IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2021

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)

PWAMANG, JSC

MARFUL-SAU, JSC

AMEGATCHER, JSC

TORKORNOO (MRS.), JSC

CIVIL APPEAL
NO. J4/08/2020

14TH APRIL, 2021

ERNESTINA BOATENG …… PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. PHYLLIS SERWAH …… 1ST DEFENDANT/APPELLANT/RESPONDENT

2. BOAMPONG NYAMEKYE …… 2ND DEFENDANT/APPELLANT/RESPONDENT

3. MARK ADU PREMPEH JNR. … 3RD DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

PWAMANG, JSC:-

My Lords, the proceedings that have culminated in this appeal were commenced in the High Court, Accra on 2nd January, 2009 but are a sequel to a partly-heard matrimonial case in that court which was struck out on 31st July, 2007 following the death of the respondent therein, Mark Adu Prempeh (the Deceased). The plaintiff/respondent/appellant (the plaintiff) herein and the deceased met and entered

into a relationship in Antwerp, Belgium in 1988 and the relationship lasted for nine years before they came to marry at Kumasi in 1997 in accordance with Akan custom. Problems developed in the relationship in 2000 causing the plaintiff to file a divorce petition against the deceased praying for dissolution of the marriage and also for declaration of joint ownership of two landed properties situate at Tantra Hill and Adabraka, both in Accra. In his defence in the divorce case the deceased disputed the validity of the marriage and denied the plaintiff's claim of joint ownership of the properties. He counterclaimed for annulment of the purported marriage and for a declaration of exclusive ownership of the two properties.

The deceased claimed that after their marriage he got to know that the plaintiff was in a subsisting monogamous marriage at the time of their customary marriage which made their marriage void so he separated from her that same year they married. In a reply to the defence the plaintiff denied that they separated and stated that the deceased was all along aware of her earlier monogamous marriage which she said was only for purposes of immigration documents and not a proper marriage. Extensive evidence was led about the marriages and the acquisition of the two properties. Unfortunately, when the trial was almost ending the respondent died in a motor accident on 17th February, 2007. On his death the defendants/appellants/respondents (the defendants) herein claiming as surviving spouse, customary successor and eldest son respectively, applied and were granted Letters of Administration over his estate including the two properties that were subject matter of the pending matrimonial case. The plaintiff therefore applied to substitute the defendants for the deceased so the case could be concluded. The court initially granted the application but subsequently it discharged the order of substitution and struck out the suit on the application of the defendants who argued that divorce proceedings are *in personam* so the plaintiff's cause of action did not survive the death of the respondent. The plaintiff filed an appeal against that ruling but later withdrew it. As will soon become evident, though the first case was a matrimonial one the parties joined issue on ownership of properties so this was not a divorce case *simpliciter* that ended with the death of one of the parties. The

plaintiff's cause of action in respect of the ownership of the properties certainly survived the death of her husband so the action ought not to have been struck out. Anyway, the plaintiff did not pursue her appeal against the striking out but rather commenced a fresh action and claimed for the following reliefs which make reference to the earlier suit;

a. Declaration that the plaintiff herein as the legal wife of Mark Adu Prempeh as at 17th February 2007 became the lawful widow of same upon his death on that date.
b. Declaration that since the Divorce petition in which the plaintiff had prayed the court to grant her joint share in the properties acquired during the subsistence of their marriage was still pending before the court, the court's ruling that her prayer before the court died with the husband was totally wrong in law and equity.
c. Declaration that by the death of the husband in the course of the determination of the state of their matrimonial properties, the plaintiff herein automatically became the sole owner of same according to the Law of Survivorship.
d. Revocation of the Letters of the Administration on the estate of Mark Adu Prempeh on grounds that it was obtained by fraud and upon illegality.
e. Perpetual Injunction against the Defendants herein, their assigns, agents and all those who claim title through them from in any way interfering with the peaceful enjoyment of House No. TH 67, Tantra Hill (sic) where the Defendants have illegally ejected her by throwing out her personal effects and renting out her premises as well as other parts of the said house.
f. Order to the defendants to render accounts on the administration of the estate of the dead husband.
g. General damages for pain and mental agony which the plaintiff has been put through by those illegal acts of the defendants.
h. Costs.

On service of the writ of summons and statement of claim the defendants entered appearance, filed a defence and counterclaimed as follows;

a. A declaration that the purported marriage of the plaintiff to the deceased Mark Adu Prempeh was void *ab initio.*
b. A declaration that the deceased Mark Adu Prempeh died intestate and therefore his surviving spouse, children and family are entitled to his estate under the Intestate Succession Law.
c. Declaration that the Defendants were entitled to the grant of Letters of Administration.

At the second trial, the record of proceedings containing the evidence of the parties and their witnesses in the matrimonial case was tendered as Exhibit "A" and relied upon by the plaintiff in addition to evidence she led. The 1st defendant testified and they called two witnesses. In a judgment dated 30th July, 2012 the High Court upheld the case of the plaintiff that she jointly acquired the disputed properties with the deceased, granted all the reliefs she claimed and dismissed the counterclaim. He said he would take judicial notice that the monogamous marriage of the plaintiff was just for immigration purposes and was therefore not a real marriage in law but that it was rather the customary marriage that was valid. The defendants felt dissatisfied and appealed from the judgment of the High Court to the Court of Appeal who allowed the appeal, dismissed the entire case of the plaintiff and granted the counterclaim of the defendants.

In their judgment dated 4th February, 2016 the Court of Appeal held that as the uncontested evidence on the record was that the plaintiff was in a subsisting ordinance marriage as at the date she purported to marry the respondent under Akan customary law in 1997, by the provisions of our law, the plaintiff could not contract another marriage so the customary marriage was void. They further held that the evidence of the parties in the aborted matrimonial case that was relied on by the High Court in coming to the conclusion that plaintiff adduced sufficient evidence of joint acquisition of

the properties was inadmissible evidence and ought to have been excluded from consideration by the court. Their view was, that aside the Exhibit "A", the plaintiff did not lead enough evidence in this trial to prove her claim of joint acquisition of the disputed properties. There was evidence in Exhibit "A" to the effect that the deceased was equally in a subsisting ordinance marriage with a woman in Belgium as at the time the 1st defendant claimed she entered into a customary marriage with him in Ghana. The plaintiff therefore argued that that marriage was void but the Court of Appeal upheld its validity holding that the evidence proved that the 1st defendant was made to go through widowhood rights by the deceased's family upon his death.

The plaintiff is aggrieved by the judgment of the Court of Appeal and has appealed against it on the following grounds;

A. The Learned Judges of the Court of Appeal erred in disregarding and or excluding Exhibit A which is a certified copy of previous court proceedings between plaintiff and Mark Adu Prempeh (deceased) in arriving at their decision thereby occasioning a miscarriage of justice.
B. The Learned Judges of the Court of Appeal erred in pronouncing the customary marriage celebrated between the plaintiff and Mark Adu Prempeh (deceased) in 1997 as void ab initio thereby occasioning a miscarriage of justice.
C. The Learned Judges of the Court of Appeal erred in declaring the defendant as the lawful spouse and widow of Mark Adu Prempeh (deceased) and therefore entitled to the grant of letters of administration thereby occasioning a marriage of justice.
D. Judgment is against the weight of evidence.

In the statement of case of the plaintiff, O. K. Osafo-Buabeng Esq, of counsel for the plaintiff concedes that since the plaintiff was in a subsisting monogamous marriage in 1997 she could not validly contract a customary marriage with the deceased. That notwithstanding, Edward Darlington Esq, counsel for the defendants, still went to town on this aspect of the case and recalled the evidence of the plaintiff under cross-

examination whereby she admitted entering into what she called "connection marriages" for money before her customary marriage with the deceased and even during the subsistence of that marriage. In fact, she stated openly in her testimony that the monies so earned were given to the deceased for their joint business. She said the deceased was aware of those marriages and he himself also indulged in "connection marriages" after obtaining proper immigration papers in Belgium. According to the plaintiff, "connection marriages" was a common practice among immigrants in Europe at the time. The following is part of the cross-examination;

Q. Do you recall telling the court that you contracted a connection marriage for the late Mark Adu Prempeh

A. Yes I did My Lord….

Q. I am putting it to you what you said you did was illegal

A. My Lord it is illegal but that is what everyone who travels outside does….

This type of marriages involving immigrants, usually referred to as "marriages of convenience", are an old phenomenon not unknown to the law except that they are not countenanced. They are not genuine marriages and if the evidence proves that a marriage was indeed contracted only for collateral purposes and not out of affection, love and for establishment of family, it may be disregarded as a marriage even for immigration purposes. Marriages of convenience have come up severally in immigration cases in Europe wherein they are defined as marriages contracted predominantly for purposes of circumventing immigration laws. See the cases of **R (Baia) v Secretary of State for the Home Department (SSHD) [2009]1 AC 287, Rosa v SSHD [2016] EWCA Civ 14 and Sadovska v SSHD [2017] UKSC 54.**

The defendants' lawyer contends that those "connection marriages" the plaintiff testified to were contracted in breach of provisions of our **Criminal and Other Offences Act, 1960 (Act 29)** on bigamy, fictitious marriage and false declarations for marriage. He therefore faults the trial judge for seeming to condone the plaintiff's illegal

conduct by upholding her customary marriage with the deceased. He submitts as follows;

"For public policy considerations it would be improper to allow the Plaintiff/Respondent to admit an illegality in court which will amount to a summary conviction in a criminal court and for the learned trial judge to give judicial blessing to it by taking judicial notice of illegality. What the Plaintiff/Respondent has done is to take advantage of the law, showing gross disrespect for the law and the institution of marriage and reducing the concept of marriage to a wager. A court of law and equity should not be interested in the illicit gains a litigant makes from her illegal activities so much so as to give its judicial blessings to it."

From the first part of the above submission the defendants appear to contend that some illegality was associated with the plaintiff's monogamous marriage that made it void so the trial judge ought not to have taken notice of it. But, this line of argument of the defendants' lawyer poses its own problems. If that marriage were void on grounds of illegality then the consequences would be that the plaintiff was unmarried at the time she met the deceased and therefore had capacity to contract the customary marriage with him in 1997. In that case the conclusion reached by the High Court judge on the validity of the customary marriage would have been right.

But that is not the legal status of a marriage of convenience. As a general principle of the law of contract, except clearly provided for in a statute, the fact that a contract violates provisions of a statute does not automatically make it void. Where there is no nullifying provision in the statute the legal consequence of violation of a provision is a matter of construction by a court but it would not be *ipso facto* void. See **Godka Group of Companies v P.S.Global [2001-2002] SCGLR 918, Hughes v Assets Managers Plc [1995] 3 All ER 669** and **Abadwam Stool & Ors v Akrokerri Stool [2017-2018] 1 SCLRG (Adaare) 1.** The customary marriage in this case is

held to be void because **Section 44 of the Marriage Ordinance 1951, (Cap 127)** provides under Part 5 on Invalid Marriages as follows;

"Any person who is married under this Ordinance, or whose marriage before the commencement of this Ordinance is declared by this Ordinance to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but save as aforesaid, nothing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom or in any manner apply to marriages so contracted."

The validity of a marriage contracted under the Marriage Ordinance is determined in accordance with the provisions of the Ordinance and not Act 29. In Family Law a marriage is either valid or invalid and there is no third category of "marriages of convenience" or "connection marriages" which are partly valid for some purposes and partly invalid for others. The trial judge therefore was in error when he failed to treat the "connection marriage" as a valid marriage and the Court of Appeal rightly reversed him on that point. Under Cap 127, once both parties to a marriage entered into as a monogamous marriage have capacity to marry and satisfy the statutory conditions under Part 5 of the Ordinance, they voluntarily consent and go through the ceremony of marriage and sign the register, it is a valid marriage and cannot be terminated except through matrimonial proceedings in court. In this case, the monogamous "connection marriage" was not dissolved by a court of law before the customary marriage involving the plaintiff so the customary marriage was void.

The second aspect of the submissions of the defendants is that, on public policy grounds, the court ought not to assist the plaintiff to recover properties that by her own showing were acquired with proceeds of illegal marriages. This we shall address comprehensively later in the judgment.

My Lords, though we have held that the marriage between the plaintiff and the deceased was void, the voidness of the marriage is distinct and severable from the

plaintiff's claim of joint acquisition of the two properties in dispute. **Article 18(1) of the Constitution, 1992** provides as follows;

"Every person has the right to own property either alone or in association with others."

Acquisition of property with others means co-ownership which can be between persons who are not married. The law has recognized and upheld co-ownership of property in situations where parties have only co-habited without being married. See **Tinsley v Milligan [1994] 1 AC 240** and **Oxyley v Hiscock [2004] EWCA Civ 546**. Such too was the case in **Gregory v Tandoh [2010] SCGLR 971.** The facts of that case are that an African American woman who visited Ghana and wanted to settle fell in love with a traditional chief at Cape Coast. The chief was already married with family but the plaintiff agreed to become a second wife believing that in Africa a Chief is entitled to marry several wives. They went through a ceremony at the office of the District Assembly which the woman understood to be a valid marriage ceremony. Unknown to her, the chief's marriage to the first wife was a monogamous marriage contracted under the Ordinance so her marriage to the chief was null and void in law. By the time she came by this knowledge she had made substantial financial contribution to the building of a house at Ankaful where the three of them lived. Their relationship naturally deteriorated and she sued in the High Court, Cape Coast for a declaration of her joint interest in the house but lost and an appeal to the Court of Appeal was dismissed. On further appeal the Supreme Court by unanimous decision upheld her claim of joint acquisition as there was ample evidence of her financial contribution to the building of the house. In his concurring judgment, Gbadegbe, JSC said as follows at page 998 of the Report;

"Although the appellant is not a spouse of the 1st respondent, I am of the opinion that it is permissible for us to grant to her a beneficial interest that is proportionate to her contribution. I think that the effect of her contribution to the acquisition of the disputed property is creating a resulting trust in her

favour to the extent of her contribution. In the case of Cooke v Head [1972] 2 All ER 38, the Court of Appeal applied the doctrine of resulting trust imposed by the courts on a legal owner in the case of a husband and wife who by their joint efforts acquired property to be used for their joint benefit to the case of a mistress and a man who had by their cumulative efforts acquired a property for the purpose of setting up a home together."

Therefore, the question to be addressed in this appeal under grounds (A) and (D) is whether there is evidence on the record which proves the contribution of the plaintiff in the acquisition of the properties in dispute. The trial judge relied substantially on the evidence given in the aborted matrimonial proceeding tendered as Exhibit "A" and found that the plaintiff contributed financially to the acquisitions but the Court of Appeal sided with the defendants' lawyer that Exhibit "A" is inadmissible evidence and reversed that finding of the trial judge. Unfortunately, no legal ground has been articulated by the lawyer and the Court of Appeal for their position except to say that the evidence was not led before the judge in this trial but in the earlier matrimonial case which was by a different judge. By that they imply that Exhibit "A" is hearsay evidence. **Section 117 of the Evidence Act, 1975 (NRCD 323)** that makes hearsay evidence inadmissible states that the section is subject to exceptions which are provided for in the Act. Former testimony before a judge in a different case is one of those exceptions stated under **section 121 of NRCD 323**. It is as follows;

"Section 121—Former Testimony.

Evidence of a hearsay statement is not made inadmissible by section 117 if it consists of testimony given by the declarant as a witness in an action or in a deposition taken according to law for use in an action, and when the testimony was given or the deposition was taken the declarant was examined by a party with interests and motives identical with, or similar to, the party against whom the evidence is offered in the present action."

Under section 121 of NRCD 323 the conditions that must exist to make evidence in a previous case admissible in a subsequent case are as follows; (a) the party in the current case against whom the evidence is offered was either a party in the previous case or has interests and motives that are identical or similar to those of a party in that previous case; (b) the evidence from the previous case that is sought to be tendered in the second case must have been subjected to cross-examination by the party with interests and motives identical or similar to the party against whom the evidence is being offered; (c) the evidence was admissible and taken in accordance with law in the previous case; and (d) the evidence must be relevant for the determination of an issue in the current case.

First of all, the defendants in the present case against whom the evidence was offered are standing in the shoes of the deceased who was the respondent in the first case. In fact, their case here is the same as that made by the deceased there even to the extent of praying for the nullification of the marriage though it was between the plaintiff and the deceased. Second, the evidence in Exhibit "A" was subjected to cross-examination by the opposing lawyers in the first case. Third, the evidence was taken in accordance with law and was admissible evidence in that previous case, and finally, the evidence concerned the marriage between the plaintiff and the deceased and the manner of acquisition of the Tantra Hill and Adabraka houses and these matters are issues for determination in the current case. Issue (2) of the issues set down for trial in this case which was proposed by the defendants in their additional issues says it all. It is as follows;

"2 . Whether or not the plaintiff was co-owner of the properties in issue."

Therefore, Exhibit "A" satisfies all the conditions to be admitted in evidence in this case as admissible former testimony. In fact, it is more in the interest of the defendants to admit Exhibit "A" because it contains the personal account of the deceased himself as to how he acquired the properties that the defendants claim were exclusively acquired by him. In the absence of Exhibit "A" the defendants would be relying on third party

evidence alone whilst the plaintiff has given first hand testimony of what she and the deceased discussed about the joint businesses while they were together in the relationship that lasted twelve years. It was therefore a grievous error on the part of the Court of Appeal to have excluded Exhibit "A" in their assessment of the respective claims of the parties as same is clearly admissible.

In his statement of case Counsel for the defendants maintained his objection to the admissibility of Exhibit "A" but his view is misconceived as we have explained. Counsel also argued that the exclusion of Exhibit "A" has not occasioned a substantial miscarriage of justice in the case. He referred to us **Section 5(3) of the Evidence Act, 1975 (NRCD 323)** which provides as follows;

"3. No finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review because of the erroneous exclusion of evidence unless—

(a) the substance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; and

(b) the court which decides on the effect of the error also determines that the excluded evidence should have been admitted and that the erroneous exclusion of the evidence resulted in a substantial miscarriage of justice."

An instance where exclusion of evidence would be said to result in a substantial miscarriage of justice is if it is demonstrated that the judgment of the court under appeal or review would have been different had it taken the excluded evidence into account. Therefore, having held that Exhibit "A" was erroneously excluded by the Court of Appeal we have to determine whether if that evidence had been evaluated, the conclusion of the Court of Appeal on the issue of joint acquisition of the properties would have been different. This calls for a scrutiny of that evidence. Counsel for the plaintiff has argued forcefully that when the evidence in Exhibit "A" is evaluated together with the evidence adduced at the trial in this case it becomes clear that the

plaintiff contributed substantially to the acquisition of the disputed properties. He pointed to various pieces of evidence in Exhibit "A" to support his submissions. Unfortunately, the lawyer for the defendants failed to analyse the evidence contained in Exhibit "A" and to indicate any portions that support their case of exclusive ownership of the two properties in order to justify his assertion that no substantial miscarriage of justice has been occasioned to the plaintiff. Having argued that the evidence is inadmissible, he ought to have taken the precautionary step of evaluating it in relation to his clients case in the event he is wrong on the admissibility question.

Be that as it may, we have read Exhibit "A" thoroughly and taken note of the totality of the evidence therein and have also considered the evidence that was led at the trial in this case by both sides and have formed the opinion that there is sufficient evidence that supports the conclusion of the High Court judge that plaintiff together with the deceased acquired the two properties in dispute. In both cases the plaintiff testified to the work she engaged in in Belgium up to the time she met the deceased in 1988. The main business through which the properties were acquired is the used vehicles and spare parts business and the deceased in Exhibit "A" admitted that the plaintiff bought cars in Belgium and shipped to Ghana for sale and that he cleared the cars for the plaintiff. Except that the deceased maintained in his testimony that the plaintiff's cars were different from his own and that they did the business separately. Contrary to the contention of the deceased, the evidence in the matrimonial proceedings tends to paint a picture of joint business for the following reasons:

The plaintiff tendered a document that recorded the particulars of the vehicles that the parties bought and shipped to Ghana for each year starting from 1993 to 1999 to be found at page 233 of Exhibit "A". It covers about 200 vehicles and states the amount that each vehicle was sold for. The deceased admitted that it is a record of vehicles he imported and sold in Ghana but he claimed that the plaintiff's vehicles were different and she had no hand in the business that record concerns. The question we ask ourselves is, if the plaintiff had no hand in that business, how come she was the one who tendered it in evidence? That document appears to us to be an account that was

rendered for the information of a partner in the vehicle business and lends credence to the case of the plaintiff that it is the record of the joint business by her and the deceased. This statement of accounts of the vehicle business corroborates the testimonies of PW1 and PW2 in the matrimonial case who used to work for the deceased in the vehicle business. Their evidence was to the effect that they got to know through the deceased that the business was for him and the plaintiff and though they were subjected to intense cross-examination they maintained their positions.

Furthermore, the plaintiff tendered her 1999 bank statement in Belgium which showed an amount of 70,000 Belgian Francs that was transferred from her account to the account of AUTODEPANNAGE ADU'S, the business entity in which name the vehicle business was conducted in Belgium. The plaintiff said the transaction was by their banker in Belgium and the transfer was to cover a deficit in the business account because the banker knew that the business belonged to her and her husband, meaning the deceased. The deceased on the other hand explained that at the time of that transfer he was in Ghana and there was the need to make some payment from the business account but there was no funds so his banker informed the plaintiff and transferred 70,000 Belgian Francs from her personal account into the business account and it was later refunded to her. Whichever way this fact is looked at the inescapable impression is that the plaintiff was involved in the business of AUTODEPANNAGE ADU'S if not the banker would not have, of his own accord, brought her into the picture when the deceased had not so directed. It also shows that the plaintiff was not without resources unlike the picture of her the deceased's lawyer sought to portray in cross-examination as being unemployed and dependent on social welfare benefits. This further rebuts the deceased's claim that he separated from the plaintiff shortly after they married in 1997.

Then there is the fact that the Trantra Hill property had a sign board on which was written "MACPEB". The plaintiff testified that it is an acronym for Mark Prempeh and Ernestina Boateng but the deceased said that the EB stands for Elizabeth Betty who is the deceased's daughter. The evidence shows that this daughter had not previously

been referred to as Elizabeth Betty and no explanation was given by deceased for using initials of his daughter on the house. If the house indeed was acquired by the deceased alone then there must be a reason why he would add his daughter's name to his name whereas he has five other children. When he was cross-examined on this matter the following ensued;

Q. I am also putting it to you that the acronym MACPEB stands for Mark Adu Prempeh and Ernestina Boateng.

A. She thinks so but it is Mark Adu Prempeh and Elizabeth Betty.

The deceased appeared to have been aware that the plaintiff was all along under the impression that the EB referred to her. If that were so then there would have been a reason for the plaintiff having that impression and what steps did the deceased take to erase it? On the contrary, the plaintiff was given part of the house to live in until she was forcefully ejected by the defendants after his death. We have taken note of the testimony in both cases of Mr Yeboah who sold the uncompleted structure of the Tantra Hill house to the parties and we see some significant discrepancies in his evidence. In any event, he, the 1st defendant and the DW1 would not have been privy to the details of the financial arrangements between the plaintiff and the deceased who lived as husband and wife. If the plaintiff had made this claim of co-ownership only after the death of the deceased that would have been a harder case to prove but she made the claim when he was living way back in 2000 when she filed her first case, the divorce petition.

On the totality of the evidence, and on account of the above explanations in particular, we are of the view that, on the balance of probabilities, the disputed properties were acquired from the contributions of the plaintiff and the deceased. In our judgment, if the Court of Appeal had taken Exhibit "A" into account and evaluated carefully the evidence therein contained they would not have dismissed the plaintiff's case of joint acquisition. In the circumstances, the exclusion of Exhibit "A" occasioned a substantial miscarriage of justice in the case so we hereby reverse the finding of the Court of

Appeal and take the view that the Tantra Hill and Adabraka houses were acquired by the joint resources of the plaintiff and the deceased. The title deeds of both properties are in the sole name of the deceased but since the payment was by him and the plaintiff, the law is that a resulting trust arises whereby the deceased held the legal titles to the two houses as trustee for the beneficial enjoyment of the two of them. This also means that the defendants herein who are successors in interest of the deceased, hold the legal title as trustees with the beneficial interest co-owned with the plaintiff.

This brings us to an examination of the issue of public policy raised by the defendants which they contend ought in any event to cause the court to disallow the claim of the plaintiff. It is indeed correct that on grounds of public policy the law recognises a defence known as the defence of illegality and where it is successfully raised a civil claimant who is otherwise entitled to rights would be denied relief by the court. Ordinarily, this type of defence ought to be pleaded in accordance with Order 11 Rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I.47). Such pleading would provide particulars of the illegality relied on and the claim it is proposed to defeat. In this case probably because it was not pleaded by the defendants but raised in their submissions they did not argue it elaborately in their statement of case and the plaintiff too failed to argue in response though it was brought to her attention by service of the defendants statement of case on her. Nonetheless, since it is a matter of law that has been raised on the basis of evidence already on the record, the court has to consider it. See **Attorney-General v Faroe Atlantic Co [2005-2006] SCGLR 271.**

The defence finds expression in two Latin maxims; ***ex turpi causa non oritur actio*** and ***ex dolo malo non oritur actio.*** Lord Mansfield in **Holman v Johnson (1775) 1 Cowp 341 at 343** explained the latter maxim as follows; "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." There are public policy reasons for this doctrine including the argument that to allow a claim tainted by illegality would be for the law to forbid a certain conduct and at the same time reward that conduct. Another reason is that if illegal claims are disallowed by the court, it will aid in the enforcement of the law that the conduct has violated which is in the wider

public interest. But the defence of illegality is not an absolute defence to a civil claim. The common law has evolved a number of principles on which courts consider that defence.

Illegality as a defence may be raised in varied situations including a contract made in violation of a positive statute, a contract for illegal purposes, and trust property tainted by illegality as in this case. In the cases of **Zagloul Real Estates Co. Ltd (No. 2) v British Airways [1998-99] SCGLR 378 and City & Country Waste Ltd v Accra Metropolitan Assembly [2007-2008] SCGLR 409** this court considered the defence of illegality against claims that were based on contracts that violated the provisions of statute. In **Schandorf v Zeini [1976] 2 GLR 418** the Court of Appeal dealt with that defence in a case of sale of a house wherein part of the purchase price was paid in foreign currency contrary to the Exchange Control Act, 1961 (Act 71).

In the case of **Tinsley v Milligan (supra)** the Claimant and Defendant were lovers. Together they purchased a property from which they jointly ran a business by letting out the rooms in the house. It was agreed that the house was to be registered in the name of the Claimant alone. This was so that the Defendant would be able to fraudulently claim social security benefits which would go into their joint bank account. The relationship broke down and the Claimant sought possession of the house asserting full ownership. The Defendant sought a declaration that the property was held on trust for both of them in equal shares. The Court of Appeal dismissed the defence of illegality by the application of a public conscience test and held that it would be an affront to the public conscience to allow the Claimant to keep the whole interest in the house. The Claimant appealed to the House of Lords. The House of Lords reviewed the previous decisions on the general issue of recovery of trust property tainted by fraud and concluded that where the claimant can make her case without necessarily relying on the illegality, then her claim ought to be allowed. So the House of Lords came to the same conclusion as the Court of Appeal by allowing the claim but through a different process of reasoning called the reliance principle.

Browne-Wilkinson L J in his judgment explained the reliance principle in relation to resulting trusts, which concerns us in this case, and stated as follows at paragraph 23;

"The presumption of a resulting trust is, in my view, crucial in considering the authorities. On that presumption (and on the contrary presumption of advancement) hinges the answer to the crucial question "does a plaintiff claiming under a resulting trust have to rely on the underlying illegality?". Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property' to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction."

In **Schandorf v Zeini** the Court of Appeal also applied the reliance principle in rejecting the illegality defence. Amissah JA, who delivered the lead judgment of the court, at page 433 of the Report said as follows;

" If the plaintiff can succeed without disclosure of or reliance upon the illegality or immorality it does not matter that at the trial an illegality or immorality in the course of the performance of a contract becomes known to the court."

In the **Zagloul Estates** case, which involved rent payment in violation of the **External and Diplomatic Missions (Acquisition or Rental of Immoveable Property) Law, 1986 (PNDCL 150),** the Supreme Court, aside Atuguba, JSC who alluded to the principle in his opinion, did not discuss the reliance principle and based their decision on the ground that the indemnity agreement at the centre of the dispute was a clever

device dishonestly contrived by both parties to defeat the ends sought to be achieved by the statute. Consequently, they upheld the illegality defence.

Going by the reliance principle applied in **Schandorf v Zeini** and in the English cases, which are referred to for comparative learning, the plaintiff's claim ought to be allowed since she can maintain her action without necessarily relying on the source of the money she used for her contribution. However, the reliance principle if generalized in its application can lead to atrocious results that defeat the public policy considerations that underpin the doctrine of illegality. For instance, if a person were to claim recovery of trust property and the evidence shows that the money the person used for her contribution to the acquisition of the trust property was proceeds of armed robbery activities, should the court allow the claim because she can maintain her claim without relying on the grave criminal activity that is the source of the funds? In order to avoid such obnoxious outcomes that could result from a strict application of the reliance principle, courts now adopt the discretionary approach in determination of when to allow a claim affected by illegality and when not to allow it. That is the approach this court applied in the **City & Country Waste** case. The discretionary approach had been in application in other common law jurisdictions such as the USA, Canada, and New Zealand.

In the **City & Country Waste case** the parties entered into a contract whereby the plaintiff was to collect and dispose of the environmental waste of the city of Accra on behalf of the defendant at a stated amount per ton of waste carted. The defendant defaulted in payment of large quantity of waste carted by the plaintiff so it sued for payment in accordance with the rates agreed to in the contract. In its defence the defendant contended that the agreement was entered into without complying with certain provisions of the Local Government Act, 1993 (Act 462) so it was illegal. The court found as a fact that there was a violation of the Act and held that it made the contract illegal. In arguing the case the parties propounded different tests which they urged on the court to adopt as the preferred test for determining the defence of illegality in contracts. It must however be pointed out that the reliance principle was not

discussed. After examining their arguments the court took into account recommendations of the English Law Commission's Paper No 154 on 'The Effect of illegality on Contracts and Trusts' published in 1999 and developed what can safely be considered our approach to the illegality defence, at least in claims for contract enforcement. At pages 436 of the Report the court, through Date-Bah, JSC approved of the following recommendations in the Law Commission's Paper No 154;

"We have said that we believe that there is a continued need for some doctrine of illegality in relation to illegal contracts and that, in certain circumstances, it is right that the law should deny the plaintiff his or her standard rights and remedies. However, we have also explained how, in some situations, we believe that the plaintiff is being unduly penalized by the present rules. This injustice would seem to be the inevitable result of the application of a strict set of rules to a wide variety of circumstances, including cases where the illegality involved may be minor, may be wholly or largely the fault of the defendant, or may be merely incidental to the contract in question. We consider that the best means of overcoming this injustice is to replace the present strict rules with a discretionary approach under which the courts would be able to take into account such relevant issues as the seriousness of the illegality involved, whether the plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal. The adoption of some type of discretionary approach has the support of the vast majority of academic commentators in this area; and it is the approach which has been followed in those jurisdictions where legislation has been implemented."

The court then concluded as follows;

"We have decided to adopt this structured discretionary approach to the resolution of issues arising from illegality of contracts. The approach is to be fleshed out on a case by case basis. On the facts of the present case,

balancing the need to deny enforceability to the contract sued on by the Plaintiff against the need to prevent the unjust enrichment of the Defendant, and, considering that in relation to the Defendant's non-compliance with the statutory provisions binding on it, the Plaintiff was not in pari delicto in a broad sense, we have come to the conclusion that the Plaintiff must be paid reasonable compensation for the services it rendered to the Defendant."

By this decision Ghana formally adopted the discretionary approach as the legal framework of analysis of the defence of illegality thereby joining many other common law jurisdictions that apply that approach. By implication the reliance principle has been jettisoned and is no longer applicable in Ghana. The United Kingdom Supreme Court only recently in the case of **Patel v Mirza [2016] UKSC 42** also abandoned the reliance principle as the scheme of analysis for considering the illegality defence and opted for the discretionary approach.

In line with our decision in **City & Country Waste case** we adopt the discretionary approach for determination of the question whether or not to allow a claim for recovery of trust property that on the evidence is tainted by illegality. The discretion is to be exercised on consideration of the following factors; a) the seriousness of the illegality, b) whether the denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts, and c) whether it would be harmful to the integrity of the legal system to allow the claim.

Applying the above factors to the facts of this case, we note that the defendant has not identified any specific law that the plaintiff violated on account of the marriages of convenience through which the funds were realized and used as part of her contribution in the joint business. We have already upheld the validity of that marriage so we cannot at the same time talk of it as a fictitious marriage. Neither can we talk of bigamy which may arise only in respect of the customary marriage but no money was earned for that marriage. From all accounts, the customary marriage was the one contracted out of love and affection but the law in its peculiar way of operation has rather nullified that

marriage and upheld the validity of the "connection marriage". The only possible illegality that appears on the facts of this case is false declaration for purposes of marriage in that when the plaintiff in those marriages said for better for worse she did not intend those pronouncements. Under **Section 268 of Act 29** the offence of false declaration for marriage is a misdemeanor which means it is not grievous. We do not consider the perceived illegality in this case to be serious enough to persuade us to deny the plaintiff's claim. We also hold that a denial of her claim would be a disproportionate response to the perceived illegality particularly as she has already lost her status of being married to the deceased, which if it existed would have entitled her to a portion of the estate of the deceased. The integrity of our legal system would not suffer by allowing the plaintiff's claim on the grounds stated above. Consequently, we hold that the plaintiff is entitled to recover her part of the two properties proportionate to her contribution.

Before deciding the extent of the plaintiff's interest in the properties we shall dispose of ground C of the appeal which is about the status of the 1st defendant, whether or not she is the lawful surviving spouse of the deceased. The basic question on this aspect of the case is whether the plaintiff has *locus standi* to challenge the marital status of the 1st defendant? In the unreported case of **Board of Governors of Achimota School v Nii Ako Nortey II & Ors, Civil Appeal No J4/9/2019 judgment dated 30th May, 2020** I said as follows at page 12 of my judgment;

"Locus standing or simply standing, is one of the core principles on which the common law operates. The jurisdiction of the court at common law is only to be invoked by persons who have interest in the subject matter in respect of which they seek relief. This is so because the courts do not try hypothetical cases but only actual controversies or disputes. The policy consideration is to make maximum use of the resources of the court by dealing only with life issues. See Ware v Regent's Canal Co (1858) 3 De G & J 212. The requirement of standing goes for the plaintiff as well as the defendant. A defendant must be shown to be an actual and true antagonist to a claim

hence the power of a court to discharge a person who has been made a defendant who would not be directly affected by the outcome of the case. See Morkor v Kuma [1998-99] SCGLR 620."

In the circumstances, having concluded that the plaintiff's marriage to the deceased was void, she loses any standing to seek for a relief against anyone who claims to have been married to the deceased. Consequently the issue raised under ground C of the appeal does not arise and that ground of the appeal is hereby struck out. The same goes for the defendants' reliefs (b) and (c) of their counterclaim. The plaintiff not having any interest in the estate of the deceased she is not a competent defendant to the claim for declaration of validity of the Letters of Administration so those reliefs of the defendants are equally struck out.

Now to the extent of the plaintiff's interest in the two houses. She argued that the disputed properties were held by the deceased and herself as joint tenants with a right of survivorship meaning on his death she takes over the whole properties as sole owner. But it is important to point out that the interest that the plaintiff has in the properties in question is an equitable one arising from the resulting trust that we have upheld on the basis of her contribution. Her interest does not arise on the basis of the conveyances covering the properties which are all in the name of the deceased alone. The settled position in land law is that equity favours tenancy in common over joint tenancy. See **Malayan Credit Ltd v Jack Chia [1986] AC 549.** Besides, Ghana law espouses a preference for property that is co-owned to be held as tenancy in common instead of joint tenancy even where there is a conveyance to persons as co-owners, except express words are used to indicate an intention of joint tenancy with a right of survivorship. Accordingly, it is provided under **Section 14(3) of the Conveyancing Act, 1973 (NRCD 175)** as follows;

"A conveyance of an interest in land to two or more persons, except a conveyance in trust, shall create an interest in common and not in joint tenancy, unless it is expressed in such conveyance that the transferees shall

take jointly, or as joint tenants, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy."

We therefore reject the plaintiff's claim of joint tenancy with a right of survivorship. She shall take the beneficial interest in the two properties under a tenancy in common with the estate of the deceased.

In cases of this nature the difficult question that courts have faced is how to determine the extent of the respective interests of the parties in the absence of clear evidence of how much each party contributed. In the case of **Gregory v Tandoh** the Supreme Court went for equal beneficial ownership between the plaintiff and the defendants but apart from observing that the plaintiff's financial contribution was substantial, no legal principle was stated and applied in arriving at the equal ownership. The fact is that it is not in all cases that equal ownership is equitable. The evidence in this case does not show the proportions of the respective contributions made by the plaintiff and the deceased towards the joint business and the building of the two houses. There is also no evidence of proportions of ownership that they intended to have in the properties beyond the testimony of the plaintiff that they acquired two other lands to build their individual houses while keeping the Tantra Hill and Adabraka houses as common properties. The Tantra Hill house was to be used for hotel business and the Adabraka house was being used partly for their business and partly for rental. The English courts have grappled with this question over many years and therefore developed some principles that can serve as persuasive reasoning in this case.

In **Oxyley v Hiscock (supra)** the English Court of Appeal considered the question of the extent of interest of beneficial co-owners in a house acquired by joint contributors who co-habited but were not married. After a thorough review of the authorities Chardwick L J summarized the position as follows;

"Three strands of reasoning can be identified. (1) That suggested by Lord Diplock in Gissing v Gissing ([1971] AC 886, at 909D) and adopted by Lord

Justice Nourse in Stokes v Anderson ([1991] 1 FLR 391, at 399G, 400B-C. The parties are taken to have agreed at the time of the acquisition of the property that their respective shares are not to be quantified then, but are left to be determined when their relationship comes to an end or the property is sold on the basis of what is then fair having regard to the whole course of dealing between them. The court steps in to determine what is fair because, when the time came for that determination, the parties were unable to agree. (2) That suggested by Lord Justice Waite in Midland Bank v Cooke ([1995] 2 FLR 915, at 926F-H). The court undertakes a survey of the whole course of dealing between the parties "relevant to their ownership and occupation of the property and their sharing of its burdens and advantages" in order to determine "what proportions the parties must be assumed to have intended [from the outset] for their beneficial ownership". On that basis the court treats what has taken place while the parties have been living together in the property as evidence of what they intended at the time of the acquisition. (3) That suggested by Sir Nicolas Browne-Wilkinson, Vice Chancellor, in Grant v Edwards ([1986] 1 Ch 638, at 656G-H, 657H) and approved by Lord Justice Robert Walker in Yaxley v Gotts ([2000] Ch 162, 177C-E). The court makes such order as the circumstances require in order to give effect to the beneficial interest in the property of the one party, the existence of which the other party (having the legal title) is estopped from denying. That, I think, is the analysis which underlies the decision of this Court in Drake v Whipp - see [1996] 1 FLR 826, at 831E-G."

We think that the facts of the case at hand fit more into the first strand of cases which adopt the approach that the parties are assumed to have deferred discussion of their respective proportions of ownership to the future but the dispute arose before that discussion. Therefore, the court shall step in and determine their respective proportions of ownership taking into account all the circumstances surrounding the acquisition of the common property. From the evidence in this case, the plaintiff and the deceased

were yet to complete building of the Tantra Hill house after which they would have had to equip it before setting it up as a hotel. Apart from agreeing to own the properties together they did not advert their minds to what proportion each was to contribute towards completion and the proportion of ownership each would have. Though the Adabraka house was completed and put to use there had been no discussion as to proportions of contribution and ownership. Meanwhile it is plain from the evidence that the deceased undertook a greater part of the work in the acquisition of the lands and putting up the houses. It is apparent that after the joint business ceased the deceased carried out further works on the Tantra Hill house. From the evidence, unlike the plaintiff who used part of her resources to build a house for herself at Taifa, the deceased did not put up any other building for himself meaning he invested every resource in these two properties. At some point the plaintiff left the jurisdiction to work while the deceased continued to apply his effort and resources on these properties.

As a court of equity, having taken the view that the properties were jointly acquired, we are to try as much as possible to decide the case in a just and fair manner taking into consideration all the circumstances surrounding the acquisition of the properties and the contributions of the parties. We accordingly set aside the judgments of the High Court dated 30th July, 2012 and of the Court of Appeal dated 4th February, 2016 and make the following orders. The parties shall be entitled to the total value of the Tantra Hill and Adabraka houses in the proportions of 40% to the plaintiff and 60% to the defendants. We order that the two houses be sold on the basis of the valuations that have been filed before us and the proceeds shared between them in the stated proportions. The parties are however at liberty, subject to agreement of all of them, to trade their entitlements between themselves. Furthermore, we consider it unacceptable for the defendants to have ejected the plaintiff from the Tantra Hill house while her claims were unresolved. She had an interest in that property and until her claims were determined by the court she ought not to have been ejected therefrom. We accordingly award in her favour and against the defendants GHC10,000.00 as damages for trespass.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

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