IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2015

CORAM: ATUGUBA JSC PRESIDING
DOTSE JSC
YEBOAH JSC
BENIN JSC
AKAMBA JSC

CIVIL APPEAL

NO. J4/37/2015

9TH DECEMBER 2015

ANTHONY VICTOR OBENG PETITIONER/APPELLANT/APPELLANT

VRS

MRS THERESA HENRIETTA OBENG RESPONDENT/RESPONDENT/RESPONDENT

JUDGMENT

AKAMBA, JSC:

This appeal by Anthony Victor Obeng, (herein after simply referred to as the appellant) raises for our decision whether or not the Court of Appeal which affirmed the decision of the trial High Court, adequately considered the material factors required by law in the latter's award of a lump sum of $80,000 or its cedi equivalent in favour of Mrs Theresa Henrietta Obeng, (herein after simply referred to as the respondent.)

The appellant and respondent got married on 27th July 1996 in East Lancing, Michigan, in the United States of America. At that time the respondent lived and worked in Michigan in the United States. After the marriage they lived apart until 1998 when the respondent moved from Michigan to join the appellant in Addis Ababa, Ethiopia, where the latter lived and worked with the United Nations (UN). There is no child of the marriage even though each of the parties has three (3) children from their previous marriages. The marriage broke down beyond reconciliation in 1999, wherefore the appellant as petitioner filed his petition at the High Court Accra on 29th December 1999. By his amended petition filed on 15th July 2003, the appellant sought the following reliefs:

"(a) The dissolution of the marriage between the Petitioner and Respondent, and (b) Property settlement in respect of Respondent's house situate at Achimota, Accra."

In her amended response to the petition filed on 22nd April 2002, the respondent also cross petitioned for the following reliefs:

"i. Dismissal of the Petition of the Petitioner.

ii. Dissolution of marriage between Petitioner and Respondent on account of Petitioner's callous and cruel misuse of the Respondent.

iii. Petitioner be condemned to pay damages and maintenance to the Respondent including the cost of resettling her in the United States of America and maintenance pending the final determination of the present suit.

iv. That the petitioner be condemned to pay the cost of this suit including the legal costs of the respondent.

v. Any further reliefs as may be just."

After a trial which lasted about two years in which neither party called any witness, the High Court on 21st April 2004 entered judgment in favour of the respondent and dissolving the marriage between the parties. It also ordered the Appellant:

(a) To pay for a one way ticket from Accra to the United States of America for the respondent.
(b) Pay a lump sum of US$80,000.00 to respondent as financial settlement. This may be made in 5 installments.
(c) Costs of US$5,000.00 or its cedi equivalent to cover costs of Legal representation.

On appeal against the High Court decision, the Court of Appeal considered the circumstances of the case and determined the award of US$80,000.00 to be just and fair but re-designated the currency in which same was made to bring it in line with decisions of this court and statutes citing reliance on the case of **Akoto v Akoto (2011) 1 SCGLR 533, 545.** Accordingly the Court of Appeal substituted for the lump sum payment of US$80,000.00 to be made in its Cedi equivalent at the current Bank of Ghana rate. The court also considered the costs of US$5,000.00 awarded to respondent to be rather high hence it was set aside and costs of GHC4, 000.00 substituted therefor.

The respondent has urged that this appeal being against concurrent findings of facts and conclusions of two lower courts this court ought not to interfere with the findings except in exceptional circumstances. Certainly this court can only arrive at a decision whether or not there are exceptional circumstances to warrant an intervention after considering the concerns raised by the appellant in the light of the record before us. See Kpakpo v Brown [2001-2002] SCGLR 876; Mensah v Mensah [2012] 1 SCGLR 300.

In this court, the appellant raised three interrelated grounds which will be determined together namely:

(a) The judgment is against the weight of evidence
(b) The order that the Petitioner must pay to the Respondent the lump sum of US$80,000.00 or its equivalent in cedis as financial settlement is excessive and constitutes gross miscarriage of justice.
(c) The trial court failed to take into account as required by law the material factors of the petitioner's circumstances in making the order for the

payment of a lump sum of US$80,000.00 by the Petitioner to the Respondent.

In summary, the issue brought for our determination is the alleged failure of the lower courts to 'use the evidence on record to determine the quantum of financial settlement'. Thus, according to the appellant, the court in determining what financial settlement to make in favour of a party should be guided by certain factors. Even though the Court of Appeal stated that the 'trial judge took a lot of factors into consideration in arriving at the lump sum of US$80,000.00 as financial settlement for the Respondent', this was only a sweeping statement by the trial judge.

The trial High Court judge relied on Section 20 of the Matrimonial Causes Act 1971, Act 367 as the basis for her lump sum award. The court stated at page 249 (last paragraph) of the Record of Appeal (ROA) thus: "The power of a court to make financial provision on the dissolution of a marriage is provided in s. 20 of the Matrimonial Cause (sic) Act 1971, Act 367. It states as follows: "the Court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable and immovable property as settlement of property rights or in lieu therefore or as part of financial provision as the court think just and equitable ". S. 20 (2) gives the Court the discretion to make payment and conveyances in gross or by installment. In making an award for financial settlement, the Court is to take into consideration the ability of the spouse who will be required to make the payment. The Court must also consider the standard of living of the parties and their circumstances."

The trial judge then proceeded to consider the evidence of the parties:

"The Petitioner in his evidence gave detailed account of his expenditure as regards the payment of school fees for his children, the maintenance of and upkeep of his mother and family members. He also gave detailed account of the use of the gratuity received on his retirement. Among others, all these reflected in Exhibit Q,X,T,U,V,W,X,Y,Z and from Exhibits 'AA' to QQ."

On the part of the Respondent the trial judge recorded "the respondent in her affidavit of means stated that since February 2000 she has been a full-time house wife and dependent on the Petitioner; that she has no independent source of income but only expenses and that the outstanding salary payment for January 1999 from OAU Addis Ababa which (see Exhibit) she received was used to defray long standing debts in the US."

Without any doubt the parties had laid essential material before the trial judge from which to make a determination as to an appropriate award given all the circumstances of the case. Matrimonial matters are fraught with all manner of sentiments on the part of the parties but at the end of the trial it for the trial judge to exercise her discretion in accordance with law. As the Constitution clearly states in article 296, every discretion vested in any person or authority requires that the person or authority and in this case the trial judge shall be fair and candid; that the power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law.

The appellant laid a catalogue of complaints, which include, that the trial judge failed to take into consideration the age of the parties. That, the appellant is a retired person whose prospect of employment is negligible due to his age. Also at his present age the appellant cannot secure a mortgage facility to acquire a house whereas the respondent, in middle age and a professional (lawyer/planner) has fair prospects of employment as a self employed person after retirement from formal employment. The next point raised pertains to the financial status of each party. The appellant's income is limited to his pension. The appellant's residential property at Airport Residential Area, Accra was acquired during his first marriage which was prior to his marriage to the respondent. That property was rented and proceeds therefrom used to help pay the school fees of his children by the previous marriage. Indeed, from the unchallenged evidence on record, this property was transferred to appellant's children. Another major lament of the appellant has been that the "court impliedly treated the gratuity received by the Petitioner on retirement after 27 years of work with UN/FAO as if it is an asset acquired by Petitioner during their marriage which spanned the entire

employment period of Petitioner with the UN/FAO and Respondent had been prevented from earning income or acquiring assets during the period."

Our able and respected brother Dotse, JSC in **Mensah v Mensah [2012] 1 SCGLR 391, at 405** in due consideration of section 20 (1) of the Matrimonial Causes Act, 1971 (Act 367) observed, that "Even though it was held in Abebrese v Kaah (supra), that the ordinary incidents of commerce would not apply in marital relations and that the courts would not employ mathematical division to determine each spouse's share in the property, the courts currently apply the equality is equity principle. This principle is backed by constitutional force in article 22 (3) (b) of the Constitution earlier referred to."

Article 22 of the 1992 Constitution provides: "(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

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

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

(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."

The essence of the observation by Dotse, JSC supra, is that even though courts are generally not guided by any mathematical formulae in determining spousal property distributions, whenever mathematics offers the appropriate solution the courts would employ them. It is quite evident that in fixing the lump sum payment awarded against the appellant both the trial court and the Court of Appeal were minded that the appellant could meet it from his lump sum gratuity. Ordinarily a court should only order a lump sum payment when the husband has capital assets out of which to pay without crippling his earning power. When he has available assets sufficient for the purpose the court should not hesitate to

order him to pay a lump sum. The payment should be outright and not subject to conditions except where there are children, when it may be desirable to make it the subject of a settlement. (See Wachtel v Wachtel (1973) 1 AER, 829 at 830). In the instant appeal the couple had been ordinarily resident and working in Addis Ababa from where the appellant retired from his UN job and obtained his gratuity. It is appropriate in the circumstance to determine the appellant's capability to meet the award from such sum, among others.

In his reply to submissions of the respondent filed on 25th March 2015 in this court, the appellant urged that the award of US$80, 000.00 represents about 30% of the Petitioner's gratuity earned from 27 years of work with the UN. The marriage between the parties was only for 5 ½ years which is approximately 25% of the period appellant worked to earn his gratuity. Persuasive as the submissions are, we are obliged to look at the totality of the evidence presented before the court in arriving at a reasonable conclusion on the award.
The case of **S v. S (1977) 1 AER, 56** relied upon by the trial judge is quite apposite to the present case on the factors to be borne in mind in arriving at the quantum of lump sum award. At page 60 of the report, **Ormrod, L.J** observed as follows:

" *I think it is of importance, with these short marriages, particularly where the people concerned are not young, to look very closely to see what the effect of the marriage has been, mainly on the wife, but of course also on the husband. There is no doubt that the fact of this marriage has been unfortunate as far as this wife was concerned. Had she not married, she would presumably still have been in her own house; she would probably still have been doing her full-time job; she would undoubtedly have earned a larger pension than she will now get, although she would not of course have enjoyed the very much higher standard of living that her husband could offer her in his house. But the result is that she has lost, as a result of the marriage, her house in circumstances which I think quite reasonable; she must be worse off pension-wise than she would have been.*

While there is no question of putting her back into the position in which she was before the marriage, or performing any hypothetical task of that kind, these are all factors which are to be borne in mind in making an order which is just in all the circumstances of the case, which is the primary requirement of the 1973 Act. As a

result of the breakdown of the marriage, she has lost substantial prospects of, at any rate, a comfortable old age which she would have had, had the marriage subsisted. That is not a question of whose fault it is; it is a fact that she has lost that.

So the court has to do the best it can to do broad justice between these two parties, bearing all of the relevant circumstances in mind and trying not to take account of a lot of irrelevant matters which irritated the parties during the process of the hearings, the trial and so on, and to try and look at the whole thing in a detached kind of way."

Viewed against the totality of evidence on record, and the needs of either party, we think it is equitable to allow a slight reduction in the lump sum figure awarded in favour of the respondent. In the circumstance we hereby set aside the award of US$80,000.00 or its Cedi equivalent and substitute therefor an outright lump sum payment of the sum of US$70,000.00 or its Cedi equivalent, at the prevailing rate as a commensurate award. The order for the appellant to pay a one way ticket from Accra to the United States of America for the respondent as well as costs of GhC4,000.00 to the respondent are affirmed.
In the result, save for the variations supra, the appeal is dismissed. We make no order as to costs.

J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH

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