IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

Civil Appeal
No. J4/20/2011

22ND February, 2012

CORAM: AKUFFO (MS) JSC (PRESIDING)
DATE-BAH JSC
ADINYIRA (MRS) JSC
DOTSE JSC
AKOTO-BAMFO (MRS) JSC

GLADYS MENSAH	-	**PETITIONER/RESPONDENT/ RESPONDENT**
VRS		
STEPHEN MENSAH	-	**RESPONDENT/APPELLANT /APPELLANT**

J U D G M E N T

JONES DOTSE JSC;

Lord Denning in his book, "Landmarks in the Law" Butterworths, 1954, writes at page 176 *"on change in attitude of the British people to Divorce"* as follows:

> "*There is no longer any binding knot for marriage. There is only a loose piece of string which the parties can untie at will. Divorce is not a stigma. It has become respectable. One parent families abound."*

The above quotation can equally be said to be applicable to the Ghanaian society as well.

In the instant case since the parties are not contesting the issue of divorce, but only devolution of property acquired during the subsistence of the marriage upon divorce, we will focus our attention to those issues.

What then are the facts in this case? In view of the importance that this court attaches to the legal and constitutional issues determinable in this case, we have considered it worthwhile to narrate in great detail, not only the facts of the case, but the reasons behind the trial court decision as well as the dismissal of the appeal by the Court of Appeal.

This will necessarily lead to a discussion of the principles upon which concurrent findings of fact by a trial and first appellate court can be set aside or departed from by this court, i.e. second appellate court, as we have indeed being requested to do.

FACTS

This is an appeal from the judgment of the Court of Appeal dated 23/7/2009 which affirmed the judgment of the High Court dated the 31st January 2003. In a petition filed on the 20th of April 2000, the Petitioner/Respondent/Respondent (hereinafter Petitioner) averred that she and the Respondent/Appellant/Appellant (hereinafter Respondent) were married under customary law in March of 1989 and converted to a marriage under the Ordinance in June of 1989. It however emerged from the evidence that the parities got married in 1987. About a decade after the celebration of this union, cracks started appearing in the marriage with the Petitioner accusing the Respondent of acts of infidelity which culminated in the Respondent moving into their jointly acquired home in Adenta with his illicit lover giving credence to the Petitioner's allegations. After diligent efforts at reconciliation had failed, the Petitioner filed her petition for divorce at the High Court.

That the parties also acquired substantial assets during the subsistence of the marriage cannot be under emphasised. These the Petitioner listed in her petition as follows;

1. Unnumbered three bedroom house at Kasoa
2. Unnumbered six bedroom house at Adenta

3. Unnumbered four bedroom house at Krobo Odumasi

4. Unnumbered three bedroom house on Spintex Road

5. Vacant plots of land at Adenta

6. One and half vacant plot of land at Krobo Odumasi

7. Shares in Guidem Company Ltd.

8. Shares in shop on the Airport El-Wak Road

9. Nissan Patrol GT 618 E

10. Nissan Sunny GT 1073 D

11. Pick-Up GT 3240 P

12. Opel GT 9414 Q

13. 20 feet Container

14. SSB Tudu Branch Current Account No. 120769006.

The Petitioner therefore prayed for a dissolution of the marriage and for the assets jointly acquired to be shared equally. It is the distribution of these assets, which the trial Court found to have been jointly acquired that has led to the present appeal.

EVALUATION OF EVIDENCE AND DECISION OF TRIAL COURT

Before coming to that conclusion, the trial judge painstakingly set out the evidence she had received and after reviewing the evidence determined that the issue to be resolved was whether or not the petitioner is a joint owner of the property and is therefore entitled to her claim of 50% share in them.

The evidence was that before the Petitioner married the Respondent, she used to trade in rice, sugar and groundnuts at the Odumase Krobo Market. After marriage she moved to Accra with the Respondent, then a junior accounts officer at the Controller and Accountant General's Department.

They both did not own any properties and lived in rented premises at La. At the weekends, they would go to Krobo to farm and plant cassava. After processing

the harvested cassava into gari, the petitioner realised 600,000 cedis which she used as capital for trading. She traded in palm oil and travelled to various towns and villages to buy palm oil. Aside from this, she also traded in cooking oil, rice and sugar from their house at La. Respondent also sold some of these items to his co-workers in the office. She also at a point in time took some money from her father to reinvest in their business. Gradually, they built up their business and from the proceeds, bought their first landed property at Kasoa, on which they put up a three bedroom house. As the business expanded, they acquired a shop at the Ministries and petitioner managed the shop whilst the Respondent continued working at the Controller and Account-General's Department. As the business continued to boom, the parties diversified to other products, including electrical appliances like fridges, TV, deep freezers etc. They also sold cloth, vegetable oil and bicycles. The Respondent arranged for these items from their suppliers on credit.

They also got their customers from the Respondent's co-workers, mostly on credit basis. This was deducted at source from their salaries. **All cash which was realised from sales was recorded into a book by the sales assistants, which the petitioner took home to the Respondent. He would check the cash and if it tallies with the amount in the book, he would sign against it. It was the Respondent who handled the accounts of the business. He also paid himself 500,000 cedis and paid the petitioner nothing**.

Both the Petitioner and the Respondent were members of a susu group and Petitioner bought her personal items with the returns from the susu contribution. They also invested in Pyram and made healthy profits from there which they ploughed back into their business.

At the peak of their business, they were making between 150 million and 300 million a month. The Petitioner therefore advised the Respondent to acquire landed properties as an investment. The Respondent agreed and allowed the Petitioner to keep a third of all cash deposits towards this acquisition.

The Petitioner it seems was very astute and acquired the Adenta and Krobo Odumase properties on which she built houses. They also acquired a number of vehicles and the first vehicle, a pick-up was

bought with part of her susu contributions and part of the business proceeds. Subsequent vehicles and properties were acquired from the proceeds of the business they run together.

The Respondent however denied that the Petitioner made any contribution to the business. According to him the Petitioner was a housewife and never worked to make a living. She had also embezzled money from him which resulted in the loss of his capital and he was compelled to go for a bank loan to recapitalise his business.

The Petitioner called no witnesses in support of her case but the Respondent called five witnesses. The trial judge however found the evidence of the petitioner more convincing than that of the Respondent and the reason she alluded to for so finding were that even **though the Respondent had maintained throughout the trial that the Petitioner never worked during the decade the marriage lasted, his own witnesses contradicted him.** The judge also made the finding that the Respondent's own evidence supported the fact that the Petitioner supervised the running of the shop and also worked in the shop. The judge further made the finding that the Respondents 4th and 5th witnesses were "serious liars" bent on throwing dust into the court's eyes. Besides, when the Respondent claimed that he took a loan to recapitalise the business after the Petitioner had drained off all the monies, the judge made the finding that the loan was applied for long after the petition had been filed. Further, the Respondent claimed he had acquired the Spintex property with the bank loan. Again the judge found that the property had been acquired long before the loan was contracted and concluded that the property was acquired with proceeds from the business. The judge further found that the Respondent had not been entirely honest when he stated that he did not sign Exhibit C2 which was the document on the Krobo Property.

He had indeed appended his signature on the document and this led the trial judge to conclude that the parties intended the property to be joint property.

Based on the above facts and findings, the learned trial Judge delivered judgment in favor of the Petitioner. Aggrieved by the decision of the trial High Court, the Respondent filed an appeal to the Court of Appeal. As was to be

expected, the Court of Appeal in a unanimous decision dismissed the Respondent's appeal.

It is against this Court of Appeal decision that the Respondent has appealed to this court based on the following grounds of appeal.

GROUNDS OF APPEAL

The Respondent's grounds of Appeal are stated as follows:

a. The Court of Appeal failed to consider adequately the evidence of the Respondent and placed unnecessary weight on the evidence of the Petitioner.

b. Exhibits 7 and 7A having been admitted, the court erred in assessing the amount to be paid to the Petitioner as her share of the profits.

c. Since the Respondent's company was a limited liability company and thus a legal entity, the court erred in ordering payment out of its profits without regard to the interests of the other shareholders of the company.

ISSUES FOR DETERMINATION

We have perused the statement of case of the parties. From the arguments contained in the Statements of case by the parties, the following issue stands out as the main issue for determination, although there are some other ancillary issues. This is:

i. Whether the equality principle used by the trial and appellate courts in the distribution of the martial property acquired during the marriage following the dissolution of the marriage between the parties is sustainable under the current state of the laws in Ghana based on the available evidence on record.

In determining this issue, matters as to whether the trial and appellate court correctly evaluated the evidence of the Petitioner by applying to it the proper rules of the Evidence Act, 1975 NRCD 323 and whether the courts below correctly awarded the lump sum payments out of accounts of a limited liability

company on statement of accounts that are not as healthy as the Petitioner made the court to believe, reference exhibits 7 and 7a are consistent with the evidence on record.

CONSTITUTIONAL PROVISIONS OF SHARING MARITAL PROPERTIES ON DIVORCE

In view of the effect some provisions of the Constitution 1992 will have on this case, we deem it expedient to set out these provisions in extenso.

1. Article 22 (2)

> ***(2)*** *"Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses." and*
>
> ***(3)*** *"With a view to achieving the full realization of the rights referred to in clause (2) of this article*
>
> ***(a) Spouses shall have equal access to property jointly acquired during marriage.***
>
> ***(b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."***

2. Article 33(5)

> *"The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man."*

From the above provisions of the Constitution, it means that, the framers of the Constitution mandated the Parliament to enact relevant legislation to regulate the property rights of spouses.

It is a sad reflection that since 7th January 1993 when this 4th Republican Constitution came into force, the above directive has as yet not been complied with.

Suffice it to be that, there is now before Parliament, a Bill in fulfillment of this article 22 (2) of the Constitution.

It is also important to note that article 22 (3) (a) & (b) give an inkling of what the said legislation should contain. **For instance it is quite clear from these provisions that the principle of having equal access to property acquired during marriage and that of equitable distribution of property upon dissolution of the marriage have been espoused.**

In view of the pride of place that our Constitution has in the sources of law in Ghana, reference article 11 (1) of the Constitution 1992, such fundamental philosophical principles which underpin distribution of marital property acquired during the subsistence of a marriage upon its dissolution should not be glossed over. This constitutional principle is similar to the emerging principle of *"Jurisprudence of Equality"* which is now applicable in issues concerning gender affairs. We will revert to this principle of Jurisprudence of Equality later.

Furthermore, the provisions spelt out in article 33 (5) re-enforce the guarantee and protection of all the fundamental human rights contained in chapter 5 of the Constitution 1992 including the property rights of women, economic rights, cultural rights and practices and general fundamental freedoms and others.

There is this proviso also in article 33 (5) which enjoins the courts in Ghana to look at other rights not specifically mentioned but which are considered to be part and parcel of an emerging democratic state intended to secure the freedom and dignity of man, and this includes the opposite, woman.

APPLICABLE GUIDELINES ON SHARING MARITAL PROPERTIES

This judgment will accordingly be discussed in line with these and other international laws and conventions which give or are designed to bring honour and dignity to spouses in cases of dissolution of the marriage.

Why did the framers of the Constitution envisage a situation where spouses shall have equal access to property jointly acquired during marriage and also the principle of equitable distribution of assets acquired during marriage upon the dissolution of the marriage?

We believe that, common sense, and principles of general fundamental human rights requires that a person who is married to another, **and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved.**

This is so because, it can safely be argued that, the acquisition of the properties were facilitated by the massive assistance that the other spouse derived from the other.

In such circumstances, it will not only be inequitable, but also unconstitutional as we have just discussed to state that because of the principle of substantial contribution which had been the principle used to determine the distribution of marital property upon dissolution of marriage in the earlier cases decided by the law courts, then the spouse will be denied any share in marital property, when it is ascertained that he or she did not make any substantial contributions thereof.

It was because of the inequalities in the older judicial decisions that we believe informed the Consultative Assembly to include article 22 in the Constitution of the 4th Republic.

We shall revert to a discussion of some of the older cases spanning the period 1959 to 2005 i.e. from the cases of **Quartey v Martey [1959] GLR 377** to **Boafo v Boafo [2005-2006] SCGLR 705** which to me is to be regarded as the locus classicus and a restatement of the law on distribution of marital property acquired during the subsistence of the marriage upon divorce.

HISTORICAL CASE LAW DEVELOPMENT

Before we embark upon this historical discourse of the cases, let us refresh ourselves with these words of encouragement from Lord Denning in the case of ***Packer v Packer [1953-54]*** Law Reports, Probate Division 15.

In this case, Lord Denning in characteristic fashion, stated that, not having done something before should not hinder a court from doing it for the first time. He stated thus:-

> ***"What is the argument on the other side. Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything, which has not been done before we shall never act anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.***
>
> ***There is no decision of this court that an order cannot be made for custody of an illegitimate child and in the absence of direct decision preventing us, I think that we should follow the course which is permitted by statute and prescribed by good service".***

Like most of the decisions of Lord Denning at the material time, it was a dissenting opinion in a matrimonial case. But with the passage of time his opinions have become accepted as the correct statement of the law.

What we take note of is that, from the above opinion, it is clear that the fact that there is no precedent to support a decision of a court is now no bar to prevent a court from arriving at a decision provided the decision will not be contrary to constitutional or statutory provisions or in conflict with the doctrine of stare decisis if the court is bound by its own decision or by a decision of a Superior court.

Fortunately, we do not find any such impediment or inhibition in this situation. This is because, the Supreme Court has given the green light in its previous decisions in the cases of ***Mensah v Mensah [1998-99] SCGLR 350*** and ***Boafo v Boafo*** already referred to supra.

This court is of the view that the time is ripe for improvements to be made to the far reaching decisions in the cases just referred to.

DEVELOPMENT OF RELEVANT GHANAIAN CASE LAW

Let us now go on our historical journey on the development of case law on the distribution of marital property acquired during marriage upon divorce. This exercise is important as it will enable us to explain the rationale for the improvements being made and the introduction of the *"principles of jurisprudence of equality."*

JOINT PROPERTY

Property acquired with the assistance of a wife was regarded as the sole property of the husband. The customary law position was that the wife and children had a domestic responsibility of assisting the husband/father with his business and as such the wife could not claim any interest in any property she assisted her husband to acquire. Thus, in *Quartey v. Martey* [1959] GLR 377, HC Ollennu J. (as he then was) held at 380 that:

> ***"The proceeds of this joint effort of a man and his wife and/or children, and any property which the man acquires with such proceeds, are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father."***

SUBSTANTIAL CONTRIBUTION PRINCIPLE

Clearly this position has since been eroded by changes in the traditional roles of men and women and the economic empowerment of women. In ***Yeboah v. Yeboah [1974] 2 GLR 114 HC***, Hayfron-Benjamin J (as he then was) held that there was no positive customary law preventing the creation of joint interest by persons not related by blood.

The current position of the law regarding joint property is that substantial contribution by a spouse to the acquisition of property during the subsistence of the marriage would entitle that spouse to an interest in the property.

In the Yeboah case, *supra* the husband and wife were married under the Marriage Ordinance, Cap. 127. Before the marriage, the wife had applied for a house from the Housing Corporation. She was allocated a plot of land for which she paid a deposit. After the marriage, she had the plot of land transferred into the name of her husband and the deposit was refunded to her by the corporation. The husband then took a loan from his employers to put up a house on the plot. Just as he was about to start constructing the building, the husband was transferred to London where he was later joined by the wife. The construction of the building started while the couple were resident in London. According to the wife, during the construction of the house she flew to Ghana at the request of her husband to supervise the construction. She stated that she paid the fare herself. She alleged that she made several structural alterations to the building with the knowledge and consent of her husband. The parties returned to Ghana and thereafter the marriage broke down. The husband then served a notice on the wife to quit the matrimonial home on the ground that he required the premises for his own occupation.

When the wife failed to quit the premises, the husband then brought an action to eject the wife from the house. Headnote 3 of the court's holding stated thus:

> *"The wife was a joint owner of the house with the husband because judging from the factors attending the acquisition of the house and the conduct of the parties subsequent to the acquisition, it was clear that they intended to own jointly the matrimonial home. Where the matrimonial home was held to be held jointly by husband and wife as joint owners, it would be improper to treat the property as a subject of mathematical division of the supposed value of the house. What the court could do in such a case was to make what would seem to be a fair agreement for the parties."*

Similarly in ***Abebrese v. Kaah and Others [1976] 2 GLR 46*** HC, the wife contributed substantially to building the matrimonial home. The husband had provided the purchase money for the land. She paid for the timber, and contributed to buying sand and iron sheets. She also supervised work done by labourers and helped to carry water to the site. However, she had not kept account of her contribution. The husband died intestate and his successor purported to sell the house. ***The court held that although the wife could not state in terms of cash how much her contribution towards the building was, it was clearly substantial.*** The court pointed out that the ordinary incidents of commerce had no application in the ordinary relations between husband and wife and the wife's evidence as to the size of her contribution and her intention in so contributing would be accepted.

Further in ***Anang v. Tagoe [1989 -90] 2 GLR 8 HC***, it was held at 11 that:

> " *… where a wife made contributions towards the requirements of a matrimonial home in the belief that the contribution was to assist in the joint acquisition of property, the court of equity would take steps to ensure that belief materialised. That would prevent husbands from unjustly enriching themselves at the expense of innocent wives, particularly where there was evidence of some agreement for joint acquisition of property."*

MATRIMONIAL CAUSES ACT, 1971 ACT 367

The cases cited supra give an indication that the courts seek to provide some protection, especially to wives, when there is evidence that a spouse has made a substantial contribution to acquire property. What amounts to substantial contribution is determined by looking at the facts surrounding the acquisition of the property. The facts would lead to an inference that there was intention by the parties to own the property jointly. Section 20 (1) of the Matrimonial Causes Act, 1971 (Act 367) provides that

> " *20(1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof as part of a financial provision as the court thinks just and equitable."* (e.s)
>
> Even though it has been held that the ordinary incidents of commerce do not apply in marital relations and that the courts will not employ mathematical division to determine each spouse's share in the property, the courts currently apply the equality is equity principle. This principle is backed by Constitutional force in article 22(3) (b) of the 1992 Constitution referred to supra.

EQUALITY IS EQUITY PRINCIPLE OF SHARING OF MARTIAL PROPERTY

Thus in ***Mensah v. Mensah*** already referred to supra, the court applied the equality is equity principle to determine which proportions the couple's joint property would be shared. Bamford-Addo JSC held at 355 thus:

> *"… the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage."* (e.s.)

It would appear from ***Mensah v. Mensah***, *supra* that the court favoured equal sharing of **joint property** in all circumstances. However, this position has been modified and clarified subsequently in the case of ***Boafo v. Boafo*** referred to supra.

In that case, the husband petitioned for divorce and the wife cross-petitioned for divorce. The marriage was dissolved. On the issue of distribution of properties, the trial judge found that the properties had been jointly acquired; that the couple had operated their finances jointly, but that the degree of financial contribution by the wife to the acquisition of the joint properties was not clear.

The trial Judge then made distribution orders which were not on a half and half (equal) basis. The wife appealed to the Court of Appeal on the ground, inter alia, that the trial judge failed to distribute the property in accordance with article 22(3) (b) of the 1992 Constitution.

The Court of Appeal held that the properties should have been distributed equally on a half and half basis and allowed the appeal. The husband appealed to the Supreme Court.

In delivering the judgment of the court dismissing the appeal, Dr. Date-Bah JSC referred to the decision in ***Mensah v. Mensah*** and further explained the position of the court. At 711, he said:

> *"On the facts of Mensah v. Mensah (supra), the Supreme Court (per Bamford-Addo JSC) held that equal sharing was what would amount to a "just and equitable" sharing. The view of Denning LJ (as he then was), in* ***Rimmer v. Rimmer [1952] 1 QB 63 at 73*** *that on the facts of that case equality is equity seems to have inspired the learned Supreme Court Judge's approach. … Denning LJ's view was that where it is clear that the matrimonial home or furniture common use belongs to one or the other of the married couple, then the courts would respect the proprietary rights of the particular spouse. But where it not clear to whom the beneficial interest belongs or in what proportions, then the equitable maxim of equality is equity would be applied. The spirit of Bamford-Addo JSC's judgment in Mensah v. Mensah appears to be that the principle of the equitable sharing of joint property would ordinarily entail applying the equitable principle, unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership.*

This interpretation of Mensah v. Mensah as laying down the principle of equitable sharing of joint property, accords with my perception of the contemporary social mores …"

The learned judge also underscored the essence of section 20(1) of the Matrimonial Causes Act, 1971 Act 367 and article 22(3) (b). At 713 he said of article 22(3) (b):

"… Thus article 22 firmly places within the domain of social human rights the distribution of the property of spouses, on divorce… It was meant to right the imbalance that women have historically suffered in the distribution of assets jointly acquired during marriage. An equal division will often, though not invariably, be a solution to this imbalance."

Then at 714, he said of section 20(1) of Act 367:

"The question of what is "equitable", in essence, what is just, reasonable and accords with common sense and fair play , is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are, therefore, fixed in accordance with the equities of any given case." (e.s.)

Therefore even though ***Boafo v. Boafo*** affirmed the equality is equity principle as used in ***Mensah v. Mensah***, it gave further meaning to section 20(1) of Act 367 and article 22(3)(b) of the 1992 Constitution. Consequently, the issue of proportions are to be fixed in accordance with the equities of each case.

The court duly recognized the fact that an equal (half and half) distribution, though usually a suitable solution to correct imbalances in property rights against women, may not necessarily lead to a just and equitable distribution as the Constitution and Act 367 envisages. It is submitted that the court made room for some flexibility in the application of the equality is equity principle by favouring a case by case approach as opposed to a wholesale application of the principle.

The above notwithstanding, it must be noted that the paramount goal of the court would be to achieve equality. Thus, the court endorsed the Court of Appeal's position to the effect that an inability or difficulty to identify clearly distinct contributions in the acquisition of the joint property would not in itself preclude a half and half sharing. At 716 Date Bah JSC quoted with approval a passage from the judgment of Wood JA (as she then was) :

> "*…Indeed in cases where the evidence clearly points to a joint ownership, I found no inflexible rule stipulating that a spouse's inability to identify clearly contribution automatically disentitles him or her from a half share. To the contrary, it does appear that the courts have been quick to apply the equality is equity rule, and so lean towards a half and half share, if from all the circumstances, such an approach would be justifiable."…*
> *Again, we consider this passage a sound statement of the law. …*
> *Where there is substantial contribution by both spouses, the respective shares of the spouses will not be delineated proportionally like a shareholding in a company. For, the marriage relationship is not a commercial relationship… equality is equity will usually be an equitable solution to the distribution issue. The Court of Appeal was therefore within its rights in intervening to achieve equality."*

It is therefore apparent that the Ghanaian Courts have accepted this equality is equity principle in the sharing of marital properties upon divorce. We believe that the death knell has been sung to the substantial contribution principle, making way for the equitable distribution as provided for under article 22 (3) of the Constitution 1992.

Let us now examine the invitation being made to us in this appeal to set aside the judgment of the Court of Appeal, and by necessary implication, that of the High Court in view of the concurrent findings by the two lower courts. Is there any sound legal basis for this request?

CONCURRENT FINDINGS OF FACT

The Supreme Court has in the following cases laid down the criteria that will enable a second appellate court, like this Supreme Court to depart from concurrent findings of fact by the trial court and concurred in by the first appellate court, the Court of Appeal.

1. **Gregory v Tandoh IV & Anr. [2010] SCGLR 971 and**
2. **Obeng v Assemblies of God, Church Ghana [2010] SCGLR 300**

The principle is therefore firmly established that where findings of fact have been made by a trial court and concurred in by the first appellate court, then the second appellate court like this court must be slow in coming to different conclusions unless it was satisfied that there were strong pieces of evidence on record which made it manifestly clear that the findings by the trial court were perverse.

In the instant case, there being no such evidence that the findings of fact are perverse, this court is unable to depart from the findings of fact as they are indeed supported by evidence on record.

EVALUATION OF EVIDENCE ON RECORD

In the circumstances of this case, even though the Petitioner did not call any witnesses, there were pieces of corroborative evidence from the Respondents

witnesses which supported the Petitioner's case that she and the Respondent took part in the trading activities.

For example, DWI, Ellen Dzifa Amugie contrary to Respondent's assertion that the Petitioner did not play any role in the business activities stated on oath that she saw the petitioner once in the premises where the Respondent was selling the items to the Civil Servants in the Ministries.

Secondly, in answer to a question from Counsel for the Petitioner, requesting explanation as to the business deals or negotiations that she DWI went out with the Petitioner to conclude, DWI answered thus:-

> *"Yes, but the woman she led me to was not ready to give us credit and so we did not take anything from her."*

These pieces of evidence at least shows that the Petitioner was not the type of lazy housewife that the Petitioner was portrayed to be. The truth of the matter is that, the Petitioner played a pivotal role in the management of the business before and after Guidem was registered as a business entity at the Registrar General's Department.

DW2 – Michael Nii Amarh Ahuloo a colleague of the Respondent at the Controller and Accountant General's Department, testified that he had ever met the Petitioner in the House of the Respondent at La. According to DW2, he went to their house at La, very early in the morning at the invitation of the Respondent. In answer to a question during cross-examination, DW2 answered that when he got to the house of the parties at La, he saw Palm oil in drums as well as tomatoes, but he could not tell who sold those items. The same witness also testified that he ever saw the Petitioner in the store of the Respondent in the Ministries but cannot tell exactly what she was doing at the material time. All these go to confirm that the Petitioner was really engaged in trading in the house at La and also took part in the business.

Finally, DW4, Isaac kwao, a close blood relation of the Respondent who later came to work with him also testified that, the procedure in the management of the store was that, "at the end of each day's sales Sister Gladys that is the petitioner comes to collect the cash. The respondent then was working with the Accountant Generals 'Department".

This particular piece of evidence is consistent with the evidence of the petitioner under cross-examination that she kept a record of the daily sales and gave it to the Respondent. This particular record has been tendered as exhibit E.

It has to be noted that, DW4 is also a Carpenter by profession and was the one who worked on the couple's Adenta property. He confirmed that it was the Petitioner who took him to the Adenta house and also that when he first met the Petitioner, she was a table top trader, dealing in the sale of rice, cooking oil and other consumables in their house at La.

The combined effect of all these pieces of evidence is that, even though learned Counsel for the Petitioner was careless in not calling evidence to support the contentions of the Petitioner, by the evidence of the Defence witnesses referred to supra, the necessary corroborative linkages had been established to enable this court draw the necessary inferences. In this respect therefore, we are of the considered view that, once the Respondent and his witnesses have corroborated in material particulars the evidence of the Petitioner on the core issues involved in this trial, the failure by her to call evidence of her own in support thereof is immaterial.

We are therefore of the considered view that, in law the burden that is cast on the Petitioner to lead sufficient evidence to enable a finding of those facts to be made in her favour has been established as required by sections 10 and 14 of the Evidence Act, 1975, already referred to supra.

We accordingly hold and rule that taking all the above pieces of evidence from Petitioner, respondent and his witnesses into consideration and on the authority of the following Supreme Court decisions, the Petitioner must be deemed to have discharged the burden cast on her by and under the Evidence Act, 1975 NRCD 323.

1. ***Dzaisu v Ghana Breweries Limited [2007-2008] SCGLR 539*** where the Court spoke with one voice through our esteemed Sister Sophia Adinyira JSC on application of section 14 of NRCD 323 at holding 1 thereof and

2. ***Ackah v Pergah Transport Limited [2010] SCGLR 728*** where the Supreme Court again speaking through our respected Sister Sophia Adinyira JSC espoused section 10 of NRCD 323 of the Evidence Act.

This means that, since it was the Petitioner's duty as required by law to produce the evidence of the facts in issue and that duty has been satisfactorily discharged, that burden has been performed and the trial and appellate courts were thus right in coming to the conclusions reached by them.

From the above, it would appear certain that all the lower courts correctly applied the principles of evaluating the evidence and the probative values attached to the party who has the burden of proof. Under these circumstances, it is our considered view that this court does not see it's way clear in interfering with the findings of fact made by the trial court which was concurred in by the Court of Appeal.

We are therefore of the very considered view that the Court of Appeal did not err in affirming the findings of fact made by the trial court.

Indeed, the Court of Appeal correctly applied the principles of evidence in this case and satisfied itself that the standard of proof required in law had been met.

Secondly, it has to be considered that, the facts of this case require that the veil of incorporation be lifted to enable the court determine the real persons who are managing the business of Guidem.

This is a situation where the respondent cleverly explored the illiteracy of the Petitioner and abused the trust reposed in him by the Petitioner. Since the primary duty of courts of law is to do substantial justice, the decision of the lower courts to be objective and consider all the surrounding circumstances of the case supports the decision arrived at.

Having reviewed the evidence on record in great detail as well as the constitutional provisions dealing with devolution of marital properties upon divorce, it is appropriate at this stage to consider the principle of Jurisprudence of Equality.

Even though the decision of this court in effect is that, the Petitioner, from the evidence on record, must be reputed to have made and contributed substantially to the acquisition of the matrimonial properties and assets on offer for sharing in this case and therefore entitled to an equal share, the constitutional provisions in article 22 (3) of the Constitution, 1992 cannot be overlooked.

This is because, as a final appellate and constitutional court, this Supreme Court has a duty to make its views clearly known on the relevance and applicability of constitutional provisions whenever these arise or call for interpretation in cases that come up before it for adjudication.

Our comments as a court, on the constitutional interpretation and applicability of the equality is equity principle contained in article 22 (3) of the Constitution 1992, in the sharing of marital properties acquired during the subsistence of a marriage and the Principle of Jurisprudence of equality, (yet to be discussed) are to be understood in that context.

Thus, even if this court had held that the petitioner had not made any substantial contributions to the acquisition of the matrimonial properties, it would still have come to the same conclusion that the petitioner is entitled to an equal share in the properties so acquired during the subsistence of the marriage. This is because this court recognises the valuable contributions made by her in the marriage like the performance of household chores referred to supra, and the maintenance of a congenial domestic environment for the respondent to operate and acquire properties. Besides, the constitutional provisions in article 22(3) of the Constitution 1992, must be construed to achieve the desired results which the framers of the Constitution intended.

In coming to this conclusion, we are not unaware of complications that may arise in the application of the principle of equality in the context of polygamous marriages.

We are however of the view that those complications can be tackled on a case by case basis in subsequent case law development, or by direct statutory intervention by the Legislature.

Finally, such an interpretation and decision would be consistent with earlier decisions of this court in *Mensah v Mensah and Boafo v Boafo* already referred to supra.

JURISPRUDENCE OF EQUALITY PRINCIPLE (JEP)

The Jurisprudence of Equality Principle, has been defined by the International Association of Women Judges in their November, 2006 USAID Rule of Law Project in Jordan as *"the application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women."* Such that the rights of women will no longer be discriminated against and there will be equal application of laws to the determination of women issues in all aspects of social, legal, economic and cultural affairs.

It is to be understood that discrimination and violence against women differ from country to country and each situation has to be considered on a case by case basis.

For example, whilst in Ghana, it is perfectly legitimate for issues such as inhuman widowhood rites, trokosi system and the inability of the courts to apply all the human rights provisions in the Constitution 1992 in favour of women so as to empower them in their quest for equality in the devolution of marital property upon divorce may be considered as discrimination and violence against women, in other countries, it may be the prohibition on female students wearing headscarves at university campuses, or the unequal payment of pensions to widows as compared to widowers that may be considered as such.

In our Ghanaian context, we have referred to the provisions of article 33 (5) of the Constitution which guarantee's other rights, duties, declarations not specifically mentioned in the Constitution as applicable by our courts in order to ensure the dignity of the human race.

For example, Article (1) of the Universal Declaration of Human Rights provides as follows:

> ***"All human beings are born free and equal in dignity and rights.*** *They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood."*

Article 12 (1) and (2) of the Constitution 1992 give the scope and content of the fundamental Human Rights and Freedoms which the individual is entitled to enjoy.

As a matter of fact, even though the Universal Declaration of Human Rights is not a binding treaty, its principles and underpinning philosophy has been incorporated into national constitutions and referred to by several national courts. This is the context into which our national Constitution 1992 has to be understood in relation to this principle of Jurisprudence of Equality.

Ghana is also a signatory to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

For example, article 1 of CEDAW, provides a definition of discrimination as follows:-

> "*For the purposes of the present convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

Furthermore, article 5 of CEDAW adds a key concept to international equal protection analysis; the need to eradicate customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women.

On the basis of the above conventions and treaties and drawing a linkage between them and the Constitution 1992, it is our considered view that the time has indeed come for the integration of this principle of "*Jurisprudence of Equality"* into our rules of interpretation such that meaning will be given to the contents of the Constitution 1992, especially on the devolution of property to spouses after divorce.

Using this principle as a guide we are of the view that it is unconstitutional for the courts in Ghana to discriminate against women in particular whenever issues pertaining to distribution of property acquired during marriage come up during

divorce. There should in all appropriate cases be sharing of property on equality basis.

We therefore endorse the Kenya Court of Appeals decision in the case of **Tabitha *Wangeci Nderitu v Simon Nderitu Kariuki, Civil Appeal No. 203 of 1997*** where the ***Court of Appeal ruled for the wife, finding that the Married Women Property Act, superseded the customary law, that the husband had failed to show that the caesarian sections had disabled her sufficiently to warrant a reduction to 30 percent, and that a housewife's contribution to the family in raising children counted as a contribution to the marriage.***

What are the facts of the above case?

In the said case both parties appealed from a lower court decision dividing marital property on divorce. The lower court found that both of the parties had contributed equally to the marital assets and ruled that the proceeds from the sale of the matrimonial home should be divided equally.

The husband discounted the wife's share of the remaining assets to only 30%, based on what he termed the "common sense notion" that the three caesarian sections the woman had endured to deliver the couple's children had diminished her ability to fully exert himself for the benefit of the household.

The decision arrived by the Kenya Court of Appeals is not only in tandem with common sense and international human rights conventions and principles, but also in tune with our articles 22 (3) (a) and (b) of the Constitution 1992.

Coming home to the instant case and applying the above constitutional provisions, relevant case laws enunciated in decisions such as ***Mensah v Mensah*** and ***Boafo v Boafo*** already referred to supra and international conventions and Principles of Jurisprudence of Equality, (JEP) this court is of the considered view that the Petitioners contribution even as a housewife, in maintaining the house and creating a congenial atmosphere for the respondent to create the economic empire he has built are enough to earn for her an equal share in the marital properties on offer for distribution upon the decree of divorce.

From the evidence on record, this court will not permit the respondent to use the petitioner as a donkey and after offering useful and valuable service dump her without any regard for her rights as a human being.

CONCLUSION

We are therefore of the considered view that the time has come for this court to institutionalise this principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the subsistence of a marriage in appropriate cases. This is based on the constitutional provisions in article 22 (3) and 33 (5) of the Constitution 1992, the principle of Jurisprudence of Equality and the need to follow, apply and improve our previous decisions in ***Mensah v Mensah*** and ***Boafo v Boafo*** already referred to supra. The Petitioner should be treated as an equal partner even after divorce in the devolution of the properties. The Petitioner must not be bruised by the conduct of the respondent and made to be in a worse situation than she would have been had the divorce not been granted. The tendency to consider women (spouses) in particular as appendages to the marriage relationship, used and dumped at will by their male spouses must cease. Divorce as Lord Denning stated long ago, should not be considered as a stigma.

In the premises, the appeal herein is dismissed as being without any merit and the Court of Appeal decision of 23rd July 2009 is hereby affirmed.

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

(SGD) S.A.B AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

(SGD) DR. S.K. DATE-BAH
JUSTICE OF THE SUPREME COURT

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

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