A SPEECH DELIVERED BY BARIMA NANA YAW KODIE OPPONG; DIRECTOR OF LEGAL EDUCATION IN GHANA & DIRECTOR, GHANA SCHOOL OF LAW AT THE 2023 GHANA BAR ASSOCIATION ANNUAL CONFERENCE HELD IN CAPE COAST, GHANA

TITLE

THE IMPACT OF THE LAND ACT[1] ON PROPERTY RIGHTS OF SPOUSES & THE EQUALITY IS EQUITY PRINCIPLE; PERSPECTIVES IN THE DAYS OF ADAM, *QUARTEY*, *MENSAH*, *ADJEI* & *ANYETEI* & NOW KODIE

MY LEARNED FRIENDS,

A couple of weeks ago, I received a call from the Bar Secretary. In the course of the conversation, he enquired whether I would accept to lead a discussion on this unruly horse of a topic which I have re-crafted thus: *The Impact Of The Land Act On The Property Rights of Spouses.* I gladly accepted the challenge.

Some may be saying of "**Adam** and **Quartey** and the rest of the names in the above title we know what they stand for, but what does 'Kodie' stand for in the context of matrimonial causes?" The position of Kodie (Kodie, my good self) on this matter is quite well known and I shall summarise the same at the end of this discussion.

Suffice it to state here and now that I do not believe that it is consistent with the customs, practices and usages of most communities in Ghana and indeed, for those who are bound by the relevant tenets of the Holy Bible, for a man, worse still, a husband, to be interested in and lay a claim to the property of his wife, whether or not acquired during marriage, and notwithstanding her wealth or station in life, which may be far better than that of the man. Such conduct is generally considered not just an aberration but more importantly, an abomination.

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[1] Land Act, 2020 (Act 1036). A substantial part of this paper has been elaborately discussed in the current speaker's book entitled: ***Contemporary Trends In The Law Of Immovable Property In Ghana***. Published in the year 2019.

PART ONE

The principle of equality is equity is used here in relation to matrimonial causes. It posits in its pristine form, as captured in *Mensah* v *Mensah*,[2] and later, more graphically in *Arthur* v *Arthur*[3]: "Marital property is thus to be understood as property acquired by the spouses during the marriage, *irrespective of whether the other spouse has made a contribution to its acquisition*."

Sometime in the year 2020, the Parliament of the Republic of Ghana gave the strongest indication yet that it is prepared to comply fully with article 22 (3) of the Constitution, 1992, when it passed the Land Act, 2020 (Act 1036). Significantly, on 23rd December 2020, the President gave his assent. Particular reference is made to **Sections 10 (9), 38, 47, and 97** thereof. Section 10 (9) read together with subsections (1), (2) and (3) covers discrimination on the basis of the nationality of a non-citizen spouse married to a citizen of Ghana. Section 38 (3) & (4) provides as follows:

> "***Parties to a conveyance***
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> *38. (3) In a conveyance for valuable consideration of an interest in land that is jointly acquired during the marriage, the spouses shall be deemed to be parties to the conveyance,* ***unless a contrary intention is expressed in the conveyance.***
>
> *(4) Where contrary to subsection (3) a conveyance is made to only one spouse, that spouse shall be presumed to be holding the land or interest in the land in trust for the spouses,* ***unless a contrary intention is expressed in the conveyance.***"

Similarly, **Section 97(5)** of the Land Act concerning application for registration of land or an interest in land jointly acquired for valuable consideration during marriage states that, where only one spouse is stated as the applicant, that spouse: "***shall be presumed to have applied on behalf of that spouse and the other spouse unless a contrary intention is expressed in the conveyance"***.

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2 (J4 20 of 2011) [2012] GHASC 8 (22 February 2012).

3 [2013–2014] 1 SCGLR 543.

In **Section 125(7)** of Act 1036 regarding the land certificate issued following registration, the Act goes even further. It states that, where only one spouse is mentioned on the certificate as proprietor, that spouse "***shall be presumed to be holding the land or interest in land on behalf of that spouse and in trust for the other spouse"*** – i.e. without any leeway for a contrary intention to disqualify the interest of the other spouse.

It is my humble opinion that these provisions of the Land Act and a few others therein are not enough to impact effectively on the matters that have caused the existence of the so-called maladies of the existing law which it sought to remedy.

THE STATE OF THE LAW EXISTING AT THE TIME OF ENACTMENT OF THE LAND ACT

Before the enactment of the Land Act, the provisions that substantially covered this area of the law have been those in article 22 of the Constitution, 1992, the Matrimonial Causes Act,[4] the Wills Act[5] and the Intestate Succession Act.[6] Article 22 of the Constitution provides:

"**22. Property rights of spouses**

(*1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.*

(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article,

(a) spouses shall have equal access to property jointly acquired during marriage;

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4 Matrimonial Causes Act, 1971 (Act 367).

5 Wills Act, 1971 (Act 360).

6 Intestate Succession Act, 1985 (PNDCL 111).

> (b) *assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon the dissolution of the marriage.*"

Reference is made to *Marfoa* v *Agyeiwaa*[7] for the distinction between clauseS 1 and 3 of article 22 of the Constitution.

THE ATTITUDE OF THE COURTS:
PRINCIPLES FOR THE ENFORCEMENT OF SPOUSAL RIGHTS TO PROPERTY

Over the years, the Courts in Ghana have fashioned out and developed a plethora of principles which have guided judges in the determination of the rights of spouses to property acquired during the subsistence of a marriage, both at the time of divorce and, in some cases, upon the death of a spouse. These principles are critically considered below:

[A] THE SUBSTANTIAL CONTRIBUTION PRINCIPLE

Over time, the Courts developed the concept of '*substantial contribution*'. The rule under the principle of *substantial contribution* is that where a spouse contributes financially to the building of or improvement on a property during the subsistence of their marriage or in the acquisition of other valuable property such as farm plantations, then that spouse shall be treated as a joint owner by virtue of his or her contribution and consequently entitled to a share in the property to such an extent as may have been agreed or may seem in all the circumstances to be just.

This principle was clearly illustrated in *Abebreseh* v *Kaah and Others.*[8] In *Fynn* v *Fynn & Osei*,[9] the Supreme Court finally clarified the seeming confusion that clouded the legal landscape on the exact nature of the contribution that a spouse must make to the acquisition of a property to consider it as jointly acquired, when it held through Her Ladyship Georgina Wood CJ that their Lordships:

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7 (J4/ 42/ 2012); [2016] GHASC 84 (9 November 2016).

8 [1976] 2 GLR 46.

9 [2013–2014] 1 SCGLR 727.

"... do not think this court's thinking on the status of property acquired during the existence of any marriage is shrouded in confusion. *Indisputably, during the existence of the marriage union, it is most desirable that the couple pool their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular*."

[B] AGREEMENT BETWEEN THE PARTIES

There are instances where the couple would agree that any particular property is the sole property of either the husband or the wife and thus not the joint property of the parties to the marriage, as was held in *Quartson* v *Quartson*[10] and *Fynn* v *Fynn.* On agreement between spouses, however, let us listen to what His Lordship Richard Adjei Frimpong J (as he then was) said in *Naa Dede Addy* v *First Capital Plus*:[11]

"*In a society like ours where men still dominate the economy of the matrimonial home and continue to wield tremendous financial dominance over their female partners who would invariably succumb to their husbands' financial overbearing coupled with the sexual and emotional ties between the parties which provide a ready weapon for undue influence*[12] [agreement between spouses cannot be a strong ground for determination of entitlement by the wife in particular]."

[C] THE AGE OF THE PARTIES

In *Obeng* v *Obeng*,[13] the Supreme Court discussed the relevance of age of the parties in determining property rights of parties as "all factors which are to be borne in mind in making an order which is just in all the circumstances of the case… ." Their Lordships further held that as "...a result of the breakdown of the marriage, she [respondent] has lost

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[10] (J4 8 of 2012) [2012] GHASC 49 (31 October 2012).

[11] High Court (Commercial Division), Accra Suit No. BDC/64/2009 dated 15th July 2011.

[12] It is anticipated that this aspect of the Judgement will generate serious debate in some circles.

[13] (J4 37 of 2015) [2015] GHASC 112 (9 December 2015).

substantial prospects of, at any rate, a comfortable old age which she would have had, had the marriage subsisted."

[D] THE NATIONALITY OF THE PARTIES:

In *Verdose* v *Kuranchie*,[14] in line with the provisions of article 266[15] of the Constitution limiting the interest that a non-citizen spouse can hold in land in Ghana to fifty years, the Supreme Court ruled that:

> *It is further our view of all the evidence that limiting the interest of the petitioner to fifty years with a reversion to the respondent and the children will achieve the ends of fairness and justice.*"

[E] THE STATUS OF THE RELATIONSHIP:

On the above, it is imperative that we contrast the decision of the Supreme Court in *Mintah* v *Ampenyin*,[16] insisting on the performance of the applicable customary or statutory or other matrimonial imperatives in order to create a spousal relationship conferring the rights under the equality is equity principle, vis-à-vis the contemporary attitude of flexibility in the application of legal principles meeting the current expectation for broad justice applied by the court in *Gregory* v *Tandoh & Another*.[17]

In other words, in the *Mintah* case supra, the Supreme Court held that unless a person can establish that she was married by a man and vice versa, she cannot be entitled to the benefits accruable under article 22 of the Constitution or any other relevant law. Fortunately, our progressive Supreme Court Justices have recently in *Serwa* v *Hashimu and Another*[18] modified their stance in the *Mintah* case and have indirectly adopted, with minimal variation, their position in the *Gregory* v *Tandoh* case supra. This latter position has been forcefully championed by the instant speaker in his said book on Immovable Property Law in Ghana.

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14 (J4 45 of 2016) [2017] GHASC 2 (25 January 2017).

15 Article 266(4) of the Constitution, 1992.

16 (J4/18/2013) [2015] GHASC 10 (25 March 2015).

17 [2010] SCGLR 971.

18 (J4 31 of 2020) [2021] GHASC 3 (14 April 2021).

[F] THE TRACING OR PIERCING OF THE VEIL PRINCIPLE:

The current position of the law in Ghana is that where the court is presented with sufficient evidence that a spouse has deliberately or fraudulently sought to overreach the law in dealings with the other spouse, as for example where a matrimonial property is converted into an asset for a company owned by a spouse, the court will deem it as matrimonial property. This principle of law was elaborately substantiated in *Akoto* v *Abrefi*.[19]

Let us compare the above situation to the decision in *Quartson* v *Quartson*,[20] where the Supreme Court had refused to accede to the prayer of a spouse for "a declaration from this court that *she is entitled to directors' fees and dividends from Pious Trading and Construction Company Limited*." The court ruled: "The law on the separate legal personality of companies vis-à-vis the personality of the directors and shareholders, is trite… *The appellant here has not shown that this case can be brought under any of the allowed exceptions that warrant the lifting of the corporate veil*."

[G] THE CONDUCT OF THE SPOUSES PRINCIPLE:

The foregoing matters need to be considered more comprehensively under this rubric in the following manner:

(i) Must the court take into account the conduct of the parties?

(ii) Should a party be deprived of an entitlement to a reasonable share in the property acquired during marriage because for example his or her immoral conduct caused the divorce?

On the above, the words of Her Ladyship Don-Chebe Agbevey J. in *Lamptey* v *Lamptey*,[21] which sought to answer the above questions, reverberate. She said:

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[19] (J4 24 of 2010) [2011] GHASC 7 dated 23 February 2011.

[20] (J4 8 of 2012) [2012] GHASC 49; dated 31 October 2012. See also the English case of *Prest* v *Petrodel Resources Limited* [2013] UKSC 34.

[21] Suit No. BDMC 454 /2013, (unreported). For more on this please refer to Chapter 4 of the current speaker's book supra.

"*In the first place, my thinking is that the property settlements to women is based on the works or contribution of the women in the marriage... What has been the contribution, in whatever form, of the petitioner in the marriage? That should be the main consideration. That is not to say that, infidelity is not a consideration at all. In this case I have found that the petitioner performed her wifely duties as expected, with the exception of this negativity of having an affair. I am not in a position to accept the contention of the respondent that the petitioner be denied completely any settlement. I am not to be understood as lauding or condoning any adulterous relationships in marriage but what I am contending is that the petitioner cannot be denied every contribution she made to the success of the respondent only because of this unfortunate affair.*"

[H] THE SOURCE OF FUNDS FOR ACQUISITION OF THE PROPERTY

In *Adjei* v *Adjei*,[22] the relevant facts were that the funds for the acquisition of the matrimonial property were sourced from a bank loan, a balance of which was still outstanding at the time of dissolution of the marriage. The Supreme Court agreed with the Court of Appeal that the respondent had not been able to establish that at the time of the dissolution, the parties had jointly acquired any property to be distributed between them in these specific words:

"… where a party or spouse takes an individual loan to develop his self-acquired plot during the subsistence of a marriage, the property so acquired shall not be considered a family property jointly acquired until the loan has been fully paid whilst the marriage subsists."

[I] OWNERSHIP OF THE LAND: IS THE PROPERTY CONSTRUCTED ON A FAMILY LAND?

Was the property built on family land? If so, what is the interest of the spouse who built on the land and that of the surviving spouse or spouses? The general position of the law is that, where a spouse builds

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22 (J4 6 of 2021) [2021] GHASC 5 (21 April 2012).

on a family land, that spouse only acquires a life interest, which means ownership does not survive that spouse upon his death. In *Ansah* v *Sackey*,[23] it was decided by Ollennu J (as he then was), as stated in the headnote at p 326, that:

> "the interest retained by a family member in buildings erected by him, using his own private resources, on family land otherwise unbuilt upon is an interest limited to his own life. Although the life interest itself is fully alienable (e.g., it can be given as security for a loan) it is not open to the life tenant, unless he acts with the consent and concurrence of the head and principal members of the family, to alienate any greater interest or estate. On the death of the life tenant the interest in the property vests in the family and any disposition by the life tenant purporting to have any other effect is ineffective."

The above position was clarified in *Amissah-Abadoo* v *Abadoo*,[24] wherein Edward Wiredu J (as he then was) applied the opinion of Ollennu in his famous book *Principles of Customary Land Law in Ghana*[25] to critique his decision in the above case, as follows:

> "The customary law position of the interest retained by a family member in buildings erected by him using his own private resources on family land appears to have been widely generalised in the Sackey case (supra) and so is the position with regard to a person's self-acquired property enunciated in the *Amoabimaa* case (supra). Ollennu himself acknowledges this when in his invaluable book 'Principles of Customary Land Law in Ghana', after reviewing the various decided cases on the point (among which were the *Sackey* case (supra), the *Owoo* case (supra) and *Santeng* v *Darkwa* (1940) 6 WACA 52, he had this to say at p 42:
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> > "It is submitted, however, that the correct statement of custom is that if a member of the family is granted a portion of the general family land, i.e. a site which has not previously been granted to another individual member of the family, or a site which another individual member has not previously

[23] (1958) 3 WALR 325.

[24] [1974] GLR 110–132.

[25] Nii Amaa Ollennu, *Principles of Customary Land Law in Ghana* (London: Sweet & Maxwell, 1962).

> effectively occupied, the house which he builds on such a site, by his independent effort and his own individual means, becomes his self-acquired property, which he may alienate inter vivos or by testamentary disposition. But a building which the individual member of a family is permitted to erect on family land in use by the family, e.g. a site on which family structure of any sort exists, is property in which the individual member who builds has a life interest only; it is to be used and treated in every respect as his individual property, except that he cannot create an interest in it which may subsist after his life."'

The above principle was further applied in *Kumah* v *Asante*,[26] wherein the court held that where a member of a family improves upon or builds additional rooms or apartments to an existing family building, such improvement does not change the family character of the building. In the same vein, where family property is lost through sale or other attachment and a member repurchases or redeems the property, it becomes family property unless members of the family were specifically informed and it was agreed at the time of the repurchase or redemption, that the property would not resume its former position as family property.[27]

[J] MAKE-UP OF THE WIFE – IS SHE BEAUTIFUL?

The courts sometimes take into account the physical appearance of a spouse claimant, particularly the wife, as played out in *Anyetei* v *Anyetei*.[28] In that case, the learned trial Judge fondly relayed his observations in the judgment by stating that as he "… ***sat and watched … the ex-wife come in and go out of court. I think she is an exquisite specimen not only of womanhood but of creation itself. Twenty (20) years of her youthful and fruitful life is now wasted. To that I shall return…The Iron clad evidence and potency of the respondent's evidence is such that the petitioner cannot have his way forever.***

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[26] [1992–93] GBR 328, CA.

[27] *Nwonama* v *Asiedu* (1965) CC 179.

[28] Civil Appeal No. J4/67/2021 dated 2nd March, 2023.

Indeed the petitioner cannot kick against the pricks of solid evidence of substantial contribution by her ex-wife."

It is important to remember that the Supreme Court however discounted the necessity to take into account the beauty or other physical manifestation of same, of a wife claimant in determining the entitlement of a wife to property acquired during the subsistence of the marriage.

PART TWO

IN THE DAYS OF ADAM; THE BIBLICAL PERSPECTIVE

As is well known, the Holy Bible teaches that in the beginning, when The Almighty God created the Earth, he gave some commandments (not the famous 10 Commandments) to the first person he created, i.e. Adam, and in particular required him not to eat of the fruits of the tree in the midst of the famous Garden of Eden. At the same time, God gave Adam control over all the earth and its habitats. Subsequently, God created Eve, who became his wife. Well, they both however disobeyed God and God imposed a respective 'punishment' nay, a responsibility, on them, as contained in the Holy Bible account in Genesis 3:16, 19 & 21, as follows:

> ***[16] "Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee…"***
>
> ***Unto the man this is what God said***
>
> ***"[19] In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return…***
>
> ***[21] Unto Adam also and to his wife did the Lord God make coats of skins, and clothed them.***"

Thus, being an ever-loving and merciful God, He made for them coats from skins (not sure of which animal), after they had covered themselves with leaves of some plants. The foregoing thus is the beginning of the process of acquisition of property.

Of particular emphasis is the responsibility imposed on Adam: simply that he shall sweat before accessing of the fruits of the earth. By extension, it is the duty of Adam to work hard in order to maintain himself, his wife and children. No such 'punishment' was rendered for Eve. Her own 'punishment' was in relation to labour during childbirth, where she would also be in excruciating pain till the baby is delivered.

In my modest opinion therefore, it is a serious aberration, at least for those who are bound by the teachings of the Bible, for a man to require his wife, however wealthy, to use part of her personally or solely acquired money whether with the support of the man or not, to maintain the home normally in the form of "*chop money*", so the man can apply his wealth to build a house for accommodation for the wife and children, and vice versa, as is popularly being championed these days. As will also be clear soon, the true position of customary law of most communities in Ghana is that it is the exclusive duty of the man to maintain the state in life of his wife and children. No such responsibility appears to have been imposed on a wife.

PART THREE

IN THE DAYS OF QUARTEY: THE CUSTOMARY LAW PERSPECTIVE

"*...**our system of succession bars the husband from the enjoyment of his [deceased wife's] self-acquired property... [For,] A wife's personal property is, as a whole, her own family property, and when she dies her family would take all of it from her husband's control.***"[29]

JB DANQUAH, *GOLD COAST: AKAN LAWS*

A number of authors and judges too in their judgments have written extensively on *Quartey* v *Martey*,[30] since Ollennu J (as he then was) delivered his decision in that popular case. One of Ghana's most celebrated jurists and authors, Justice Stephen Alan Brobbey, writing on the topic*: Changing Face of the Law*, has opined that:

[29] Danquah, *Gold Coast: Akan Laws*, 209.

[30] *Quartey* v *Martey & Anor* [1959] GLR 377.

> "Before Ghana achieved Independence Status and the period around the independence era, the law was simply that every property acquired during marriage belonged to the husband. That was the position whether or not the property was acquired solely by the husband or jointly by the wife and the husband and the properties acquired by the husband with the assistance of the wife or children belonged to the husband exclusively. Many cases were decided on the basis of this principle …"[31]

The eminent jurist proceeded to cite *Quartey* v *Martey* as one of the "many cases" which he alluded illustrated what according to him was the simple but dominant position of the law quoted above. Writing under the sub-title "No joint ownership", the learned jurist contended that the gravamen of the *Quartey* v *Martey* case was, "whether or not the widow of the deceased was entitled to a share of the deceased husband's estate." The learned author then proceeds to refer to holding (3) of the case, which purported to summarise the ratio of the case as follows:

> "… by customary law, it is the duty of a man's wife and children to assist him in carrying out of the duties of his station in life. The proceeds of that joint effort, and any property which the man acquires with such proceeds, are by customary law the individual property of the man, not the joint property of all."

Justice Brobbey elucidates that under customary law there was a tradition that upheld those properties acquired during the marriage belonged to the man alone and upon the man's death there was no inhibition on the man's family which disallowed them from stopping his widow's continuous enjoyment of her spousal abode.

According to Justice Brobbey, this phenomenon "partly, accounted for the age-long tradition of the elders chasing away widows from their matrimonial home [and that] that was the predominant position of customary law which prevailed in the period before independence." It was for these reasons that the learned Justice launched a devastating

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[31] Stephen Alan Brobbey, *Changing Face of the Law*. (Paper delivered at the 2015 Ghana Bar Association Conference held in Kumasi). It is now published in the 2011–2015 vol XXIII of Review of Ghana Law, p 248, particularly from pp 252–261.

‘missile’ on the so-called “prevailing view” of customary law, describing it as “***the illiterate way of looking at the issues at stake***.”

Indeed, there is widespread criticism of this aspect of the so-called customary law. Critics illustrate their point inter alia, by raising the specter of a woman in the rural areas, burdened on her head with a heavy load and carrying her baby on her back on her way from the farm. All the while, her husband idles alongside her, holding his cutlass or locally manufactured gun and whistling or happily singing his favourite song. And yet, in the end, they claim that the woman who laboured for him would not be entitled to even an insignificant portion of any property acquired during the marriage. It is said that even equity and good conscience ought not to support such cruel and unjust treatment.

In contrast, some of those who have been at the receiving end of these criticisms tenuously contend however that what such critics fail to acknowledge is that the husband is by custom imposed with a duty to protect and secure the lives of his wife and children. Consequently, if he were to carry a heavy load as well, he would not be able to perform his security duties and would have been ridiculed or sanctioned for his inability to protect his wife and children were they to have been attacked by a wild animal or some evil men in the bush or while on their way home from the farm.

As many others, I do not condone any form of servitude or a man’s acts of inhumanity to any man or woman. This real-world example however serves to illustrate the dominant practice and understanding of people “in the olden days” and indeed in some rural communities in Ghana right up to the present day, although the situation has changed drastically with the emergence of facilities such as the ubiquitous *Aboboyaa* aiding the carriage and carting of goods made possible by the development of footpaths into roads of all kinds.[32]

Another point well worth making is that, wherever possible, reference should be made to, and reliance placed on, the text of a judgment rather than exclusively to the holdings, which are what the Editor considers to

[32] In Ghana the phenomenon of “*Aboboyaa*” a form of tricycle, designed to carry both goods, farm produce and labourers, to and from farms has to a large extent rendered the practice of overloading of persons from the farm unjustifiable in any way. Indeed, other forms of vehicular facilities have also aided the carriage of both humans and farm produce.

be a summary of what in his or her view is the relevant portion of the judgment. To illustrate the point, I wish to quote *in extenso* relevant portions of the *Quartey* judgment to confirm what Ollennu J (as he then was) actually said:

> "Again, by customary law, it is a domestic responsibility of a man's wife and children to assist him in carrying out of the duties of his station in life; e.g. farming or business. 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***."[33]

According to Justice Ollennu, a part of the above principle of customary law was applied in *Okwabi* v *Adonu*,[34] where the West African Court of Appeal confirmed the Judgment of the Land Court and held that:

> " …it is a common feature of family life that a son will work with and for his father and therefore in the absence of any strong evidence to the contrary, no presumption of trust will be raised that the property obtained by the joint efforts of father and son and held by the father is held by the father in trust for the son absolutely."

Consequently, Justice Ollennu felt bound to apply that principle, being the decision of a "higher Court" which he was, by the principle of *stare decisis*, bound to apply and thus not to depart from. He thus felt compelled to rule that:

> "On the same principle I must hold that, **in the absence of strong evidence to the contrary**, any property a man acquires with the assistance or joint effort of his wife, is the individual property of the husband and not joint property of the husband and wife."[35]

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33 *Quartey* v *Martey and Another* [1959] GLR 377 at 380.

34 2 WALR 268.

35 Ibid, at 380.

Dr Danquah's opinion rendered earlier, therefore eminently bears repeating thus:

> "*...**our system of succession bars the husband from the enjoyment of his [deceased wife's] self-acquired property... [For,] A wife's personal property is, as a whole, her own family property, and when she dies her family would take all of it from her husband's control.***"[36]

Indeed, in most communities in Ghana, it is almost an abomination for a man to lay claim to ownership of property acquired by his wife. That husband will not only be the subject of extreme ridicule but also verbal abuse by most people in the community; unprintable and sometimes vulgar language would be hurled at him, until he desists from making such an unreasonable demand.

The general position of customary law amongst most communities in Ghana is that no one is entitled to a share of some category of chattels such as a man's under-cloth known among the Akans of Ghana as "*danta*" and that of a woman as "*amoasen*", a small piece of cloth which serves as a woman's underpants. It is also trite that a man risk being a laughingstock in the community were he to make a demand for a share in, for example, the set of apparel of a woman, a humiliation which may be exacerbated, were he to be seen wearing such clothes known locally by Ghanaians as "*Maata*." The experience of a very famous Honourable man a few years ago is enough to illustrate the point.[37]

In their scholarly book, "*Contesting Land and Custom in Ghana. State, Chief and the Citizen*," Amanor and Ubink, widely reputed as land and agrarian scholars, confirmed Danquah's position on the customary law with a profound rendition of women's assertion of their rights to matrilineal land over their brothers in this arresting narration:

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36 Danquah, *Gold Coast: Akan Laws*, 209.

37 A few years ago, a well-known politician in Ghana became the subject of extreme ridicule when he was seen wearing what was deemed to be a ladies' overcoat. His reported admission that the coat belonged to his wife and he had borrowed it from her to enable him to contain the unaccustomed cold weather in Europe or was it in North America, caused him even further ridicule and, in some cases, verbal abuse.

> "We are three sisters and a brother. Our mother's brother (wofa) is dead, and he has left a large tract of land for us, which is lying fallow. We are planning to meet here to share the land among us. **We are planning that we will not give our brother any part of the land because it will allow him to develop part of it and leave it to his children.** So he has to find his own land elsewhere, since he is not going to marry from our family. We can develop what is there, little by little, for our children."[38]

What then is the true relevant ratio decidendi in the Quartey v Martey case?

The case substantially restates the established customary law that the wife and children of a man are vested with an entitlement, and indeed "**a right to maintenance and support from the husband and father**." This means that it is the duty of a husband to provide the necessaries of life, such as food, clothing and shelter for his wife and children. He is indeed responsible for the health needs of the wife and children.

There does not appear to be a correspondent duty on a wife to provide such needs for the husband. Affirmatively, the provision of maintenance is not, under customary law, a shared responsibility of a husband and wife. This is not to discount the role women play in domestic settings, including the provision of the necessaries of life. The point that needs to be highlighted is that no duty is imposed on a wife under customary law to provide such maintenance for the husband.

The *Quartey* case further reiterates the customary law position that the obligation of a man to maintain his wife or wives and children even extends beyond his death. Indeed, the "…**widow can maintain an action for her support [and that of the issues] against the head of [the man's family], against the successor to her late husband... or against the customary husband.**"[39]

[38] Amanor and Ubink, *Contesting Land and Custom*, 74.

[39] *Quartey* v *Martey*, 382.

In *Benyi* v *Amo*,[40] Adumua-Bossman, J (as he then was) cited with approval John Mensah Sarbah, who had re-stated the law to the effect that by customary law when:

> "... a man takes in marriage a woman ... and the members of her family give or point out to the husband a plot of land to build on, ... the rule of descent with regard to any such erections on such land is somewhat similar to what is known in English law as tenancy in tail special. The grant is invariably made to a man and his issues (not heirs) ...for all practical purposes the man has only a life interest, which he forfeits by wrongfully and improperly terminating the marriage. The man's heir or successor has no title or interest in such premises, nor can he himself sell or mortgage them."

Indeed, the above customary law did, around the period when *Benyi* v *Amo* and *Quartey* v *Martey* were held, bear a striking resemblance to some relevant English laws.[41]

It needs to be emphasised that, contrary to conventional wisdom which seems nowadays to be gaining currency, there is no known valid customary law to the effect that where a woman, married or not, acquired property by the application of her own expenditure of energy and other resources, part is forfeited to the husband if acquired in the course of the marriage. Indeed, as stated earlier, it is deemed preposterous and sometimes **'abominable'** for a man to demand a share in property acquired by his wife, however wealthy she may be – a principle fully shared and being vigorously propagated by the current speaker.

As will be demonstrated however, rather than enhancing this pristine principle sensitive to the peculiar circumstances of women in relation to the acquisition of property, recent laws, including constitutions and case

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40 [1959] GLR 92 at 95. It is interesting to observe that this case, which was prosecuted and determined in the High Court, Cape Coast on 28 February, 1959, predated *Quartey* v *Martey*, which was prosecuted and determined in the High Court, Accra on 17 November, 1959. Thus, the similarities in the *dicta* in the two cases heard in two separate regions which are worlds apart only go to confirm how common and predominant this general position of the law has been.

41 *Vaughan* v *Vaughan* [1953] 1 All ER 209. See also *Nanda* v *Nanda* [1967] 3 All ER 401.

law, have evolved various concepts such as equality is equity, in a bid to resolve the seeming problem of the prevalence of some insensitive men depriving their wives of a fair share of property acquired during the subsistence of the marriage, which they gleefully do without any acceptable justification.

These laws and legal principles, though fashioned out with good intentions, have rather emboldened some men additionally to insist, contrary to the age-old customary law and biblical imperatives set out above, that they also have an entitlement to an equal or, where they want to sound generous, reasonable share of property acquired by their wife or wives. As can be attested to by members especially those who are into litigation in matrimonial causes, this phenomenon is becoming eeringly regular in our courts.

The principle which appears to be gaining currency is one consistent with sound law and also accords with basic standards of morality and indeed equitable principles. It is that where there is evidence that two persons, whether as husband and wife (or wives), or not, by their joint direct effort acquired property, they are entitled to a reasonable, assessable share according to the quantum of their contribution, and their decision – or the decision of the Court based on a reasonable assessment – ought, in that case, to be enforced. Authorities for this proposition are indeed not in short supply, as illustrated below.

In *Mensah* v *Mensah (No 2)*,[42] the Supreme Court asked a fundamental question thus:

> "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?"

The Court spoke through Dotse JSC, who, consistent with his unflinching adherence to the principles of 'judicial activism', sought to answer it thus:

> "We believe that, common sense, and principles of general fundamental human rights requires that a person who is married

[42] [2010–2012] 1 GLR 204.

> to another... 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 was 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 martial 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."

The Supreme Court did in this case indeed establish that the performance of the responsibilities of a spouse in the form of "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…" entitles the claimant spouse to a share in the property acquired by the other spouse in the course of the marriage. This is because, the court deems significant the performance of "household chores", which leads to the "creation" of "a congenial environment" thereby enabling the other spouse to have "a free hand to engage in economic activities", as it invariably enables the other spouse to acquire property in various forms.

In other words, property acquired by spouses during marriage is presumed to be marital property. The Court felt bound to follow this holding of the Supreme Court in *Mensah* v *Mensah (No 2)* and held that "Marital property is thus to be understood as property acquired by the spouses during the marriage, irrespective of whether the other spouse has made a contribution to its acquisition."

In *Fynn* v *Fynn & Osei*[43] the Supreme Court, speaking through Her Ladyship Georgina Wood, CJ, sounded a note of caution that, in applying the equality is equity principle, care must be taken not to overlook a very important provision of the Constitution. She said that:

> "...the decided cases envisage situations where within the union parties may still acquire property in their individual capacities as indeed is their guaranteed fundamental right as clearly enshrined under article 18 of the Constitution, 1992, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in this instant case. No court in such clear cases would invalidate a sale transaction on the sole legal ground that the consent and concurrence of the other spouse was not obtained."

Usurpation of Legislative Power?

It is notoriously known that at the time *Mensah (No 2)*[44] was determined by the Supreme Court, there had been pending before Parliament a Bill filed pursuant to the mandatory provision of article 22 of the Constitution, 1992, as noted by the court as follows:

> "From the above provisions of the Constitution, [that is Article 22], 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 7 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."

Thus, in spite of the recognition by the court of the constitutional imperative exclusively directed at Parliament, the Supreme Court nonetheless proceeded to formulate its own principles, albeit along the guidelines contained in the said article 22. This bold revolutionary initiative and creativity of the Supreme Court, though commendable, may, with all due respect, be deemed to fly in the face of the sterling

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43 [2013–2014] 1 SCGLR 727 at 741.

44 [2010–2012] 1 GLR 204. It is said that the Bill was first drafted sometime in the year 2008.

admonition contained in a line of cases of substantial imperative force, to the effect that:

> "There must be a curb on the law reforming proclivities of our creative judges. A fortiori where a new law on the subject is already on the draftsman's desk, the courts have no business to pre-empt the law maker. If for nothing else, constitutional propriety forbids the exercise."[45]

As has been stated at the beginning of this paper, in the year 2020, Parliament of the Republic of Ghana gave the strongest indication to date, that it is prepared to comply with the mandatory provisions of the relevant part of article 22 of the Constitution, 1992. It has been thirty good years, and we are still waiting for our progressive Parliament to comply with this very important assignment. Obviously, that is a more than reasonable amount of time.

It is my hope and expectation that our current Parliament, headed by Rt Hon. A.S.K. Bagbin, that progressive Speaker (whether as no. 2 or no. 3 on the ladder of State authority), would vigorously pursue this agenda as one of his most memorable initiatives. When this is done, judges, lawyers, students of Family Law in particular and indeed a wide cross-section of Ghanaians will receive clear answers to the following questions, which I believe I am permitted to take liberties to ask of our Honourable members of Parliament on behalf of those asking them:

> ***Is it because our honourable men in do not want their wives to have an equal share in their property?***
> ***And why have not our lady honourables been actively pursuing such a noble cause? Is it because they do not want their husbands to have an equal share in the wealth they have also acquired***?

I hope I will not receive a call from my good friend Hon. Cyril Nsiah, Clerk to Parliament, to appear before the 'dreaded' Privileges Committee. I however think that I am protected by the principle of academic freedom and similar privileges.

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[45] *Eleko* v *Officer Administering the Government of Nigeria* [1931] AC 662.

PART FOUR

***ENTER ADJEI* v *ADJEI*[46]**

As referred to supra in *Adjei* v *Adjei*, the Supreme Court sought to realign the existing law espoused in the *Mensah* v *Mensah* line of cases analysed above. The apex court, speaking through His Lordship Yaw Appau JSC, took pains to explain the relevance or essence of the phrase 'jointly acquired' thus:

> "The combined effect of the decisions referred to supra is that; any property that is acquired during the subsistence of a marriage, be it customary or under the English or Mohammedan Ordinance, is presumed to have been jointly acquired by the couple and upon divorce, should be shared between them on the equality is equity principle. This presumption of joint acquisition is, however, rebuttable upon evidence to the contrary – {See the *Arthur case* supra, holding (3) at page 546}. What this means, in effect is that, it is not every property acquired single-handedly by any of the spouses during the subsistence of a marriage that can be termed as a 'jointly-acquired' property to be distributed at all cost on this equality is equity principle.
>
> Rather, it is property that has been shown from the evidence adduced during the trial, to have been jointly acquired, irrespective of whether or not there was direct, pecuniary or substantial contribution from both spouses in the acquisition. The operative term or phrase is; ***"property jointly acquired during the subsistence of the marriage"***. So where a spouse is able to lead evidence in rebuttal or to the contrary, as was the case in *Fynn v Fynn* (supra), the presumption theory of joint acquisition collapses."

In my view, this fantastic rendition of the equality is equity principle should only apply to property acquired by the husband with or without the assistance of the wife, subject to the conditions stated below. In other words, property acquired by the wife ought not to suffer any such presumptions. In all cases, it should be deemed to be property solely belonging to the wife, as proposed below.

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[46] (J4 6 of 2021) [2021] GHASC 5 (21 April 2021).

PART FIVE

KODIE'S OPINION

In my view, property of any description acquired by a woman during the subsistence of the marriage with or without the support of the husband should continue to be deemed as her personal property to the exclusion of her husband. Conversely, property of any description acquired by the husband in the course of the marriage ought to be treated as property in which the wife has a reasonable interest. After all, this is the import of article 22 (1) of the Constitution, even though it only applies, albeit to both spouses, in a situation where a spouse dies, and his property comes up for distribution.[47]

It is sad to have to note that instead of enhancing the limited powers, capabilities and opportunities for acquisition of property which our illustrious women in particular are, in comparison to their male counterparts, generally unequally circumstanced to possess and/or instead of affording our women unhindered access to property that they are able to eke out, by following and adhering religiously to the tenets of, for our purposes, the Bible and acceptable customs and practices, we have rather fashioned out statutory rules, including the Constitution and also case law, which have failed to follow the path charted by the biblical rules and customary law as shown above.

If this had been done, we would not have been here today still struggling about who is entitled to what property. And, even where it is agreed, the quantum of percentage also becomes a huge problem. My personal view – which may be found tinged with humour – is that to the extent that a man would proceed to another man's house and plead to have his daughter released to him in marriage, thus relieving the man from the burden of maintaining his said daughter, then it would be improper for the husband to now enter into a kind of joint commercial venture with his wife regarding maintenance and acquisition of property.

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47 *Marfoa* v *Agyeiwaa* (J4 42 of 2012) [2016] GHASC 84 (9 November 2016).

By this proposition, the man's property alone will be shared in accordance with legally founded discretion subject of course, to conditions including:

1. ***Maintenance of issues of the marriage till they attain the age of majority and are in the position to maintain themselves.***
2. ***Reasonable consideration is made regarding the man's responsibility to his extended family, who may have immensely contributed to the development of the man especially in his formative years.***

The above proposition does not make the wife worse off, whether or not she bears children of her own. Where however she has her own children, she will indeed be in a formidable position. After all, if the wife belongs to the family that subscribes to the strict adherence to the matrilineal system of inheritance, the children of the marriage are deemed to be members of her extended family and therefore the benefits of whatever property they acquire as a product of the maintenance of them by their father shall at least trickle down to benefit that family. Indeed, even if the wife belongs to the patrilineal system of inheritance, the overwhelming evidence is to the effect that children would usually maintain their mother in their station in life, even if technically they rather belong to their father's family in terms of inheritance.

A RECAP

For the avoidance of doubt, the equality is equity principle ought not be applied to a wife, however wealthy she might be. That is, even if she is richer or wealthier than the husband. Thus, inter alia, this is the surest way to save most marriages, which are tearing apart principally because of issues about who is entitled to which property and by what percentage. Whether or not a wife or wives will share their wealth with their husbands should be left to their sense of generosity and magnanimity.

In other words, any law that compels married women to compulsorily share with their husband any property acquired by them during the subsistence of the marriage with or without the support of their husband is retrogressive and ought to be removed from our statute books or departed from if it is a binding decision of the courts.

This recommendation is however subject to the applicability of the "***fault principle***". The person whose conduct engenders dissolution of the marriage must not take the full benefit for it.

Thank you for your endurance.

POSTSCRIPT

Soon after delivering the above speech, and sometime thereafter, I was notified of countless words of condemnation laced with a sense of bewilderment from my male friends and even others unknown and, conversely, at the same time, words of commendation were showered on me by our female counterparts, known and unknown. Both sets of reaction give me deep, enduring satisfaction.

DATED 12TH SEPTEMBER 2023