IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ADINYIRA, JSC (PRESIDING)
YEBOAH, JSC
GBADEGBE, JSC
AKOTO-BAMFO, JSC
BENIN, JSC

CIVIL APPEAL
NO. J4/20/2017

6TH DECEMBER, 2017

MRS. THERESA OWUO ……. PETITIONER/APPELLANT/RESPONDENT

VRS

FRANCIS OWUO ……. RESPONDENT/RESPONDENT/APPELLANT

JUDGMENT

AKOTO BAMFO, JSC: -

The appellant herein, who was the respondent in the divorce proceedings before the High court, married the respondent herein (the petitioner therein) in accordance with custom in 1989. They lived together as man and wife for a period of 10 years. In 1999, they converted the essentially polygamous union into a monogamous one at a ceremony in Tema.

Undoubtedly, it was a joyous occasion, the beaming smiles in the photographs, the exhibit-B series taken at the ceremony, bear eloquent testimony. A new chapter was obviously opened in their lives with the retirement of the appellant after working for

a considerable number of years with Ghana Ports and Harbours Authority, and the movement into their own house at Community 16, Lashibi number 68/69, a suburb of Accra.

Cracks were soon to appear in the marriage which culminated in the filing of a petition for the dissolution of the marriage by the petitioner and for a further grant of these reliefs:

a) That the said marriage between the parties be dissolved
b) That plots Nos.68 and 69 situate at community 16, Lashibi with a building thereon on a portion of same be declared as jointly owned by the petitioner and respondent.
c) That an order (sic) the said plots Nos. 68 and 69 with buildings thereon be sold and the proceeds shared equally between the petitioner and the respondent.
d) That Audi car which is currently being used by the respondent be declared as the personal property of the petitioner and be accordingly settled in her favour.
e) That the respondent be ordered to pay a lump sum of GH100,000.00 to the petitioner.

The appellant did not essentially contest the dissolution, but prayed that the divorce be granted on the following grounds:

a) That the said marriage be dissolved.
b) That petitioner has no share in the two (2) plots and the building thereon because petitioner did not contribute to their acquisition and the construction of the building.
c) That petitioner is not entitled to any share in the plots and the building thereon.
d) That petitioner is not entitled to Respondent's own Audi car.
e) That petitioner is not entitled to any lump sum payment because she deserted the matrimonial home on her own volition.

f) That the three (3) plots of land and 3,000 blocks on them which Respondent acquired in Petitioner's home town be settled on Petitioner.
g) That Petitioner be asked to stop using Respondent's name ''Mrs. Owuoh''

In his judgment, the learned judge found that the marriage was a nullity on grounds that the appellant was married to one Mrs. Beatrice Owuo at the time he purportedly contracted the marriage with the Respondent, and therefore lacked the capacity to contract any other marriage. He further dismissed the Respondent's claim for the joint ownership of the Lashibi property on the basis that the Respondent failed to prove that she made a substantial contribution towards its acquisition.

Naturally dissatisfied with the decision, the Respondent lodged an appeal at the Court of Appeal on these grounds;

1) The learned trial judge's finding that the two plots were acquired by the Respondent without any contribution from the Petitioner is not supported by the evidence on the record.
2) The learned trial judge erred when he held that the petitioner did not contribute to the construction of the home on the two plots of land situated at Lashibi-Tema.
3) The learned trial judge's failure to consider exhibit 3 which was procured by the Respondent and purportedly signed by Nii Abotsi Borlabi a dead man occasioned a grievous miscarriage of justice.
4) The learned trial judge erred when he held that the Petitioner could not prove that she gave USD1,300 to the Respondent for Respondent to buy a car so that he could give the Audi car to her.
5) The learned trial judge fell into grave error when he misconstrued the property rights of the Appellant and the Respondent who by their own sworn affidavit (Exhibit 2) got married in 1989.
6) The learned trial judge fell into a grave error when he dismissed reliefs b, c, d and e sought by the Petitioner/ Appellant.
7) Further or other grounds of appeal shall be filed upon receipt of the record of proceedings.

On the 23rd of April, 2016; the court of Appeal, in a unanimous decision, allowed the appeal in part. Speaking through Agnes Dordzie JA, she delivered herself thus:

> ''Having placed the petitioner in the position of a wife who by the evidence, had given the services of a wife for twenty years, I consider half share of the land property acquired during the relationship an appropriate compensation to the petitioner.
>
> I would in the circumstances order that the property described as plots No 68 & 69 Community 16 Lashibi be valued and half of the value paid to her in cash as compensation. I also order that the respondent pays the cost of this litigation including solicitor's fees of the petitioner."

The appellant registered his protest against the decision by filing a Notice of Appeal before the court.

He premised his attack on these grounds;

a) The learned judges of the Court of Appeal erred in law by finding that the appellant acted fraudulently in marrying the Petitioner

Particulars of error

Fraud was not pleaded and particularized by the Petitioner. Further it did not form part of the Petitioner's case and was raised suo motu by the Court of Appeal.

b) The learned Justices of the court of Appeal having found the marriage to be a nullity, erred in law by ordering property nos 68/69, community 16, Lashibi to be valued and half of the value paid in cash to Petitioner as compensation.

Particulars of Error

Conferring benefits on the Petitioner notwithstanding the finding that the marriage was contracted during the subsistence of an earlier monogamous marriage, hence it was null and void ab initio.

c) The award of half of property nos 68/69, community 16, Lashibi to Petitioner as compensation or damages for the commission of a tort by

Particulars of error

(i) Petitioner did not include any relief for damages for tort or compensation in her petition.

(ii) Award of compensation or damages for tort in effect changed or substituted completely the case of the Petitioner.

d) The order that respondent should pay the costs of Petitioner including solicitors fees is harsh and unconscionable

e) Judgment is against the weight of evidence

f) Additional grounds will be filed on receipt of the records.

It must be stated that no additional grounds were filled.

Before delving into the issues raised in this appeal, we find it necessary to comment on paragraph 9 of the statement of case filed on 30/3/17.

Learned counsel must take note of the fact that this apex court has, at all material times, determined cases before it in terms of the law and therefore needs no comments, like those referred to as reminders. Counsel should be measured in their comments as required by the rules and practices of this noble profession.

Even though both learned counsel argued their grounds of appeal under distinct heads, we would consider all the issues under the omnibus ground, that is the evidence being against the weight of evidence led and would thereafter discuss briefly the other issues raised; for in our respectful view, a discussion of the omnibus ground would effectively dispose of all the issues.

The central issue for resolution is whether the court of appeal having concurred in the findings of the court of 1st instance on the annulment of the marriage could settle the property on the respondent as compensation and make further orders on costs etc.

In sum, learned counsel contended that in so far as the marriage between the parties was found to be void by both the High Court and the 1st appellate court, the latter could not have validly made any orders even under section 19 of the Matrimonial causes Act since no legal consequences could have properly flowed from the annulled marriage particularly in the light of the finding by the learned judge that the respondent did not lead sufficient evidence to establish that she contributed towards the acquisition of the property.

He argued that there being no decree of nullity, sections 19, 20 and 21 could not have been invoked since those sections envisaged the settlements to be made in favour of a ''party to the marriage''; that since the said ''marriage'' never existed in the eyes of the law, no legal consequences could have properly flown therefrom. He strenuously attacked the award for compensation and argued that it had no basis.

This court has stated in a plethora of cases the considerations which should weigh on the court where an allegation is made that the judgment is against the weight of the evidence on record.

In the off-cited case of Tuakwa v Bosom (2001-2002) SCGLR 61, It was stated that the court in such circumstances is enjoined '' to analyse the entire record of appeal, take into account the testimony of the witnesses and all the documentary evidence adduced to satisfy itself before arriving at a decision that on the preponderance of the probabilities, the conclusions of the trial judge are reasonable or amply supported''
Oppong v Anarfi 2011 SCGCR 556
Djin v Mensah Baako 2007-2008 SCGLR 686 and
Abbey v Antwi 2010 SCGRL 17

In Eric Kwame Amoah v Ben Owusu Domena civil appeal no J4/13/2014 dated 30th July 2014, Benin JSC expatiated on the principle in these terms; '' the sole ground of appeal throws up the case for a fresh consideration of all the facts and law by the appellate court. We are aware of this court's decision in Tuakwa v Bosom

(2001-2002) SCGLR 61 on what the court is expected to do when the ground of appeal is that the judgment is against the weight of evidence. It has erroneously been cited as laying down the law that when an appeal is based on the ground that the judgment is against the weight of evidence then only matters of fact may be addressed upon. Sometimes a decision on fact depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law. Thus when the appeal is based on the omnibus ground that the judgment is against the weight of evidence, both factual and legal arguments could be made where the legal arguments would help advance or facilitate a determination of the factual matters. This court's decision in **Attorney-General v. Faroe Atlantic co. Ltd (2005-2006) SCGLR 271 at p.306** per Wood JSC (as she then was) cited by Counsel for the respondent is apt on this point."

Furthermore, it is trite learning that an appeal is by way of re hearing.
The court of 1st instance found and same was affirmed by the High Court that the parties were never married in the eyes of the law since at the time they purportedly went through the marriage ceremonies, the marriage between the appellant and Mrs. Beatrice Owuo subsisted. The court additionally found that the respondent was not entitled to a share in the Community 16 Lashibi property because she could not prove that she contributed towards its acquisition.

The court of Appeal took a different view, it came to the conclusion that it would be unjust to allow the appellant to benefit from his own wrong doing and awarded half the value of the property as compensation on grounds of equity and public policy.

It is well established that Equity does not override the Law, neither is it supposed to either destroy or violate it; Equity indeed supplements and assists the law, hence the maxim Equity follows the Law. Where therefore the Law provides a remedy i.e. where there are statutory provisions they must prevail.

Where Statute expressly provides a remedy therefore; it is not appropriate to ignore the statutory provisions in favour of equitable principles. In the instant appeal; section 21 of the Matrimonial Causes Act clearly provides a remedy.

Where therefore the marriage is declared nullity, the respondent is required to prove with sufficient particularity that she made substantial contribution towards the acquisition of the property, Section 21 provides

> "when a decree of divorce or nullity is granted if the court is satisfied that either party to the marriage, holds title to movable or immovable property or part or all of which rightfully belongs to the other, the court shall order transfer or conveyance of the interest to the party entitled to it on the terms that the court thinks just and equitable."

When the learned High Court judge found that the parties lacked the capacity to have contracted the marriage celebrated in 1999 owing to the existence of an earlier marriage between the appellant and Mrs. Beatrice Owuo, he ought to have decreed the annulment notwithstanding the fact that the case was not fought on those grounds.

Article 129(4) of the Constitution as amplified by Rule 23(3) of CI16 enjoins this court in an appeal to assume the jurisdiction of the trial court make all orders necessary for the determination of the real issues in controversy and indeed orders which the trial court ought to have made. We would therefore decree that the marriage celebrated between Theresa Owuo and Emmanuel Owuo annulled.

Is there sufficient evidence to support the findings of the learned High Court judge that the respondent did not make any substantial contribution towards the acquisition which finding was upset by the Court of Appeal under the guise of a compensatory award? Having nullified the marriage, the respondent could only succeed if she produces credible evidence that she indeed contributed and that the contribution was substantial.

What amounts to a substantial contribution, may be ascertained from the factors attending to the acquisition and the conduct of the partners subsequent to the acquisition and to determine whether they intended to hold the property jointly. Owing to the nature of the relationship, there could be lack of hard evidence on the contributions, evidence with mathematical precision of the contributions would not be forthcoming, for it would be unjust to apply the ordinary incidents of commerce in these circumstances.

The contributions could be in cash or kind. There is ample evidence that for some 20 years, the respondent laboring under the impression that she was lawfully married, traded variously as a baker, fish monger dealer in textiles, the income which she used to cater for the six children the appellant had with Mrs. Beatrice Owuo; when the land was being acquired, she was led to believe it was going to be in their joint names, whenever the appellant needed money to supplement the wages for the workers on the building, she obliged him, she could not naturally determine the total amount since they were given out in bits.

Aside from those monetary contributions, the household chores, cooking, taking care of the 6 children for a period of 20 years, if quantified would certainly be substantial. A perusal of the record shows that the appellant made a strenuous effort at shifting the dates of their relationship in order to situate the acquisition before they met. Therefore, even though on his own showing, as per his own sworn affidavit, exhibit-E, he ‘’married” the respondent under custom in 1989, in the court he averred that the customary marriage was celebrated in 1995, significantly a year after the acquisition of the land in 1994!

We are of the view that the evidence on record supports the conclusion reached by the Court of Appeal that the respondent made substantial contributions towards the acquisition of the property and would therefore under sec 21 of the Matrimonial Causes Act, order the transfer of half of the value of property nos 68/69 Lashibi Community 16 to her.

Learned counsel sought to make moment of the fact that the Court of Appeal raised issues of fraud even though same was not pleaded.
Obviously fraud was neither pleaded nor particularized as required by the cardinal rules of pleadings. It could not however be denied that evidence was led that documents evidencing the grant of the land on which the property stood was executed by a dead man. Additionally, even though the appellant testified that he had to seek advice before ''marrying" the respondent, in the light of the evidence by his own daughter, Brigid RW2, that while he lived with the respondent as man and wife, he continued to pay visits to Mrs. Beatrice Owuo and sent her remittances through the daughter surely were not consistent with the acts of an innocent party, who had no intention to deceive.

The appellant was called to the Bar in 2001, significantly, the petition was filed by the petitioner in 2010 when he must have obviously had lectures at the School of Law in Family Law and would therefore have come to the realization that he was committing a crime.

It is not apparent from the record that he took any steps to regularize the position. Indeed while he lived with the respondent, he still maintained his relationship with Beatrice Owuo (per RW2) through visits and remittances.

In Appea v Asamoah 2003-2004 1SCGRL 226 at 243 the supreme court speaking though Brobbey JSC stated:

> ''Ordinarily, fraud should be pleaded. It was not pleaded in the instant case. Notwithstanding the rules on pleadings, the law is that where there is clear evidence of fraud on the face of the record, the court cannot ignore it. That was the decision of this court in Amuzu v Oklikah (1998-99) SCGRL141. In that case, fraud was not pleaded but when it was raised, it was upheld by the trial court in the Supreme court. In the same way, failure to plead the issue of fraud at the trial court did not prevent the trial court and this court from endorsing it when it was raised. Indeed, fraud vitiates everything. A

relevant statement on this that will be found in Okofoh Estates Ltd v Modern sign Ltd. (1996-97) SCGRL233 at reads:

'' An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or a document obtained by fraud pass no right."

On the issue of the legal fee and costs of the proceedings, we do not intend to dwell at any length on same, suffice it to state that there is no basis for the award for the respondent made no attempt at the High Court at demonstrating, by way of invoices or receipts etc how much costs she incurred in payments to her lawyer etc. furthermore, the Court of Appeal, in making the order for the award also failed to name specific sums in relation to both the costs and the legal fees, thereby leaving the issue at large, a situation which is far from satisfactory. we would, therefore without any hesitation, allow the appeal on that ground and set aside the award made by the Court of Appeal.

In the result, we would dismiss the appeal on all the grounds for the reasons stated herein save ground (d) which succeeds and is therefore allowed.

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

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(JUSTICE OF THE SUPREME COURT)

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