IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ADINYIRA, JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO, JSC

CIVIL APPEAL
NO. J4/61/2014

13TH DECEMBER, 2017

MILLICENT ASARE BOAFO ……. PETITIONER/RESPONDENT/APPELLANT

VRS

PETER ABABIO
(SUBSTITUTED BY PAUL
KWABENA MENSAH) …….. RESPONDENT/APPELLANT/RESPONDENT

J U D G M E N T

ADINYIRA, JSC:-

On 20 March 2002, Millicent Asare Boafo (Petitioner) filed in the Divorce and Matrimonial Court., Accra, a petition seeking the following reliefs:

(a) That the [customary] marriage between her and [Peter Ababio] be dissolved.
(b) The matrimonial home which stands in the name of the [Peter Ababio] be declared as jointly owned by the parties in equal share.

(c) That the unnumbered house at railway quarters Achimota which was in the name of [Peter Ababio] but built from joint contribution of the parties be declared as jointly owned by the parties in equal share.
(d) That in the alternative in the event that [Peter Ababio] has sold the unnumbered house at railway quarters Achimota the petitioner is given a half share of proceeds accruing there from.
(e) That [Peter Ababio] is ordered to pay lump sum of alimony to the petitioner.
(f) That [Peter Ababio] is ordered to pay the petitioner cost for the suit.
(g) Any order(s) that this honourable court may deem fit.

Peter Ababio died in October 2004 before the actual trial started. The Petitioner applied for the head of family of the deceased, Abusuapanyin Yaw Mensah, to be substituted as respondent in the divorce proceedings, which was granted on 5 April 2005. On 30 April 2005, Abusuapanyin Yaw Mensah died and, he was substituted on 12 December 2005, by Paul Kwabena Mensah, (Respondent) the customary successor of Peter Ababio.

On 15 May 2006 the High Court commenced hearing evidence on the petition for divorce and that very day proceeded to dissolve the marriage on the grounds that the marriage has broken down beyond reconciliation. The Judge fixed a date to hear evidence on the ancillary reliefs in respect of the matrimonial properties.

On 13 July 2007 the trial judge entered judgment for the Petitioner and settled on her the matrimonial home at Kokomlemle, numbered, C144/4. The Respondent being dissatisfied appealed to the Court of Appeal on the main ground that the Petitioner failed to prove any contribution to the acquisition of the matrimonial home.

On 10 May 2012, the Court of Appeal upheld the appeal and set aside the order of the trial judge and in its place awarded the Petitioner an amount of GHC 30,000 as sufficient financial settlement based on section 20(1) of the Matrimonial Causes Act, 1971, Act 367. Being dissatisfied in losing the Kokomlemle house the Petitioner appealed to this Court.

On 4 July 2017, this appeal came before the Supreme Court for hearing and we ordered both counsel to address us on the issue as to whether the cause of action survived after the death of Peter Ababio; as the financial order by the Court of Appeal was made

under the Matrimonial Causes Act. We made this order in compliance with rule 6 (8) of the Supreme Court Rules, 1996, (C.I. 16), as we believed our decision may turn on this point. The rule 6(8) states:

> Where the Court intends to rest a decision on a ground not set forth by the appellant in the notice of appeal, or on a matter not argued before it, the Court shall afford the parties reasonable opportunity to be heard on that ground or matter without re-opening the whole appeal.

The parties complied.

Counsel for the Appellant concedes that the divorce proceedings being an action *in personam* abated upon the death of Peter Ababio, but contends the same cannot be said in respect of the ancillary reliefs. He submits that reliefs (b) (c) and (d) in particular survived the death of the Respondent; and any judgment rendered thereon would result in judgment *in rem* and 'concludes all persons'. He submits further that where the judgment to be rendered is *in rem,* it survives the death of any party as it affects the estate*.*

Counsel for the Respondent submits that there is no cause of action arising where a party dies in the course of proceedings for the dissolution of marriage, as the action abates, and consequently, the jurisdiction of the court to equitably divide marital property is also lost.

We recall that the common law rule of abatement of cause of action, upon the death of either a sole plaintiff or defendant was abolished by **section 23 of the Civil Liability Act, 1963 (Act 176),** which provides:

23. Survival of cause of action subsisting against deceased person

> (1) A cause of action subsisting against a deceased person shall on the death survive against the estate of that person.

With the demise of Peter Ababio, the divorce petition automatically abated though whatever claims the petitioner had against the estate of the deceased subsisted.

However the question that arises is whether the matrimonial court can proceed with the hearing of the case for the dissolution of the marriage in order to divide the marital property equitably?

Counsel for the Petitioner invites us to look at other jurisdictions which lean towards the position that death of a party to the dissolution of the marriage marks the end of the claims as regards the dissolution of the marriage or divorce only, but incidental claims or ancillary reliefs such as property rights survive the death of a party. He submits divorce petitions may seek inter alia reliefs "that are equitable in nature and it is a fundamental principle of equity jurisprudence that once jurisdiction is acquired, equity will do complete or substantial justice". He referred to the US case of ***Perstein v Perstein, 217 A. 2 d 481, 483 (Connecticut 1966);*** where, the court held the view that, because the widow could claim a right to the deceased's estate, the case could continue with the executor or administrator's estate.

Be as it may, our laws on testate and intestate succession either under **the Wills Act, 1971, (Act 360)** or **the Intestate Succession Act, 1985, (PNDCL 111**), respectively, differ from those of the United Kingdom and the United States of America; and the nature of a claim of right by a surviving spouse to the deceased's estate depends on whether the spouse died testate or intestate. See section13 of Act 360, and Section 4 of PNDCL111. Under both laws a surviving spouse has an interest in the deceased's estate and is not required to prove joint ownership. We take note that the Petitioner as a surviving spouse is not without a remedy.

Unfortunately the trial judge did not avert her mind to the legal implication of the demise of Peter Ababio and proceeded to hearing evidence and dissolving the marriage which had terminated with the death of Peter Ababio in October 2004; and went on to determine the ancillary reliefs as if the Petitioner was a divorcee which denied her rights in law as a surviving spouse. We therefore hold that the trial judge erred in law by determining the matrimonial case as the action abated with the death of Peter Ababio.

Counsel for the Petitioner invited us to reverse the judgment of the Court of Appeal and restore the judgment of the High Court, as the cause of action survived against the estate which we refuse as that was not the reasoning of the Court of Appeal for the reversal of the High Court Judgment. The Court of Appeal's reasoning was that "the Petitioner failed to establish joint ownership of any of the landed properties."

In our opinion, the Court of Appeal fell into the same error as the High Court and treated the Petitioner as a divorcee and applied section 20(1) of the Matrimonial Causes Act and made a settlement of GHC 30,000.00 in favour of the Petitioner "in recognizing the contribution of the petitioner in their marriage relationship".

With due respect to their lordships, the Matrimonial Causes Act is only applicable to matrimonial causes and other matters connected therewith; and their lordships erred in making the settlement on the Petitioner, as the divorce proceedings abated with the demise of Peter Ababio. For purposes of clarity I set out the said section:

20. Property settlement

> (1) The Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party movable or immovable property as settlement of property rights in lieu thereof or as part of financial provision that the Court thinks just and equitable.

From the foregoing we strike out the Petitioner's action and all consequential orders made there under.

We make no order as to cost.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

V. AKOTO-BAMFO (MRS)
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JUSTICE KOFI ODURO FOR THE RESPONDENT/APPELLANT/RESPONDENT.