IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
OWUSU (MS.) JSC
HONYENUGA JSC
PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL
NO. J4/30/2021

26TH JANUARY, 2022

LINDA AKOTO ..... PETITIONER/RESPONDENT/RESPONDENT

VRS

BRIGHT KWASI MANU ..... RESPONDENT/APPELLANT/APPELLANT

JUDGMENT

OWUSU (MS.) JSC:-

On 14th November, 2019, the Court of Appeal, Accra, dismissed the Respondent/Appellant/Appellant's appeal in its entirety and affirmed the judgment of the High Court dated 18th December, 2015. Dissatisfied with the decision of the Court of Appeal, the Appellant filed an appeal to this Court on the following Grounds:

a. *That the judgment is against the weight of evidence on record before the court.*
b. *The learned judges of the Court of Appeal, with respect, erred when they disregarded the Terms of Settlement signed by the parties.*
c. *The Court of Appeal, with respect, erred when it failed to uphold that the failure of the trial High Court to determine the matter based only on the outstanding matters identified by the parties under the Terms of Settlement denuded the trial High Court of jurisdiction to try the matter without paying regard to the Terms of Settlement.*
d. *The Court of Appeal with respect fell into the same error as the trial High Court when it assumed jurisdiction to hear the matter resulting in a judgment at variance with the binding agreement of the parties under the Terms of Settlement.*
e. *The Court of Appeal, with respect, erred when it failed to hold that the Terms of Settlement signed and filed by the parties effectively ended the dispute between the parties, thus limiting the dispute in terms confined by the Terms of Settlement.*
f. *The Court of Appeal, with respect, erred when it failed to hold that the trial High Court did not give the Appellant a fair hearing when the trial High Court settled a whole property in favour of the Respondent without any specific provision for the Appellant thereby occasioning a substantial miscarriage of justice.*
g. *The Court of Appeal, with respect, failed to carry out substantial justice when it struck out grounds 2 and 4 of the Appellant's grounds of appeal on procedural grounds despite the substantial jurisdictional argument raised and argued thereunder*.

On 25th February, 2021, pursuant to leave granted by this court, the Appellant amended Ground (g) of his Ground of appeal to read:

g. *The Court of Appeal erred in law when it failed to hold that the High Court violated the constitutional provisions imposing on Courts a duty to distribute matrimonial assets equitably.*

Particulars of Error of Law:

i. By settling the only alleged Matrimonial Property on Record in the Petitioner/Respondent/Respondent without evidence as to the existence of other assets jointly acquired during marriage the High Court and the Court of Appeal breached Article 22(3) (b) of the 1992 Constitution of Ghana.

ii. Failure by the High Court and the Court of Appeal to interrogate the existence or otherwise of other properties and whether or not they were acquired before or during the marriage occasioned substantial miscarriage of justice.

iii. By affirming the judgment of the High Court, the Court of Appeal also committed error of law when it failed to apply the provision of Article 22 (3) of the 1992 Constitution.

Before dealing with the arguments canvassed in support and against the appeal, we would give a brief background of the case.

The parties are both Ghanaians. They were married customarily in 2004 and have two children. In 2014, they registered the said marriage. The Respondent/Appellant/Appellant herein referred to as Appellant is resident in Holland whilst the Petitioner/Respondent/Respondent herein referred to as Respondent is permanently resident in Ghana. The Respondent filed for a Divorce at the High Court praying for the following reliefs:

1. That the marriage between the parties be dissolved.
2. The Petitioner be granted custody of the children of the marriage.
3. That a declaration for care and maintenance of the children of the couple be made.
4. That the following properties be settled in favour of the Petitioner.
   (a) The thirteen (13) bedroom one storey building (almost completed) at Adjiringano with House No. 100, Tema motorway
   (b) The KIA Sportage car.

When the Petition was served on the Appellant, he Entered Appearance through counsel but did not file an Answer to the Petition. The Petition was subsequently set down for trial. After giving evidence, the Respondent was extensively cross examined by counsel for the Appellant. After the cross examination, the parties made an attempt at reconciliation but failed. The matter was then adjourned for judgment.

In her judgment, the trial court held amongst other things as follows;

"In view of the fact of Respondent's ownership of two other houses, I consider it just and equitable to grant Petitioner's prayer that thirteen (13) bedroom matrimonial home situate at Adjiriganor be given Petitioner as property settlement and I so order. Respondent is hereby ordered to transfer or convey title to the said house to the Petitioner if he has not already done so. In the event of Respondent's failure to do so, the Registrar of this court is authorized to execute the said transfer or conveyance to the Petitioner". See page 25 of the Record of Appeal the second paragraph.

It is the above Order of the High Court, that the Appellant has fought through the Court of Appeal to this Court.

In arguing the appeal, counsel for the Appellant, argued Ground (a) first which is:

The judgment is against the weight of evidence on record before the court.

Counsel referred us to the evidence of the Respondent where the latter testified that, the Appellant had two other houses besides the matrimonial home. He continued that, the trial judge in her judgment held that, the Appellant failed to file an answer to the Petition, Secondly, the evidence by the Respondent that, the Appellant had two other houses was not challenged or opposed to by counsel for the Appellant. Counsel then submitted that, the Respondent did not lead credible evidence to establish or support the claim that the Appellant owned two other houses or provide any description whatsoever to establish whether the said properties existed in the first place, and even if they did, whether or not such properties were acquired during the subsistence of the

marriage. Consequently, the Respondent failed to discharge the burden imposed on her by law to show the existence of these two properties. That the Court of Appeal also erred when it failed to take into account the standard of proof cast on the Respondent in evaluating the evidence on record before it proceeded to affirm the judgment of the High Court. Counsel referred us to the cases of **MAJOLAGBE v LARBI [1959] GLR190; ZABRAMA v SEGBEDZI [1991]2 GLR 221; BONSU v KUSI [2010] SCGLR 60** and others as well as *sections10, 11(1) and (4), 12 and 14 of the Evidence Act 1975,(NRCD 323*) on the standard of proof cast on a party alleging the existence of a fact before a finding could be made in her favour that the fact he alleges exists. Counsel conceded that where unpleaded evidence is not objected to or challenged by the opposing counsel while it is being proffered, such evidence is admissible and the court is bound to consider it. He however submitted that, in evaluating such evidence, the court should examine the said evidence in terms of what weight to accord it and how to apply it having regard to the requisite standard of proof referred to above. In the instant case, counsel argued, both the High Court and the Court of Appeal were duty bound to measure the unchallenged evidence in the context of the law governing distribution of marital property in matrimonial proceedings if the burden of proof has been satisfied. According to counsel for the Appellant, merely stating that a party has property elsewhere is not enough to adjudge whether the alleged property can be adjudged to be jointly acquired or spousal property in law. Counsel referred us to the case of **DZAISU v GHANA BREWERIES LTD [2007-2008] SCGLR 539**and submitted that in the case under consideration, a duty was cast on the Respondent at least to lead evidence to establish the location of the property, the ownership, whether or not the said property was acquired in the course of the marriage and the nature of the property. Counsel concluded on this ground that, the failure to examine the testimony of the Respondent within the context of the distribution of spousal property caused error in the judgment of the trial judge and this erroneous judgment was affirmed by the Court of Appeal and this led to a substantial miscarriage of justice against the Appellant. Counsel referred us to this Court's decision in the case of **JULIANA AMOAKOHENE v EMMANUEL K. AMOAKOHENE dated 13th May, 2020**

and submitted that, in the Amoakohene case referred to supra, failure to apply Article 22 (3) of the 1992 Constitution in the settlement of a spousal or jointly acquired property, the Supreme Court interfered with the lower courts' concurrent findings of fact. He therefore invited us to interfere with the findings of the High Court that the Appellant owned two other properties which finding was affirmed by the Court of Appeal and settle the thirteen (13) bedroom uncompleted house in accordance with Article 22 (3) of the 1992 Constitution. Based on the forgoing, counsel for the Appellant submitted that the judgment of the Court of Appeal is against the weight of evidence on record.

In response to ground (a) of the appeal, counsel for the Respondent submitted that, the judgment of the Court of Appeal is amply supported by evidence on record and that, the Appellant by failing to file an answer to the Petition, he was deemed to have admitted the facts pleaded in the Petition. The Appellant thus failed to discharge the burden required of him in law when he alleged that, "the judgment is against the weight of evidence on record". Counsel for the Respondent referred us to case law on this point, Order 11 Rule 13 (1) of CI 47, Odgers on Pleading and Practice (18th Edition) at page 131 and section 11 of the Evidence Act 1975 (NRCD 323). He then submitted that, the Court of Appeal on the basis of the evidence before it and the strength of the legal authorities did not err and invited us to so hold.

From the evidence on record, the Appellant did not file an answer to the Respondent's Petition. Counsel for the Appellant also did not raise any objection when the Respondent testified that the Appellant has two other houses. Not only that, counsel for the Appellant did not cross examine the Respondent on the evidence that his client had two other houses apart from the matrimonial home. The trial judge thus had only the evidence of the Respondent before her in evaluating the evidence that the appellant has two other houses besides their matrimonial home. In this case right from the word go, the Respondent stated what she wants in her Petition. She also gave evidence to support her claim of the ancillary reliefs. Section 11(1) of the Evidence Act 1975 (NRCD 323), provides that:

"For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue".

This position of the law was amply explained by this Court in the case of **IN RE ASHALEY BOTWE LANDS; ADJETEY AGBOSU & OTHERS [2003-2004] SCGLR 400, 425-426.** This Court speaking through *His Lordship Brobbey JSC* held as follows:

"The effect of section 11 (1) and 14 and similar sections in the Evidence Decree, 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of fact, or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has a duty to help his own cause by adducing before the court such facts or evidence that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence the court will be left with no choice but evaluate the entire case on the basis of the evidence before the court, which may turn out to be the only evidence of the plaintiff.

If the court chooses to believe the only evidence on record the plaintiff may win and the defendant may lose. Such loss may be brought about by default on the part of the defendant. In the light of the statutory provisions, literally relying on the common law principle that the defendant does not need to prove any defence an therefore does not need to lead any evidence may not always serve the best interest of the litigant even if he is a defendant(our emphasis).

Relating the case cited supra to the case under consideration, the Respondent filed a Petition seeking dissolution of her marriage with the Appellant and claimed some ancillary reliefs. The Appellant failed to file an answer. When the Respondent testified and stated that the Appellant has two other houses apart from their matrimonial house. The Appellant failed to challenge the Respondent on this assertion. The trial judge was thus right when she settled the matrimonial house on the Respondent as there is unchallenged evidence on record that the Appellant has two other houses aside the matrimonial house. The argument from counsel for the Appellant that the trial Judge should have found out the location of the said properties, its value etc. and her evaluation of the evidence on record is without merit. If the Appellant had challenged this piece of evidence, then the Respondent would have been obliged to give the particulars the Appellant is referring to. See the case of **TAKORADI FLOUR MILLS v SAMIR FARIS [2005-2006] SCGLR 882**, holding (1) where their Lordships held that:

"The law is well-settled (as held by the trial court and affirmed by the Court of Appeal) that where the evidence led by a party is not challenged by his opponent in cross-examination and the opponent does not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial court.

From the forgoing, the trial judge properly evaluated the evidence on record and came to the right conclusion. Her finding is clearly supported by evidence on record. Consequently, the Court of Appeal did not err when it affirmed the finding of fact by the trial High Court. This Court as the second Appellate Court will affirm the findings of the two lower courts on the issue that the Appellant has two other houses apart from the matrimonial house. In that respect, the trial judge and the Court of Appeal did not disregard Article 22 (3) (b) of the 1992 Constitutional. On the contrary the High Court and for that matter the Court of Appeal took into consideration Article 22 (3) (b) of the Constitution in settling the thirteen (13) bedroom house on the Respondent since the

Appellant has two other houses apart from the matrimonial home. This is what the trial High Court said in its judgment:

"Petitioner testified that Respondent owned two (2) other houses. This claim was not challenged by the Respondent or the unpleaded assertion that, the matrimonial home was constructed prior to Respondent's marriage to the Petitioner. This assertion, the Petitioner vehemently denied. Having already discussed the effect of the Respondent's failure to file an answer, it will serve no useful purpose elaborating on the reasons why this court should prefer the evidence of the Petitioner over that of the Respondent regarding the said property. I therefore hold that the thirteen (13) bedroom single storey house situate at Adjiriganor qualifies as joint matrimonial property in which Petitioner should have a share even in the absence of any evidence of direct financial contribution by her. I am fortified in this view by the decision of the Supreme Court in the case of MENSAH v MENSAH (2012) 1 SCGLR @ 391 and also by Article 22 (3) (b) of the 1992 Constitution which states that assets which are jointly acquired during marriage shall be distributed equally between spouses upon dissolution of the marriage.

In view of the fact of Respondent's ownership of two other houses, I consider it just and equitable to grant Petitioner's prayer that thirteen (13) bedroom matrimonial home situate at Adjiriganor be given to Petitioner as property settlement and I so order. *Respondent is hereby ordered to transfer or covey title to the said house to Petitioner if he has not already done so. In the event of Respondent's failure to do so, the Registrar of this court is authorized to execute the said transfer or conveyance to the Petitioner*".

See page 25 line four of the first paragraph to the end of that paragraph of the Record of Appeal.

Thus, this finding by the High Court and affirmed by the Court of Appeal is clearly supported by the evidence on record and the law. See the case **OWUSU-DOMENA v AMOAH [2015-2016] 1 SCGLR, 790.**

Ground (a) of the appeal fails and it is accordingly dismissed.

This brings us to Grounds (b), (c), (d) and (e) which were agued together by counsel for the Appellant.

The arguments advanced in support of these grounds by counsel for the Appellant are that, the Terms of Settlement filed is binding on the parties. Secondly, when the Terms of Settlement were filed, the matter was no longer before trial court to be determined on the merits. He referred us to the case of **THE REPUBLIC v HIGH COURT, ACCRA, EX-PARTE DEBORAH ATAKORAH (CUDJOE INTERESTED PARTY) [2015-2016] SCGLR 329.** Counsel for the Appellant therefore submitted that, the position of the Court of Appeal is at variance with both statutory provisions and case law. He concluded on this point that, the Terms of Settlement having been filed, was binding on the parties just as any other contractual agreement. Thus, the High Court and the Court of Appeal ceased to have jurisdiction particularly in respect of the property settlement as the matter was no longer subsisting before the High Court for determination on its merits. Consequently, the High Court committed grievous jurisdictional error when it assumed jurisdiction to determine the matter after the Terms of Settlement had been filed. Counsel for the Appellant therefore invited us to interfere with the concurrent findings of the High Court and the Court of Appeal by reversing their findings and hold that the Respondent is only entitled to a house to be built by the Appellant or an alimony on terms to be agreed or to be determined by way of a limited trial before the High Court.

In response to the above submissions, counsel for the Respondent submitted that, the submissions by counsel for the Appellant are incorrect statement of the law and facts in this case. He continued that; the Terms of Settlement filed were considered by the Court but were not adopted as consent judgment. This is because the parties were not ad idem as to the terms contained therein. Therefore, the Terms of Settlement were not binding on the trial court and the Court of Appeal. Secondly, the parties stated that they did not agree to the alimony or constructing a house for the Respondent. This therefore put the determination of the said issues squarely within the precincts of the trial court's jurisdiction. Therefore, the trial court did not err in determining the issue of

settling the Matrimonial Home on the Respondent since same was not included in the Terms of Settlement. The Court of Appeal was therefore right in upholding same upon rehearing the matter. Counsel therefore submitted that, the Ex-parte: Deborah Atakorah case referred to by counsel for the Appellant should be distinguished from the case under consideration both on the facts and ratio.

With all due respect to counsel for the Appellant, his submission on the Terms of Settlement is erroneous. This is because, when the trial judge adjourned the matter for judgment, she urged the parties to file Terms of settlement by certain date, if the parties are able to settle the matter for her consideration in writing her judgment.

The proceedings for that day are quoted hereunder for emphasis. The Court notes read;

"BY COURT

RESPONDENT*: My lord, I am opposed to the divorce. I still love my wife.*

This matter is due for judgment. However, Respondent has expressed a desire to attempt reconciliation. The parties are therefore (sic) reported to His Excellency Yaw Osei for parties to attempt reconciliation.

Petition adjourned to 17th November, 2015 for parties to report on outcome of attempt at settlement".

See page 16 of the Record of Appeal, the last paragraph after the end of the cross examination of the Respondent, then the Petitioner

On the adjourned date, counsel for the Appellant prayed for a short date to report on the outcome of the settlement. The matter was thus adjourned to 27thNovember, 2015. On 27th November, 2015, the Appellant was in court and this is what he said:

"Respondent: We went to the Counsellor. He has asked us to come tomorrow. Given the nature of the strained relationship I do not think I still want to reconcile with the Petitioner".

See page 18 of the Record of Appeal

The matter was then adjourned to 30th November, 2015 for the parties to report on Reconciliation. On 30thNovember, 2015, the Appellant insisted he is no longer interested in reconciliation and the Respondent also said she was also not interested in the marriage.

The court's notes read:

"COURT" In the face of this clear unwillingness of parties to go through the process of reconciliation. This court will rescind its order and proceed with the trial of the matter.

RESPONDENT COUNSEL: My lord we have closed our case. We intend to file an address but will consider filing terms of settlement for consideration of the court.

Counsel For Petitioner: We then intend to file an address.

COURT: Counsel are to file their addresses by 14th of December 2015. In the meantime, the parties if they are able to settle the matter as suggested are to file Terms of Settlement by 8th of December, 2015 (which is the departure date of Respondent) to guide the court.

BY COURT: Petition adjourned to the 18thof December, 2015 for judgment".

See page 20 of the Record of Appeal.

From the proceedings quoted above, the parties were to file Terms of Settlement by 8th of December, 2015 to guide the Court. A careful reading of the Record of Appeal shows that the Terms of Settlement was filed on the 17THof December, 2015. See page 14 to 15 of the Record of Appeal. This was way beyond the time given to the parties to file the Terms of Settlement. The trial judge was thus right to go ahead and give her judgment**.** In the case of **SAM v NOAH and OTHERS [1992-93] GBR 262, Their Lordships held in holding (1)** as follows:

"The appellants' plea of illiteracy was no excuse, as was the alleged ill-health of the first defendant-appellant of which proof was lacking. The delay of

almost two years and three months in bringing the application was too long and the grounds or excuses could not justify the long delay."

In the case referred to supra, the Supreme Court relied on the Privy Council case of **Ratnam v Cumarasamy [1965] 1 WLR 8 at 12** where the applicant was four days out of time in fulfilling conditions of appeal. The Privy Council held:

"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step-in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation." (Our emphasis)

See also the case **of Revici v Prentice Hall Incorporated and Others [1969] 1 WLR 157, 159,**referred to in the **Sam v Noah** case supra, whereLord Denning had this to say**:**

"Nowadays we regard time very differently from the way they did in the 19th century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time."

From the cases referred to supra, the issue of jurisdiction raised by counsel for the Appellant is erroneous and without merit as the Terms of Settlement was filed outside the time given by the Court. The trial judge was thus right in giving her judgment. She also did not breach any rule of natural justice as the parties were given a hearing. Giving a party hearing also means giving the party the opportunity to be heard. Therefore, where a party is given the opportunity to be heard and he failed to take it, he cannot complain that he has not been heard. In this case, the appellant failed to file an answer to the Respondent's Petition. When the Respondent testified and said the Appellant has two other houses, the latter failed to challenge this assertion in cross

examination in spite of the lengthy cross examination done by counsel for the Appellant. It is too late in the day to be raising this issue before the Supreme Court. Consequently, the Court of Appeal did not err in affirming the judgment of the High Court. Grounds (b), (c), (d) and (e) of the Appeal fail and they are accordingly dismissed.

The last ground of appeal is ground G.

The Court of Appeal erred in law when it failed to hold that the High Court violated the constitutional provisions imposing on Courts a duty to distribute matrimonial assets equitably.

Counsel for the Appellant gave the particulars of Error of Law as follows:

i) By settling the only alleged Matrimonial Property on Record in the Petitioner/Respondent/Respondent without evidence as to the existence of other assets jointly acquired during the marriage the High Court and the Court of Appeal breached Article 22 (3) (b) of the 1992 Constitution of Ghana

ii) Failure by the High Court and the Court of Appeal to interrogate the existence or otherwise of the other properties and whether or not they were acquired before or during the marriage occasioned a substantial miscarriage of justice.

iii) By affirming the judgment of the High Court, the Court of Appeal also committed an error of law when it failed to apply the provision of Article 22 (3) of the 1992 Constitution.

We addressed the issue whether the Appellant has two other houses and Article 22 (3) (b) of the 1992 Constitution when we discussed ground (a) of the appeal. We emphasized that, the Appellant did not proffer any contrary evidence before the trial judge. Thus, the trial judge was left with only the evidence of the Respondent to evaluate. In line with Article 22 (3) of the 1992 Constitution, since the Appellant has two other houses, the trial judge settled the matrimonial house on the Respondent. All the arguments canvassed by the Appellant are a repetition of the argument submitted on ground (a) of the appeal.

Ground G of the appeal also has no merit and it is accordingly dismissed.

From all of the forgoing the appeal fails and it is accordingly dismissed. The judgment of the Court of Appeal dated 14th November, 2019, is hereby affirmed.

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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

C. J. HONYENUGA
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