchase price had been fully paid for. According to the respondent, the payment was made between 1998-2001. The applicant does not dispute this. The question is if the respondent was unable to pay for the matrimonial home between 1997-2001, then how was he able to pay for a new house from the Korang's in 2011?

Respondent on his part says that he acquired the matrimonial home solely and same cannot be shared equally between him and the applicant. He tendered in evidence various exhibits indicating that he paid for the cost of the house and at the time although he was retired, he was the managing director of Mensbro Castings and was earning money from that business. He also testified that he had some vehicles which were working commercially for him during the period and so he was in a position to pay for the matrimonial home.

His evidence is that he paid for the said house between 1997 and 2001. He tendered in evidence EXHIBIT 2 which is an offer letter from TDC and addressed to him dated the 8th day of February, 2002. It indicates that he made an application to purchase the house in October 1997. The selling price is 3,600,000 cedis which he had already paid vide three receipts of payments dated between 1998 to 2001.

Prior to that, he had made various extensions to the house with the consent of TDC in 1994. He tendered in evidence EXHIBIT 2A which is a TDC approval plan for him to extend the house and construct a fence wall. It is dated 14th March, 1984.

At the time, he and the applicant were married. They had five (5) children including their step children between them and the applicant was responsible for taking care of them. Indeed, even after the respondent came on retirement, from his evidence which the applicant corroborates, he established a company and also went to Bible School to become a pastor. According to him, at the time, their first child had just turned a teenager. Thus even on retirement, he still left the running and maintenance of the home alone to the applicant.

That means the applicant created a peaceful, convenient and reliable atmosphere at home that allowed him to go about his business and lead his life the way he wanted because she kept the home and the children and he did not have to bother about that. Under cross examination by learned counsel for the applicant, he had admitted that the applicant provided him with the necessary moral support. In that stead, whatever property he acquired during the period would be deemed as jointly acquired property.

DOTSE JSC put it succinctly in the ***Mensah v. Mensah case (Supra)*** and which counsel for the respondent refers to same in the conclusion of his written address "a person who is married to another, and performed various household chores for the other partner…must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved''.

From the evidence, I find that the parties herein celebrated their customary marriage sometime between 1978-1980. Prior to that, the respondent was living in the matrimonial home which was rented property. Thus upon their marriage, they lived in same as their matrimonial home. In 2002, the said house was leased to the respondent by the TDC for a period of 80 years. He and the applicant were still married. It was in 2013 that their marriage was dissolved. The matrimonial home is thus a jointly acquired property of the marriage.

Now that they are divorced, the principle to be applied in the distribution of the said matrimonial property is the equality is equity principle. I find that the parties are entitled to an equal share of the matrimonial home. Each has a 50% interest in house no. S/31, Community 8, Tema. Each party has the option of first refusal.

With regard to the second house at Newland Afienya, the applicant's claim is that same was acquired by the respondent in the course of their marriage whilst she used her resources to maintain the home. The respondent denies that he acquired same at all. His claim is that it is rented premises which he rented after the applicant attorney and his son prevented him from living in the house at community 8 with his new wife. He tendered in evidence EXHIBIT 5 which is a receipt evidencing the payment of rent for the said property.

The burden of proof laid on the applicant to lead evidence to establish that indeed the said house was owned by the respondent. She failed to lead any evidence in proof of same. Her attorney simply repeated her assertions on oath. She failed to testify of any fact or facts from which the court could safely infer the existence of her claim. For instance, at page 30 of the record of proceedings, she answered under cross examination by learned counsel for the respondent:

Q. *I put it to you that the respondent is currently living in a rented property and the property is owned by Mr. and Mrs. Appiah Korang.*

A. *That is so. We know Mr. and Mrs. Appiah Korang and we are good friends. They owned the land on which the house is situated at the time there was only one room at the time. They later decided to sell it and so the respondent acquired same. He has now added another room to the structure and lives there with his new wife and her children.*

Q. *So what were you agreeing to when you said that the house belongs to Mr. and Mrs Appiah Korang.*

A. *Mr. and Mrs. Korang are the owners of the house but respondent is not a tenant in same.*

Q. *How much did respondent buy the property from the Appiah Korang's.*

A. *I cannot tell. It is my principal who can say but even if that, she left soon after they began the process of acquiring it.*

Q. *In which year was the property purchased by the respondent.*

A. *I cannot tell but he left to that property in 2011. It was a single room and at the time, the applicant was not in Ghana.*

Q. *Was respondent working in 2011or he was on pension?*

A. *Even before my principal left Ghana, the respondent was working. He was taking contracts from Unilever /Lever Brothers.*

The applicant simply repeated her assertions. PW1 who is applicant's sister muddied the waters more when she insisted indeed cross examination that the applicant and respondent had jointly acquired a piece of land on which the said building sits. Their claims were inconsistent. Judgments are based on evidence and evidence only.

Appau JSC held in the case of ***Emmanuel Osei Amoako v. Standford Edward Osei (substituted by Bridget Osei Lartey); Civil App. No. J4/3/2016 dated 1st June 2016, S.C. (Unreported)*** as follows: *"Respondent, did not go beyond his rhetorical statements … Judgments must be based on established facts not mere rhetoric or narrations without any supporting evidence that can sustain the claim*".

On this basis, I hereby find that with regard to the second house, the applicant has failed to lead credible and cogent evidence to establish the existence of her claim in the mind of the court. Accordingly, her claim for the sharing of the said house at Newland Afienya fails and same is accordingly dismissed.

3. ***Whether or not the applicant is entitled to financial provision of fifty thousand Ghana cedis (Ghs 50,000)***

The applicant is praying for the court to order the respondent to settle her with the sum of fifty thousand Ghana cedis (Ghs 50,000.)as financial settlement.

It is trite that the Courts in determining financial settlement, do not take into account whose actions led to the breakdown of the marriage. In the case of ***Aikins v. Aikins [1979] GLR 223*** **holding 4,** *the court held that "in considering the amount payable as lump sum, the court should not take into account the conduct of either the husband or the wife but it must look at the realities and take into account the standard of living to which the wife was accustomed during the marriage''.*

In the case of ***Oparebea v. Mensah [1993-94] 1 GLR 61,*** the court held that in order to determine a claim made under ***Section 20 (1) of the Matrimonial Causes Act***, the court must examine the needs of the party making the claim and not the contributions of the parties during the marriage.

The case of ***Riberiro v. Ribeiro [1989-1990] 2 GLR 109*** provides a good guidance to a court when making decisions on financial provision. My consideration should not only be based on the need of the respondent but also on the financial strength of the petitioner as well as the standard of living to which the respondent was accustomed to during the marriage.

Any order for financial provision must be based on equitable grounds. Factors to be considered in arriving at an equitable decision include the earning capacities of the parties, property or other financial properties which each of the parties has or is likely to have in the foreseeable future, the financial needs, obligations and responsibilities of each of the parties and the standard of living enjoyed by the family before the breakdown of the marriage.

The parties both filed an affidavit of means. Whereas the respondent supported his claim with documentary evidence by way of his bank statement which indicates his pension allowance payment from SSNIT and a document from his church which indicates his monthly allowance, the applicant did not tender any document in proof of her claim.

EXHIBIT 4 is the respondent's bank statement from the National Investment Bank. It is from the period of December, 2020 to February, 2022. It shows pension allowance payment ranging between five hundred and forty Ghana cedis (Ghs 540) to six hundred and fifty nine Ghana ceids (Ghs 659) for the period.

EXHIBIT 5 is a letter from the Calvary Gospel Mission to the respondent dated the 30th day of November, 2020. It assures him of a monthly stipend of two hundred Ghana cedis (Ghs 200).

Whereas the applicant is currently a medical technologist in the U.S.A who as at 2018, earned USD 1,200, the respondent is on pension and as at 2018, earned six hundred Ghana cedis (Ghs 600) per month between his pension allowance and pastoral allowance.

In this court, the applicant attorney had sought to put forth a case that the respondent earns far more than that because he has a lathe machine with which he works. The respondent denied same. Applicant failed to provide any proof in support of her claim that the respondent earns more than he has disclosed.

At page 20 of the record of proceedings;

Q: You know the respondent is a former employee of VALCO

A: That is so.

Q: And he is currently on pension.

A: That is so.

Q: Are you aware that he receives a pension allowance of GH¢400 a month.

A: No.

Q: I put it to you that, that is what he receives and that sums up to GH¢4,800 a year.

A: Not Correct.

Q: You know that the respondent is also a pastor of Calvary Gospel Mission.

A: That is so.

Q: Are you aware that he receives a pastoral allowance of GH¢200 a month.

A: No, My Lord.

Q: I put it to you that the pastoral allowance comes to GH¢2,400 per annum.

A: No, My Lord.

Q: I put it to you there that his total income per annum now is GH¢7,200.

A: No, My Lord.

Q: I put it to you that apart from this amount, the Respondent has no other source of income.

A: My Lord, I do not agree to that.

Ayebi JA succinctly summed it in the case of ***Fordjor v. Kaakyire [2015] 85 G.M.J 61 @ 93*** as follows: "*It has to be noted that the court determines the merits of every case based on legally proven evidence at the trial and not mere allegations and assertions in the pleadings. A bare assertion without adducing evidence in support of that assertion is not evidence to require denial in cross-examination by an opponent.*"

On that basis, the evidence before the court clearly indicates that the applicant earns more than the respondent. The essence of the award of financial provision is to ensure that a party is among others maintained in the type of lifestyle to which she was accustomed to in the course of the marriage.

The applicant by her affidavit of means clearly enjoys a higher standard of living than the respondent who is on allowances as a pensioner and a pastor. If at all, the financial strength of the respondent is lower than the applicant. It would thus be inequitable to order the respondent to pay to her the sum of fifty thousand Ghana cedis (Ghs50,000.00) as financial settlement.

Accordingly, the relief of the applicant for financial settlement in the sum of fifty thousand Ghana Cedis (Ghs 50,000.00) hereby fails and same is accordingly dismissed.

Each party is to bear their own cost in suit.

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

SARAH KUSI FOR THE APPLICANT

CHARLES WALKER DAFEAMEKPOR FOR AFFUM AGYAPONG FOR THE RESPONDENT.