IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA

CORAM: ATUGUBA, J.S.C (PRESIDING)
AKUFFO (MS), J.S.C.
ANIN-YEBOAH, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS), J.S.C.

CIVIL APEAL
NO J4/24/2010

23RD FEBRUARY, 2011

DR. OWUSU AFRIYIE AKOTO - - - PETITIONER/APPELLANT/APPELLANT

-VRS-

ADWOA ABREFI AKOTO - - - RESPONDENT/RESPONDENT/RESPONDENT

J U D G M E N T

ATUGUBA, J.S.C:

The facts of this case as gleaned from the Petitioner / Appellant /Appellant's statement of case and the judgment of the court of appeal are as follows: The Appellant and the Respondent who were husband and wife got married by custom in July 1974. The marriage was converted into a monogamous marriage under ordinance in Cambridge England on July 16, 1976. After the said marriage the couple cohabitated mainly in the United Kingdom and apparently had a blissful relationship that was blessed with three issues from 1974-1997, when the Respondent discovered two letters that caused the otherwise blissful marriage to

unravel leading to the Appellant filing for divorce on August 29, 1997 while the Respondent was still in England. Nineteen days later the Respondent filed a Cross Petition for the dissolution of the marriage and other ancillary reliefs which included properties both within and outside the jurisdiction, as follows:

"(a) dissolving the marriage,

(b) declaring her a joint beneficial owner of House No. 38/39 BLK 01/115 East Legon, Accra

(c) declaring her a joint beneficial ownder of 5 Kingsfield Road, EALING W5 ILD London, U.K.

(d) declaring her a joint beneficial owner of 18 Chatsworth Avenue Wembley Middlesex U.K.

(e) declaring that she is entitled to one half of the net income from the rent of 5 Kingsfiled Road EALING W5 ILD London, a property jointly owned by both parties,

(f) that the Appellant pays her a lump sum settlement

(g) that the Appellant maintains the children of the marriage

(h) that she be given custody of Owusu Akoto Jnr. the Minor child with reasonable access to the Appellant, and

(i) that she be granted such other reliefs as the Court may deem fit."

The Respondent was successful both in the High Court and the Court of Appeal. The areas of the appellant's dissatisfaction are as stated per Aduama-Osei J.A delivering the judgment of the Court of Appeal at p. 623 of the Record of appeal as follows:

"the settled principle which he Appellant contends have been disturbed by the trial court are in two areas: one is in respect of the jurisdiction of the court over immovable properties situated abroad and one in respect of the separate legal existence of a limited liability company from its members. We find therefore that in their Written Submissions, Counsel for the Appellant question the jurisdiction of the trial court to deal with immovable properties situated in the United Kingdom,

outside its jurisdiction and also question the validity of the trial court's order giving the Respondent certain properties registered in the name of limited liability companies of which the Respondent was neither a shareholder nor a director. The Appellant also invites this Court to review the trial court's award of £150,000.00 in favour of the Respondent as financial settlement, as well as the cost of ¢80,000,000.00 awarded the Respondent."

Accordingly the appellant's grounds of appeal to this court are as follows:

"(i) The Court of Appeal erred in law when it confirmed the assumption of jurisdiction by the High court to determine rights relating to immovable properties situated outside the jurisdiction of the courts.

(ii) the Court of Appeal erred in law when in its judgment it gave certain percentages and properties that belonged to the company to the Respondent who was neither a shareholder nor a director nor a subscriber to the company's regulations.

(iii) The financial settlement awarded to the Respondent in Pound Sterling was erroneous in law and excessive."

<u>The issue of Jurisdiction</u>

The appellant strenuously contends that it is the ***lex situs***, that is to say the law of the country in which the land is situated that governs it and therefore the High Court has no jurisdiction in so far as the immovable properties in England are concerned. The respondent contends that in matters of equity there is an exception to that rule in favour of the High Court's assumption of jurisdiction in this case. The appellant denies the validity of that exception.

In so far as assistance from the Matrimonial Causes Act, 1971 (Act 367) is concerned the choice of law provisions as far as the issue herein is concerned are sections 33 and 35. They are as follows:

> "**33. Additional jurisdiction relating to financial provision**
>
> In addition to any other jurisdiction conferred by this Act the Court shall have jurisdiction, *where a party* who may be ordered to make financial provision *has assets in Ghana*, to order that party to *make financial provision not exceeding the value of those assets.*
>
> **"35. Choice of law**
>
> In proceedings under this Act, except in proceedings for a decree of nullity of a void marriage, *the issues shall be determined as if both parties* to the marriage *were domiciled in Ghana at the commencement of the proceedings.*"

The proceedings in this case were commenced in August 1997. The parties are Ghanaians.

We agree with the appellant's counsel that though the course of the marriage between the parties herein evokes sentiments of sympathy towards the respondent, the law must prevail.

> "**Conflict of law rules in matrimonial cases**
>
> Global trends on the matter, are evolving the following questions and principles.
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> In divorce cases, when a court is attempting to distribute marital property, if the divorcing couple is local and the property is local, then the court applies its domestic law lex fori. This becomes much more complicated when local laws allow polygamy. *The case becomes even more complicated if foreign elements are thrown into the mix*, such as when the place of marriage is different from the territory where divorce was filed; when the parties' nationalities and residences do not match; *when there is property in a foreign jurisdiction*; or when the parties have changed residence several times during the marriage.

Different jurisdictions follow different sets of rules. Before embarking on a conflict of law analysis, the court must determine whether a property agreement governs the relationship between the parties. The property agreement must satisfy all formalities required in the country where enforcement is sought.

Movable v. Real Estate – In general, applicable matrimonial law depends on the nature of the property. Lex situs is applied to immovable property (i.e., real estate), and the law of matrimonial domicile applies to movable property, provided there has been no subsequent change in the spouses' domicile.

There are further issues relating to Mutability and Immutability Doctrines of Domicile.

Lex Fori – In many cases, courts simply avoid this complicated and expensive analysis by applying their local law to the parties' entire property, even if there is a foreign element. This is based on the assumption that laws around the world are basically similar in their treatment of marriage as a co-partnership. *Since the partnership can be placed in the forum, the forum's law applies to all its aspects*.

In any event, a careful study of the cases of *King v. Elliot* (1972) 1 GLR 54 C.A and *Youhana v Abboud* (1974) 2 GLR 201 C.A and sections 33 and 35 of the Matrimonial Causes Act, 1971 (Act 367) as well as the choice of law rules in s.54 of the Courts Act, 1993 (Act 459) particularly Rule 6 thereof, since the customary laws of the parties is unknown, shows that it is the lex situs that governs the reliefs relating to the immovable properties in this case situate in England. That lex situs however refers to the conflict of laws rule of the situs. See *Elliot v King* at 57 per Bentsi-Enchill JSC and *Youhana v Abboud,* supra at 205 – 206 per Apaloo J.A (as he then was). That lex situs is part of the received common law of Ghana and is not different from English common law on the point. A recent exposition of the common law as to the lex situs is contained in the decision of the Singapore Court of

Appeal (a common law jurisdiction) which applied the English law on the point, in *Eng Liat Kiang v Eng Bak HernLiat Kiang* [1995] 3 LRC 398.

The facts of the case and the court's decision thereon are as stated in the headnote thereto as follows:

> "The appellant and his son, the respondent, *had interests in various companies and properties in Singapore and abroad*. The parties fell out and the respondent filed a petition to wind up a company in Singapore and a similar petition in Malaysia to wind up a company there. The appellant filed *an action in the Singapore High Court claiming*, inter alia, *a declaration that the respondent held on trust for him* shares in four companies incorporated in Singapore, Malaysia and Hong Kong *and various parcels of land in Malaysia*. The respondent *filed a notice of motion for an order that the claims relating to the shares* in the Malaysian companies *and the land situated in Malaysia be stayed on the ground that the court in Singapore had no jurisdiction in relation to foreign immovable properties*, and, alternatively, on the basis of forum non conveniens. The trial judge allowed the respondent's application on the alternative ground. The appellant appealed to the Court of Appeal.
>
> **HELD**: Appeal dismissed
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> **(1)** *In general, except where an action was based on a contract or equity between the parties, a local court had no jurisdiction to entertain proceedings principally concerned with a question of title to, or the right of possession of, immovable property situated outside of the jurisdiction*. Since the *appellant's claim for a declaration of an express or resulting trust arose in equity, the court had jurisdiction over the matter even though the proceedings were concerned with foreign immovable properties*. In addition the respondent did not show that the Malaysian court would never recognize a trust that was declared by a court other than its own, while there was nothing in Singapore law which made it impossible or illegal for such a declaration to be made or which would be an impediment to the relief sought. The appellant's claim accordingly came within the exception

and the court had jurisdiction to entertain the application (see pp 402, 403, 404 – 405, post). *Cook Industries Inc v Galliher* [1978] 3 All ER 945 and *Webb v Webb* [1992] 1 All ER 17 approved."(e.s)

In similar circumstances in *King v. Elliot* supra, the facts and the decision of the Court of Appeal are as stated in the headnote as follows:

"P. being the only child of her mother, a West Indian domiciled at Cape Coast, inherited her mother's property on her death intestate. *P. died in 1943, and by her will, she devised various properties to her relations and descendants*. *One of her properties was a house called "Pitts House" which was devised to the plaintiff*. Control over the house was however assumed by the defendants because *a provision in the will of their father (who was a son of P.) had stipulated that the income derived from the Pitts House should for the next ten years be used in repayment of the cost of redeeming a mortgage on the property*. On the expiry of the ten years, *the defendants refused to surrender possession and continued to exercise control over the house on the ground that the plaintiff's title was defective, being derived from the will of P. who had no power to dispose of the said property by will, as it was family property originally acquired by her mother who died intestate*. Wherefore the plaintiff brought an action to claim mesne profits and a perpetual injunction against the defendants. Judgment was given in favour of the plaintiff and the defendants appealed.

Held, dismissing the appeal: (1) *Ghana law is the lex situs of Ghana and an alien who acquires a domicile of choice in Ghana does not become subject to a particular customary law unless he could be shown by positive evidence regarding manner of life to have embraced that system of customary law*. *In the absence of such evidence the law applicable to the estate in question is the English common law as it stood in 1874, (being the current Ghana law) and* P. being the sole surviving daughter must be adjudged as having inherited the properties of her mother absolutely under the Statutes of Distribution.

(2) The defendants, together with the whole family had, *fully accepted, approbated and acted upon P.'s testamentary dispositions.* They could not, therefore, *either in equity or at customary law, be allowed to approbate and reprobate.*"(e.s)

In the present case the facts indisputably show that the appellant has dealt most inequitably with the respondent as regards their jointly acquired properties by various stratagems and secret dealings. The Court of Appeal dealt at length with this situation but a few excerpts would suffice. Thus at p. 626 of the Record the court per Aduama-Osei J.A said:

"There is also evidence on record that *in many instances, without the knowledge of the Respondent, the Appellant used the properties which he had jointly acquired with the Respondent to take loans which he deliberately refused to service and thereby allowed the properties to be repossessed by the lending financial institutions.*

Counsel for the Appellant agree that on the above state of the facts, the Appellant dealt most unfairly with the Respondent. I will again quote from counsel's written submissions:

"*After carefully reading the record of proceedings and the trial judge's summary of the facts of the case, we form the impression that evidence portrays the Respondent as a woman who has been short changed in a marriage that span about twenty three years, during which she gave her heart and soul and more*. From a purely emotional perspective *we are of the opinion that the learned trial judge gave the Appellant his just desert* but from a legal perspective we submit that the judge committed certain fundamental errors of law and as such erred in law."

Again at p.627 the court per Aduama-Osei J.A said:

"It is my view that *the evidence on record supports a conclusion that the Appellant was fraudulent in his dealings with the Respondent regarding the properties and* I reject the argument by Counsel for the Appellant that the facts do not warrant the orders made by the trial Court."

In these circumstances and having regard to the principles set out supra, the trial court rightly assumed jurisdiction in equity in this case.

Lifting the Veil

The ground of appeal relating to corporate personality must likewise fail. At p.627 of the Record the court of Appeal said:

> "There is no doubt from the evidence that in respect of the properties owned jointly by the parties, the Appellant stood in a fiduciary relationship with the Respondent. *To my mind, what the Appellant did amounted to converting the East Legon and North Labone properties, which he owned jointly with the Respondent, into money and putting the money into his companies for the operation of the companies and for his exclusive benefit.* I do not think that in the face of the facts the trial Court was precluded by any principle of law or equity from *ordering that one or two vehicles registered in the name of one or the other of the companies be given to the Respondent."*

In *Worldwide Shipping and Agencies (GH) Ltd v Darko* [2001-2002] 2 GLR 488,C.A, Brobbey J.A (as he then was, his other brethren concurring), quoted with approval the views of Sanborn J in *United States v Milwaukee Refrigeration Transit Co,* 142 Fed 247 at 255 (quoted in Pennington's *Company Law* (3rd ed), p.51 reflecting the position of the American courts as follows:

> "… A corporation will be looked upon as a legal entity as a general rule … *but when the notion of legal entity is used to* defeat public convenience, *justify wrong*, *protect fraud,* or defend crime, *the law will regard the corporation as an association of persons.*"

Again in *Re Polly Peck International plc (in administration)*[1996]2 All ELR 433 at 447 Robert Walker J said:

"*….I was referred to quite a lot of authority touching on what is sometimes called lifting (or piercing) the corporate veil. That is a vivid but imprecise metaphor which has possible application in several different contexts*, some far removed from this case. *The most relevant, it seems to me, is where corporate personality is (in the words of Lord Keith in Woolfson v Straithclyde Regional Counci*l 1978 SLT 159 at 161) *used as 'a mere façade concealing the true facts*.'

x x x

Façade' (or 'cloak' or 'mask') is perhaps most aptly used where one person (individual or corporate) uses a company either in an unconscionable attempt to evade existing obligations (*Gilford Motor Co Ltd v Hone* [1933] Ch 935, [1933] All ER Rep 109 and *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832) *or to practice some other deception* (a sort of unilateral sham, since the corporate façade has no independent mind). *In Adams v Cape Industries plc* [1991] 1 All ER 929, [1990] Ch 433 *the establishment and interposition of the Liechtenstein corporation referred to as AMC was a façade in this sense, and 'no more than a corporate name*'".

See also *Morkor v. Kuma* (1998-99) SCGLR 620.

It is clear on these principles that the courts below, impliedly or in substance, if not in form did properly lift the veil of incorporation and granted the respondent the necessary reliefs. In any case this court could have itself done so upon its plenary appellate powers if necessary.

The ground of appeal relating to the financial settlement awarded cannot be upheld. It cannot be said to be based on any wrong principle or that it is based on irrelevant or insufficient considerations. However in the mixed situation in this case we order that the amount awarded be converted into the cedi equivalent. Save as to this, for all the foregoing reasons, the appeal is dismissed.

[SGD] W. A. ATUGUBA
[JUSTICE OF THE SUPEME COURT]

[SGD] S. A. B. AKUFFO [MS.]
[JUSTICE OF THE SUPREME COURT]

[SGD] ANIN YEBOAH
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