IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: GBADEGBE, JSC (PRESIDING)
PWAMANG, JSC
DORDZIE (MRS.), JSC
KOTEY, JSC
OWUSU (MS.), JSC

CIVIL APPEAL
NO. J4/32/2019

22ND JULY, 2020

LYDIA KWAO ……. PETITIONER/RESPONDENT/RESPONDENT

VRS

PASCAL MUAKO TCHEMCO ……. RESPONDENT/APPELLANT/APPELLANT

JUDGMENT

OWUSU (MS.), JSC:-

On 20th July, 2017, the Court of Appeal dismissed the appellant's appeal and affirmed the judgment of the trial court. The Court held among other things as follows:

> *"Finally, for the reasons given in this judgment, the appeal fails and subject to the exclusion of the Nissan X-Terra from the properties ordered to be shared equally by the parties, the judgment of the trial court dated the 10th of December, 2015 is hereby affirmed."*

Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court on the following grounds:

i. *That the Court of Appeal erred in affirming the decision of the trial court that the appellant's properties as contained in the petition be shared equally between the parties.*
ii. *That the judgment is against the weight of evidence.*
iii. *That further grounds of appeal may be filed upon receipt of a certified full copy of the judgment of the Court of Appeal.*

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

The appellant in this case is a Camerounian born and a Canadian citizen. He is a businessman who deals in the importation and sale of used clothes which he imports from Canada to Ghana, Cameroun and Guinea for sale whilst the respondent is a Ghanaian trader in used cloths. The parties met in the course of their trading activities. Subsequently, the appellant married the respondent customarily at Nkoranza, in the then Brong Ahafo Region sometime in 2003 in the presence of the respondent's family.

The parties converted their marriage into an ordinance one as evidence by the Marriage Certificate dated 30th August, 2003, Exhibit 'A'. They also stayed together and co-habited in their matrimonial home at Aplaku anytime the appellant visited Ghana from 2003 to 2011. The respondent filed for a decree of nullity on the ground that the marriage is by law void and that, the respondent be granted a share in all the assets in Ghana acquired by the parties and or acquired after the formation of PASCO M & SONS LTD. and costs.

In his amended answer and cross petition, the appellant denied that he is legally married to the respondent. He also denied that the respondent made financial contribution towards the acquisition of any of the properties as the latter was a destitute living in abject poverty when they met. The appellant therefore cross-petitioned for:

i. *A declaration that the marriage between the parties is null and void and of no legal effect.*

ii. *That the petitioner accounts for the sales /proceeds from the goods that the respondent shipped from China amounting to $168,000.00 plus interest on the said sum.*

iii. *The petitioner be ordered to pay back an amount of $60,000.00 that petitioner withdrew from the company's account and deposited same into another account beyond the reach of respondent.*

iv. *That petitioner be ordered to account to respondent for the sale of the 50.000 pieces of cement blocks amounting to Gh¢40,000.00*

v. *That petitioner be ordered to pay to respondent the funds meant for building project i.e. 1,000 bags of cement amounting to Gh¢11,000.00 and 1632 pieces of iron rods of various sizes also amounting to Gh¢260,000.00*

vi. *That petitioner be ordered to return to respondent a KIA Truck which respondent bought for the use at the Cement Block Factory for the building project which was not mentioned in the petition.*

vii. *That petitioner be ordered to return respondent's two vehicles i.e. Nissan X-Terra and the new Land Rover Discovery that petition recently removed from his house where they have always been parked.*

viii. *That the petitioner be ordered to return to respondent the Mercedes Benz Truck which cannot presently be traced*

ix. *That since the respondent is the sole owner of all the properties mentioned at paragraph 25 (11) of the petition because petitioner made no monetary contribution towards their acquisition, the respondent should be made to keep all of them.*

At the trial, the appellant in this appeal insisted his marriage to the respondent was a sham. It was just to facilitate for the latter to get visa to travel to Canada.

The trial Judge based on the evidence adduced at the trial, found as a fact that, the respondent believed in all intent and purposes that she was legally married to the appellant. In view of Exhibit '10', the trial Judge decreed the marriage celebrated between the parties in 2003, i.e. Exhibit 'A', a nullity.

On the question of property settlement, the trial Judge found as a fact that the properties listed in the respondent's petition were acquired during the subsistence of the marriage. He also found as a fact that the properties were acquired from proceeds of the trading activities of the parties (import and sale of used clothes) in Ghana. Secondly, the projects at Aplaku were supervised by the respondent who sometimes purchased materials meant for the construction of the Aplaku properties. Thirdly, the respondent performed all the duties of a wife whenever the appellant was in Ghana. Based on these facts, the trial court came to the conclusion that the respondent contributed to the acquisition of the properties and therefore is entitled to equal share in the properties.

The Court of Appeal affirmed the findings and the decision of the High Court except one vehicle which it said belongs to the Company PASCO M & SONS LTD. hence this appeal.

In arguing the appeal, counsel for the appellant argued the two grounds together. The import of the grounds is that, the judgment is against the weight of evidence on record. He then submitted that, there are certain pieces of evidence on record if applied in his favour, would have changed the decision in his favour and or certain pieces of evidence have been wrongly applied against him. He pointed out a couple of them and continued that, having appealed on the ground that, the judgment of the trial court was against the weight of evidence adduced which judgment was affirmed by the Court of Appeal, this Court should treat this appeal as a re-hearing and make its own findings of fact based on the evidence on record.

Counsel for the appellant argued that, the respondent could not prove her contribution to the acquisition of the properties listed in her petition. Nonetheless, the trial court ordered the said properties to be shared equally between the parties. He concluded that, both the trial court and the Court of Appeal disregarded the appellant's case and thus failed to properly evaluate the case of the appellant. Counsel for the appellant therefore invited this Court to review the entire record of appeal and come to the right conclusion that, the respondent is not entitled to a share of the properties listed in her petition.

In response to the above submission, counsel for the respondent argued that having appealed on the ground that the judgment is against the weight of evidence, this court is enjoined to treat this appeal as a rehearing to see whether the trial court reached a fair conclusion in the light of the evidence. In this regard, counsel submitted that this Court is not to substitute its findings of fact for the primary findings of the trial court which findings were affirmed by the Court of Appeal. He continued that, the **Matrimonial Causes Act, 1971 [Act 367]** is the main statute covering the relationship of the parties. The Act makes provision for the nullification of matrimonial engagement within the country. Counsel for the respondent continued that, **Section 13 of Act 367** does not discriminate against the type of petition presented. Whilst Section 20 deals with property settlement and Section 21 provides for the conveyance of title to any of the party. Based on the above law, he submitted that the High Court and the Court of Appeal properly evaluated the evidence on record and came to the right conclusion. Therefore, this court should not disturb the primary findings of facts, which findings have been confirmed by the Court of Appeal and this court as a second appellate court cannot substitute its findings for that of the High Court and the Court of Appeal even if on the evidence it will have come to a different conclusion.

But more importantly, counsel argued, the Court of Appeal further held that on public policy, the appellant having entered into marriage with the respondent first under customary law and later under the ordinance in 2003, cannot be heard to say that the marriage for which Exhibit 'A' was issued was a sham and was for the purpose of securing a visa for the respondent to travel to Canada. That would mean the appellant benefiting from his own wrong by deceiving a public officer.

Based on the above submissions, counsel for the respondent invited us to dismiss the appeal as same lacks merit.

In this appeal, the decision by the trial Judge to dissolve the marriage celebrated between the parties for which Exhibit 'A' was issued is in order based on Exhibit '10', the decree of divorce granted by the Canadian Court of the marriage between the appellant and Suzanne Nkwekwe. At the time the appellant married the respondent in 2003 in Ghana,

the former was already married to the said Suzanne. Thus, both parties in their pleadings, claim for the dissolution of the marriage on grounds of nullity. In her amended petition pursuant to the order of the High Court dated 9th July, 2013, the respondent prays as follows:

a. *"That the petitioner be granted a decree of nullity on the ground that the marriage is by law void."*

In his answer and cross-petition to the amended petition, pursuant to leave of the High Court dated 12th December, 2014, the appellant in paragraph 1 avers that:

"The respondent denies paragraph 1 of the petition and states that at the time of the said marriage to the petitioner on 30th August, 2003, the respondent was legally married to Suzanne Nkwekwe which said marriage was celebrated on 18th May, 2000 as a monogamous marriage in Canada and dissolved by the Superior Court of Justice in Ontario, Canada on the 2nd June, 2006."

The appellant therefore prayed as follows:

i. *"A declaration that the marriage between the petitioner and respondent is null and void and of no legal effect."*

The ***Matrimonial Causes Act, 1971 [Act 367]*** makes provision for the nullification of matrimonial engagement within the country. ***Section 13 (1) of Act 367***, provides that:

"A person may present a petition to the Court for a decree of nullity for annulling the marriage on the ground that it is by law void or voidable."

Section 20 (1) of Act 367 deals with property settlement. It provides as follows:

"The Court may order either party to the marriage to pay to the other 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."

From the grounds of appeal filed, the appellant's complaint is about the distribution of the properties acquired which the court ordered to be shared between the parties. Thus, all the grounds of appeal filed can be considered on the omnibus ground which is that, the judgment is against the weight of evidence on record. Indeed, counsel for the appellant argued grounds 1 and 2 together. These grounds are that:

> *"That the Court of Appeal erred by affirming the decision of the trial court that the appellant's properties as contained in the petition be shared equally between the parties and the judgment is against the weight of evidence."*

We have already pointed out the findings of fact which counsel for the appellant argued and submitted that they were not properly evaluated. In this appeal, the findings of facts of the High Court were affirmed by the Court of Appeal. The law is that, a second appellate court should be slow in setting aside findings of facts of the two lower courts. See the case of ***Fosua & Adu-Poku vs. Dufie (deceased) & Adu-Poku Mensah [2009] SCGLR 310 holding (4) of the Headnotes,*** where their Lordships held that:

> ***"In the instant case, the most important issue was whether the disputed house was the self-acquired property of the late Kwaku Poku as contended by the defendants. That was an issue of fact entirely within the province of the trial Judge to determine one way or the other. Provided he resolved the issue in favour of or against one side based on the evidence before him, the settled law was that an appellate court would be slow to interfere with or set aside the findings of facts so made unless the findings were so perverse or not supported by the evidence on record."***

See also the case of ***In Re Fianko Akotuah (deceased): Fianko & Another vs. Djan & Others [2007-2008] 1 SCGLR 165, 171*** where Atuguba JSC delivering the judgment of the Court stated the legal position relating to concurrent findings of fact as follows:

> ***"The Supreme Court in the case entitled Achoro vs. Akanfela [1996-97] SCGLR 209 held that, <u>in an appeal against findings of facts to a second</u>***

appellate court, such as in the instant case, where the lower appellate court had concurred in the findings of the trial court, the second appellate court would not interfere with the concurrent findings of the two lower courts *(our emphasis)* ***unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparent in the way in which the lower tribunals had dealt with the facts."***

In the case of **G. A. Sarpong & Co vs. Silver Star Auto Ltd. [2013-2014] 2 SCGLR 1313, 1315 holding (1)** their Lordships in their unanimous decision held that:

"It is settled law that an appellate court such as the Supreme Court ought not to disturb the concurrent findings of fact of two lower courts unless the findings are perverse.

Furthermore, an appeal being by way of rehearing, the second appellate court is bound to choose the finding which is consistent with the evidence on the record. In effect, the court may affirm either of the two findings or make an altogether different finding based on the record."

Relating the cases cited supra to the case under consideration, both the High Court and the Court of Appeal considered and evaluated the following finding of facts correctly:

a. *Whether the marriage between the parties for which Exhibit 'A' was issued was a sham.*
b. *Whether the respondent contributed to the acquisition of the properties listed in the petition.*
c. *The issue of fraud in the incorporation of the Company PASCO M & SONS LTD.*
d. *The reference to the unamended pleadings.*

Thus, this Court cannot substitute its own findings for that of the trial Court. From the record of appeal, there is overwhelming evidence that the properties acquired, that is, the buildings at Aplaku were acquired through the joint used cloths trading activities of the parties. The appellant shipped the used cloths to Ghana and the respondent is the

one who cleared same from the Port, sold and or distributed same to customers and transferred the monies to the appellant in Canada.

Secondly, there is overwhelming evidence on record that the properties in contention were acquired during the subsistence of the marriage between the parties and as stated above, the ***Matrimonial Causes Act, 1971 [Act 367]*** makes provision for property settlement when a marriage is declared a nullity or in case of a divorce. The Act does not discriminate between a divorce and declaring a marriage a nullity. Under the general powers of the Act, ***Section 20 (1),*** it provides that:

> ***"The Court may order either part to the marriage to pay to the other party a sum of money or convey to other party movable and immovable property as settlement or property rights or in lieu thereof or as part of financial provision that the Court thinks just and equitable."***

Having contributed to the acquisition of the properties, it is only fair and just that the respondent be given a share. Consequently, we would endorse the decision of the High Court, which decision was affirmed by the Court of Appeal. The properties listed in the judgment of the High Court, with the exclusion of the Nissan X-Terra should be shared equally between the parties. By ***Section 21 of Act 367,*** we order the appellant to transfer and or convey interest of half of the Aplaku properties to the respondent.

From the foregoing, the appeal fails in its entirety and it is accordingly dismissed.

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

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