IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
BAFFOE-BONNIE, JSC
DORDZIE (MRS.), JSC
AMEGATCHER, JSC
OWUSU (MS.), JSC

CIVIL APPEAL.
NO. J4/02/2019

13TH MAY, 2020

EMMANUEL K. AMOAKOHENE ..... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

JULIANA AMOAKOHENE
a.k.a MAAME SIKA ..... DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

DORDZIE (MRS.), JSC:-

FACTS

The parties are a couple who married customarily in 1988. They were domiciled in Ghana and in the United States of America. On 10 May 1988, they formalized the relationship in a civil marriage ceremony in the United States of America. (This is borne out by exhibit one the marriage certificate) In the course of the marriage, they acquired two landed properties in Kumasi. The said properties are No. 23 Block 'D' Adiebeba-Kumasi, (which

will be describe as property 'A') and Plot 1 Block C Kagyase Abuakwa, (which will be described as property 'B').

In or about the year 2011, the relationship between the parties grew sour, the customary marriage was dissolved as a result in that year and the civil marriage was later dissolved in the USA on 20 January 2015 the divorce certificate is part of the record before us.

After the dissolution of the customary marriage, the properties described above became subject matter of litigation between the parties.

The plaintiff / respondent / respondent herein initiated the litigation when he took out a writ in the High Court Kumasi for the following reliefs:

1. A declaration that House No. 23 Block 'D' Adiebeba-Kumasi is the personal property of the Plaintiff and therefore the sole owner entitled to eject Defendant from same,

Or in the alternative

2. A declaration that House Number 23 Block 'D' and another house situate at Kumasi in the sole name of the Defendant are the joint properties of the parties the same having been acquired during the subsistence of the marriage.
3. An order that both houses be proportioned equally between the parties in the event that the Court grants relief (2).
4. Any order(s) the Honourable Court deems just.

The defendant /Appellant / appellant resisted the claims and counter claimed as follows

i. A declaration that she is the sole owner of House No. 23 Block 'D', Adiebeba, Kumasi
ii. A declaration that the house acquired in her sole name (Plot 1 Block C Kagyase Abuakwa) is her self-acquired property and that the plaintiff has no semblance of a right to same.

iii. An order of injunction restraining the Plaintiff, his agents, servants, assigns, privies and those claiming through or under him or by him from in any manner interfering with the Defendant's title and interest to the said properties.

iv. Any order(s) that the Honourable Court may deem fit.

For easy reference, the parties will hereafter be described as plaintiff and defendant.

The High court gave judgment to the plaintiff granting him the first relief. The defendant's counter claim was dismissed. The defendant appealed against the decision of the High Court. The Court of Appeal dismissed the appeal and affirmed the decision of the High Court.

The defendant has appealed to this court canvassing the following grounds of appeal-

GROUNDS OF APPEAL

a) The Court of Appeal completely misconstrued the scope and ambit of the law on advancement thus occasioning a substantial miscarriage of justice to the Defendant/Appellant/Appellant.
b) The Honourable Court erred in basing itself on extraneous matters falling outside the trial thereby applying wrong analysis to the issues before it.
c) Having upheld Ground (c) of the Grounds of Appeal that the Trial Court erred when it suo motu made pronouncements on the ownership of some business when same was not sought by the parties the Court of Appeal erred in nonetheless holding that the appeal is dismissed in its entirety.
d) By affirming the erroneous decision of the High Court that H/No. 23 Block D, Adiebeba-Kumasi should be vested in Plaintiff/Respondent/Respondent and the uncompleted and uninhabitable building at Abuakwa be vested in the Defendant/Appellant/Appellant the Court of Appeal has occasioned a substantial miscarriage of justice to the Defendant/Appellant/Appellant and deprived her of the only roof over her head.
e) The Court of Appeal erred in not holding that the writ which initiated the suit suffered fundamental legal defects and thus a nullity.

f) The Court of Appeal did not equitably distribute the properties said to have been acquired during the subsistence of the marriage between the parties against the backdrop that the Plaintiff/Respondent/Respondent initiated the suit at a time the marriage between the parties was subsisting.

g) The Honourable Court's grant of ownership of H/No. 23 Block D, Adiebeba-Kumasi in the Plaintiff/Respondent/Respondent to the exclusion of the Defendant/Appellant/Appellant is contrary to the 1992 Constitution and binding judicial pronouncements on the issue of property rights upon dissolution of a marriage thereby occasioning a substantial miscarriage of justice to the Defendant/Appellant/Appellant.

h) The judgment is against the weight of evidence

i) Additional grounds may be filed upon receipt of a certified copy of the judgment

Grounds (a) and (b) were not argued by the appellant in the written statement filed on her behalf. The implication is that these two grounds have been abandoned they are hereby dismissed accordingly. Ground (c) does not reflect what is on the record. The concluding words of the Court of Appeal in their judgment is this: "In conclusion, it is my view that with the exception of ground 3, all other grounds of appeal are dismissed and the judgment of the High Court is hereby affirmed." The court never said, "The appeal is dismissed in its entirety." The alleged error never occurred ground (c) is a misconception and it is hereby dismissed. On the authority of this court's decision in the case of ***The Republic v The Registrar and President, National House of Chiefs & Others Ex-parte –Ebusuapanyin Kojo Yamoah (Substituted by Ebusuapanyin Ekow Abaka); Nana Abor Yamoah – Applicant. (unreported) Civil Appeal N0. J4/45/2017 dated 25 July 2018;*** ground (e) has no merit. It is the position of this court in the above-cited case that, the mere non-endorsement of solicitor's license number on a writ does not render the writ a nullity. That the solicitor who issued the writ has no practice license is a statement that required proof. The issue was not raised in the trial court where evidence could have been led to establish the alleged facts. Ground (e) therefore is dismissed as unmeritorious.

Grounds (f) (g) and (h) are the only valid grounds left for us to consider. Though the notice of appeal indicated that additional grounds would be filed no additional grounds were filed. All these grounds were argued together by the appellant.

Grounds (f) & (g) we will consider under ground (h) which is - the judgment is against the weight of evidence.

It is a well-established principle of law that, in an appeal against findings of fact, a second appellate court like the Supreme Court would not interfere in concurrent findings of the two lower courts unless it was established that in dealing with the facts the lower courts committed a blunder or an error resulting in a miscarriage of justice. It must be apparent that the judgments of the lower courts were wrong. See ***Achoro & Another v Ankafela & Another [1996-97] SCGLR 209***. This court has steadily followed the same principle in subsequent decisions; for example in the cases of ***Fosua & Adu-Poku v Dufie (Deceased) & Adu-Poku Mensah [2009] SCGLR 310,*** the court specified circumstances in which the second appellate court may interfere to avoid miscarriage of justice and said at page 313; per Ansah JSC that: ***"A second appellate court would justifiably reverse the judgment of a first appellate court where the trial court committed a fundamental error in its findings of facts but the first appellate court did not detect the error but affirmed it and thereby perpetuate the error. In that situation, it becomes clear that a miscarriage of justice had occurred and a second appellate court will justifiably reverse the judgment of the first appellate court"***

See also the cases of ***Gregory v Tandoh IV & Hanson [2010] SCGLR 971 Kamil v The Republic [2011] 1 SCGLR 300 and Gladys Mensah v Stephen Mensah [2012]1 SCGLR 391.***

In the present case before us, there are two arrears we consider the two lower courts had erred and had come to conclusions that resulted in miscarriage of justice therefore; this court would be justified in reversing the decisions of the two lower courts.

Firstly, the records clearly demonstrate that the parties, in their pleadings and evidence at the trial, admitted that they intended property 'A' to be owned jointly by them, therefore documents on the property was prepared in their joint names. The Deed of Assignment Exhibit A is the documentary evidence supporting the oral evidence of both parties on the issue of ownership of property 'A'. The Deed of Assignment bears the names of the parties as the assignees.

Secondly, the trial court completely ignored the constitutional provisions regarding property rights of spouses in respect of properties acquired during the subsistence of marriage, and charted a path of its own, dwelling on principles of law completely irrelevant to the issue. The two lower courts equally disregarded principles developed by this court in respect of property rights of parties upon dissolution of the marriage, which case law principles are binding on the two lower courts. To justify the above statements we would take a walk through the relevant portions of the pleadings, the issues set down for trial at the trial court and the evidence adduced therein.

THE PLEADINGS

Plaintiff in his relief one sought a declaration that "House No. 23 Block 'D' Adiebeba-Kumasi is the personal property of the Plaintiff and therefore the sole owner entitled to eject Defendant from same."

In paragraphs, 5 and 6 of his statement of claim found on page 3 of the record plaintiff averred thus: "5. Plaintiff avers that he bought the property H/N0 23 Block D Adiebeba Kumasi in 1987 when he was not married to the defendant. 6. Plaintiff says that the documentation on the said property was only completed in 1989 at the time he had married the defendant and so plaintiff requested that the property bears the names of the parties as husband and wife"

In paragraph, 10 of the statement of defence the defendant averred thus - "The defendant further states that she caused the lease to be prepared in the joint names of herself and the plaintiff and sent same to the plaintiff in the United States of America to sign."

THE ISSUES SET DOWN FOR TRIAL WERE:

1. Whether for the first 10 years of their marriage, the Defendant was engaged in gainful employment.
2. Whether it was Defendant who acquired the land on which H/No. 23 Block 'D', Adiebeba, Kumasi is situate.
3. Whether it was Defendant who financed the building of H/No. 23 Block 'D', Adiebeba, Kumasi at 12 Million old Cedis.
4. Whether Plaintiff bought or acquired H/No. 23 Block 'D', Adiebeba, Kumasi before marrying Defendant.
5. Whether the house acquired in Defendant's sole name is the joint property of both parties.
6. Any issues raised on the pleadings.

THE EVIDENCE

In plaintiff's evidence it stands out that his averment that he acquired the property before marrying the defendant is not wholly true. In his evidence at page 23 of the record, this is what he said in respect of the ownership of the properties. "Now the defendant claim ownership over the 2 houses and I had no place to lay my head. But the fact of the matter is that defendant is claiming ownership over the house we put up together and that being the case I have the right to insist on ownership of the other house as well." (Emphasis added) In cross-examination at pages 27 and 28 of the record, he admitted he intended that the defendant be a part owner of property 'A'.

The defendant confirmed their intent of owning property 'A' jointly when in her evidence she said they put up property 'A' together and it belongs to the two of them. At page 36 & 37 of the record this is what the defendant said in her evidence "I know plot N0 23 Block D Adiebeba-Kumasi. This is a house, which belongs to both defendant and plaintiff. …… Subsequently he agreed to help out. Plaintiff started to contribute money for the building. During the construction of the house, plaintiff was in the USA but I was in Ghana."

From the paragraphs of the pleadings of the parties as quoted above and the evidence of both parties regarding the ownership of property 'A', there is no issue joined between the parties in that regard. Both parties concede that they built property 'A' together and intended it to be a joint property. The deed of assignment gave documentary endorsement to these facts. At the close of evidence therefore, issues 2 to 4 set down for trial became none issues. Evidence on record also shows that for the first 10 years of the marriage the defendant was gainfully employed.

The only issue left to be determined at the close of evidence was issue number 5, which is - whether property 'B' is a joint property of both parties.

Unfortunately, irrespective of the evidence as clearly demonstrated above, the trial court made findings that are contrary to the evidence placed before it. The trial judge extensively gave exposition of the law on advancement, which is not relevant to the issues joined between the parties before him. In the end, his findings were that the Adiebeba house was solely owned by the plaintiff and the Kagyase house solely owned by the defendant. These findings are clearly contrary to the parties' pleadings and evidence placed before the court.

In his judgment granting plaintiff's first claim these are the words of the learned trial judge – "In conclusion, I first hold and declare that the Adiebeba house is solely owned by plaintiff. In much the same manner, I hold and declare that the Kagyase house belongs solely to the defendant." The findings and the conclusions reached by the trial judge are not in any way supported by the evidence on record.

THE COURT OF APPEAL DECISION

The intriguing thing about the decision of the Court of Appeal is that in analyzing the evidence it came to the conclusion that the properties were jointly acquired during the marriage and yet it went ahead to affirm the trial court's decision. The findings of fact by the trial High Court on the issue of ownership of the properties are contrary to the findings

made by the first appellate court. It is therefore most illogical for the first appellate court to affirm the conclusions drawn by the trial court in its judgment.

ANALYSIS OF THE EVIDENCE BY THIS COURT

It has been established by the evidence of both parties both documentary and oral that property 'A' was jointly acquired by the parties during the subsistence of their marriage. In respect of property 'B', that is the Kagyase house; there is no dispute about the fact that it was acquired during the subsistence of the marriage between the parties. However, defendant's stand is that she acquired property 'B' exclusively from her own resources. The intention was to acquire that property for her two sons who are not fathered by the plaintiff, one of the said sons contributed to the purchase. According to her, she discussed this with the plaintiff. It was an uncompleted building she bought. She took pictures of it, sent them to plaintiff, and obtained his consent before she purchased it. At the time of the trial, the record has it that, that property had been completed and roofed. Whether the necessary fittings had been put in place or not does not form part of the evidence on record.

The defendant agreed that they operated their finances jointly; they have joint accounts in both Ghana and the USA. Her position is that she acquired property 'B' from a business she run exclusively. She supplied the Police Service uniforms; it is from the earnings of that business that she acquired property 'B'. The plaintiff strongly opposed these facts. In the circumstances the burden lies on the defendant to provide proof, for example that she kept a different account of the police uniform business. However, the defendant in her evidence in cross - examination rather admitted that the capital for the police uniform business came from their joint accounts. In the face of this admission, her claim that the police uniform business is her exclusive business cannot hold. She also did not provide any proof that her son contributed to the acquisition of property 'B'. The conclusion we reasonably draw from the evidence on record is that property 'B' was acquired from the joint earnings of the parties, the said property therefore is a jointly acquired property of the couple.

It is our view that properties 'A' and 'B' were jointly acquired by the couple during the subsistence of their marriage. The next step is to consider the applicable law on the distribution of such properties to spouses when divorce occurs.

Determination of property rights of spouses had been a thorny issue in our courts for ages. The framers of the 1992 Constitution of Ghana were mindful of these issues therefore, in Chapter 5, the chapter of the Constitution on fundamental human rights provision had been made to protect the property rights of spouses. Article 22 of the Constitution provides as follows –

"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."

Though Parliament had not been able to enact any legislation yet to regulate the property rights of spouses as required by article 22 (2), this court in various decisions had made efforts, to as much as possible allow the intentions of article 22 (3) reflect in its decisions on distribution of marital properties between spouses upon dissolution of the marriage. This court has also taken into consideration the provisions of the Matrimonial Causes Act, 1971 (Act 367) which gives the court the discretion to settle proprietary rights of parties in a divorce matter in a just and equitable manner. Section 20 (1) of the Act reads – ***"(1) The Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party movable or immovable property as***

settlement of property rights or in lieu thereof or as part of financial provision that the Court thinks just and equitable"

The consistent trend in recent decisions of this court has been the application of the 'equality is equity' principle. Which means marital properties acquired during marriage are presumed to be jointly acquired and should be shared equally. The emphasis in this jurisdiction however has been that, this principle ought to be applied on 'case to case' basis. In other words, the facts and circumstances of each case determines how the principle is applied. Ultimately, the objective is to do a just and equitable distribution in the circumstance of each case. Thus in the case of ***Boafo v Boafo [2005-2006] SCGLR 705*** this court per Date-Bah JSC said ***"the question of what is 'equitable', in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case."***

In ***Gladys Mensah v Stephen Mensah [2012]1 SCGLR 391*** this court per Dotse JSC adopting the liberal approach in interpreting article 22 (3) (b) of the constitution endorsed the equality principle and re-emphasized the case to case approach in applying the principle and said a case to case approach is preferred to a wholesale application of the principle.

In the instant case before us, there is ample evidence on record (evidence that is the consensus of both parties) that the properties in contention were jointly acquired during the subsistence of the marriage. By virtue of article 22 (3) (b) of the Constitution which says, ***"assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage"*** we would consider what is equitable and just in the circumstances of this case and distribute the two houses accordingly.

The evidence on record has it that the plaintiff voluntarily vacated the matrimonial home about 9 years ago, 2011 precisely. The defendant has been in occupation and obviously

responsible for its maintenance all these years. We consider it fair and just in the circumstances to order that she remains in possession of house No. 23 Block 'D' Adiebeba- and takes the said property as her share of the properties. The plaintiff on the other hand takes Plot 1 Block C Kagyase as his share.

In compliance with section 21 of the Matrimonial Causes Act which reads, - "(***1) When a decree of divorce or nullity is granted, if the Court is satisfied that either party to the marriage holds title to movable or immovable property part or all of which rightfully belongs to the other, the Court shall order transfer or conveyance of the interest to the party entitled to it on the terms that the Court thinks just and equitable."*** We do order that the parties take steps to convey their interest in each of the properties appropriately in accordance with the orders we have made as to ownership.

The appeal is allowed the decision of the Court of Appeal is hereby reversed.

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

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(CHIEF JUSTICE)

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