DEVELOPING JURISPRUDENCE OR CREATING CHAOS?: AN EXAMINATION OF THE DECISIONS OF GHANA'S SUPREME COURT ON PROPERTY RIGHTS OF SPOUSES

By

Daniel Korang[1]

DENNISLAW
A legal material portal

Abstract

The rise in global recognition of women's rights has led modern legal systems to devise measures to prevent discrimination against women, particularly in respect of property rights of spouses. In Ghana, the property rights of women have evolved from an era of zero recognition to a time of equal sharing of spousal property upon divorce. Redeeming the law from the clutches of unfair and discriminatory customary law that denied women any share in property acquired during marriage, the courts in Ghana developed the substantial contribution principle which entitled women to a share of only property to which they made substantial financial contributions. From the 1998 decision of Mensah v Mensah,[2] the Supreme Court purported to have abolished the substantial contribution principle and in its place evolved equitable theories in sharing spousal property upon divorce. In the absence of any legislative framework notwithstanding, the Supreme Court has sought to evolve a jurisprudence of equality for sharing property acquired during the subsistence of a marriage. But far from being consistent, the Supreme Court has failed to develop a meaningful jurisprudence on the property rights of spouses. A review of the decisions of the Supreme Court over the last three decades reveals an embarrassing trend of contradictions and conflicts in judicial theory and reasoning. This Article explores the contradictions and conflicts in the theory of the Supreme Court, whilst emphasising that the jurisprudence of the Supreme Court is in fatal disarray and anarchy. The so-called jurisprudence of equality does not only lack constitutional anchorage, but it is forged on the anvil of judicial activism, and influenced by chauvinistic tendencies of individual judges to achieve gender equality of spouses and not to do justice per se. What we have now is a chaotic jurisprudence which offers no meaningful guide for the distribution of matrimonial property upon divorce. This Article concludes that the ghost of the substantial contribution principle haunts the Supreme Court as it continues to rule from the shadow of its supposed grave.

Keywords: divorce, property rights, jurisprudence, presumptive ownership, matrimonial property, substantial contribution, customary law, jurisprudence of equality

INTRODUCTION

The rise in global recognition of women's rights has led modern legal systems to devise measures to prevent discrimination against women, particularly in respect of property rights of spouses. The rise in constitutional democracy particularly in Africa has given rise to legislative action and judicial awareness of the rights of spouses, particularly women, to spousal property. In Ghana, the property rights of women have evolved from an era of zero recognition to a time of equal sharing of spousal property upon divorce. Spousal rights to property acquired during the subsistence of marriage has engaged the attention of judges, academics and human rights activists over the last three decades. Historically, the law in Ghana evolved from the days when

1 Daniel Korang is a Ghanaian private Legal Practitioner and a renowned Author. He has published several books and articleS in law
in botH local and international journals and online portals.

2 [1998-99] SCGLR 350

the customary law exclusively applied to the time of the substantial contribution principle, and recently to the era of the jurisprudence of equality. These three critical stages of the law's evolution are discussed in the pages that follow.

PROPERTY RIGHTS OF SPOUSES UNDER THE CUSTOMARY LAW

Historically, at customary law, property acquired by a man with the assistance of his 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 neither the wife nor the children could claim any interest in any property they assisted the husband to acquire. The right of the wife and the children was a right to maintenance and support from the husband and father. "*Quartey v. Martey*".[3] There was no presumption of joint ownership of spousal property. However, it was not impossible under customary law for a woman to claim a share of property acquired jointly with her husband, or for a child to claim a share of property he jointly acquired with his father. But this required clear evidence to establish joint ownership. In the old case of *Okwabi v. Adonu,*[4] the West African Court of Appeal held that it was a common feature of family life that a son will work with and for his father, and that therefore, in the absence of strong evidence to the contrary, no presumption 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. Basing himself on this same principle, Ollennu J. (as he then was) held in *Quartey v. Martey*[5] 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 the wife." The principle that under customary law, a wife who helped the husband to acquire property had no interest in the property, was not only judicially settled, but it was a principle recognized by jurists of high acclaim in the customary law. In his *Fanti Customary Laws (3rd ed.)*, Sarbah said at p. 60: "Whatever a wife helps her husband to acquire is the sole property of the husband."

The customary law sadly regarded women as appendages in marriage with no substantive right to property acquired during their marriages.

THE SUBSTANTIAL CONTRIBUTION PRINCIPLE

As a result of the injustice caused to women on strict application of the customary law, the law developed a principle called "the substantial contribution principle". According to this principle, 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. Thus, women, particularly, could only claim to be part owners of property with their husbands if they could prove that they made substantial contribution to the acquisition of the property[6] Clearly, the customary law position was changed as a result of the changes in the traditional

3 Quartey v. Martey [1959 GLR 377
4 2 W.A.L.R 268
5 [1959] GLR 377
6 Yeboah v. Yeboah [1974] 2 GLR 114; Abebrese v. Kaah and Others [1976] 2 GLR 46; Anang v. Tagoe [1989 -90] 2 GLR 8

roles of men and women and the economic empowerment of women. By the turn of the 1970s, there were several women who were gainfully involved in economic activities as their male counterparts. The economic empowerment of women set the stage for the dislodgment of the customary law that did not recognize the contributions of women as to make them joint owners with their husbands of property acquired during marriage. Thus in *Yeboah v. Yeboah,*[7] the High Court declared a husband and wife as joint owners of a house they jointly acquired during their marriage. The undisputed evidence in that case was that, before their marriage under the Marriage Ordinance, Cap. 127, 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. When the parties returned to Ghana, the marriage broke down and it was subsequently dissolved. 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 brought an action to eject the wife from the house. Basing himself on the English cases of *Smith v. Baker*,[8] *Pettitt v. Pettitt*[9] and *Gissing v. Gissing,*[10] Hayfron-Benjamin J (as he then was) held that 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. Regarding the manner of division, the learned judge held that where the matrimonial home was held to be owned jointly by husband and wife, it would be improper to treat the property as a subject of mathematical division of the 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. In the circumstances of this case, the wife was held to be entitled to an equal share in the house as the husband.

The substantial contribution principle applied even in cases where the wife could not mathematically quantify her contribution towards the acquisition of the property. Thus in *Abebrese v. Kaah and Others*,[11] the wife contributed substantially to the building of 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 fetch water to the site. However, she had not kept account of her

7 [1974] 2 GLR 114 HC
8 [1970] 2 All E.R. 826 at pp. 828 and 829 (Dicta of Lord Denning M.R. and Widgery L.J.)]
9 [1969] 2 All E.R. 385, H.L.
10 [1970] 2 All E.R. 780, H.L.
11 [1976] 2 GLR 46 HC

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 the extent of 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.

Similarly, in *Anang v. Tagoe*,[12] the plaintiff sued her husband for a declaration that she was joint owner of a house at Mataheko. The case of the plaintiff was that shortly after she had got married to the defendant, the defendant acquired a plot of land for the purpose of building a matrimonial home. During the construction of the house, the plaintiff made substantial contributions (not evidenced by any receipts) including money for the purchase of building materials, providing meals for the workers engaged in the construction and her own labour expended in supervising the construction whilst the defendant was on transfer outside Accra. Even though there was no proof of the precise extent of the plaintiff's contributions, the court declared the plaintiff to be a joint owner of the house. Brobbey J (as he then was) held at p. 11 as follows:

> It has been established that where a wife makes contributions towards the requirements of the matrimonial home in the belief that the contribution is to assist in the joint acquisition of property, the court of equity should take steps to ensure that that belief materialises and indeed if that were not so, husbands would unconscionably be made to unjustly enrich themselves at the expense of innocent wives. This is particularly the case where there is evidence of some semblance of agreement for a joint acquisition of property.

In the latter case of *Achiampong v. Achiampong*,[13] the Court of Appeal outlined the grounds on which a wife could have an interest in a property acquired during a marriage. The court noted that by virtue of the status conferred on her by marriage, a wife had the right to live in her matrimonial home, but did not become a part owner thereof. It was further held that a wife could become a part owner of a matrimonial home where there had been an agreement between the husband and wife giving the wife some beneficial interest in the property, notwithstanding that the property was in the sole name of the husband as the legal owner; or where the wife directly or indirectly made substantial contribution in money or money's worth towards the acquisition of the property, e.g. making direct financial improvements, renovation or extensions in respect thereof or applying her income for the common benefit of both of them and the children so as to enable the husband financially to acquire the property in dispute. This case emphasized the substantial contribution principle and the rule of equity and good conscience. Having regard to the extent of wife's contribution, the court declared that she should be entitled to a half-share of the property. It is significant to note that, even though during the regime of the substantial contribution principle, a wife's contribution could entitle her to an equal share of a property or even to be declared the exclusive owner of a property acquired during the marriage.

The right of wives to own their own property in marriage was long recognized by the courts.

12 [1989 -90] 2 GLR 8 HC
13 (1982-83) GLR 1017

The case of *Reindorf Alias Sacker v. Reindorf*[14] decided in 1974 that a wife had legal capacity to acquire her separate property and to bring an action in respect of such property. Thus, it was possible for a wife to own property exclusively and separately from her husband.

THE PRIOD AFTER 1992: THE ERA OF A CHAOTIC JURISPRUDENCE

Absence of statutory framework on property rights of spouses

The substantial contribution principle remained the guiding principle in sharing matrimonial property upon divorce until the adoption of the 1992 Constitution. The right of spouses to matrimonial property did not escape the elaborate human rights provisions under Chapter 5 of the Constitution. The framers of the Constitution clearly saw the need to provide a legal framework for spousal right to property. Indeed, the framers of the Constitution intended to positively create some rights to be known as "Property Rights of Spouses" under Article 22 (2) of the Constitution. But short of creating property rights of spouses, what the framers of the Constitution did was to simply task Parliament to enact a law to regulate that all-important right. Clause (2) of Article 22 provides thus:

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

It is clear from this provision that the Constitution did not create the property right of spouses. Rather, the provision mandated Parliament to "enact legislation regulating the property rights of spouses." This was a golden opportunity for the framers of the Constitution to have laid down in clear terms the right of spouses to property and the manner of sharing matrimonial property upon divorce. This opportunity was however painfully missed. It is submitted that until Parliament enacts a legislation to regulate the property rights of spouses, it can be said there is no statutory law on the subject.

Clause 3 of Article 22 of the Constitution gives an idea of the legislation envisaged by the framers of the Constitution under clause 2 of Article 22. It provides as follows:

> (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.

The unimpeachable import of these provisions is that the law expected to be enacted by Parliament would give spouses two important related rights, viz, (1) equal access to property jointly acquired during the marriage, and (2) equitable share of property jointly acquired during the marriage upon divorce. Judges of the Supreme Court have openly lamented the sluggish and lackadaisical attitude of Parliament towards the implementation of the important legislative duty cast on them by Article 22 of the Constitution. Writing for the Supreme Court in *Mensah v Mensah*,[15] Dotse JSC observed:

---

14 [1974] 2 GLR 38
15 [2012] 1 SCGLR 391

> 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.

Similarly, in *Quartson v Quartson*,[16] Ansah JSC lamented the inaction of Parliament as follows:

> It would be worthwhile at this stage to mention that Parliament has till this day, not enacted legislation to regulate the distribution of jointly acquired property of spouse upon divorce, as the Constitution mandate. This fact will be revisited later, but for now it would suffice to mention that due to Parliament's inaction the courts have, over the years, carved out the principle of substantial contribution as the litmus test for determining whether or not a case can be made for joint ownership of property.

Continuing his lamentation, the learned judge said:

> In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament.

Adding his voice to the chorus of judicial lamentation on the inaction of Parliament to effectuate the property rights of spouses, Date-Bah JSC observed in *Arthur (No. 1) v Arthur (No. 1)*:[17]

> It should be stressed that the preferable route to giving effect to Article 22(3) of the 1992 Constitution is for Parliament to discharge its obligation under Article 22(2) to enact legislation that provides for the courts a comprehensive framework that guides their decisions on the property rights of spouses… It is in the absence of Parliament's implementation of the principles embodied in Article 22(3) that this Court has sought to implement them through constitutional interpretation in *Mensah v Mensah* (supra).

In her dissenting opinion in *Adjei v Adjei*,[18] Dordzie JSC did not hide her disappointment in Parliament's failure to enact a legislation on the property rights of spouses. At page 73 of the record, the learned judge underscored the sad reality that the Parliament of Ghana had failed to comply with Article 22(2) of the Constitution almost 30 years after the coming into force of the Constitution. The learned judge explained that the court, being an institution committed to doing substantial justice to the citizenry of this nation, had taken steps to develop equitable principles of determining property rights of spouses, bearing in mind the changes in social values and practices that modernisation had introduced to societies globally. What is clear is that over three decades after the coming into force of the Constitution, Parliament is yet to enact a legislation to provide for the property rights of spouses in Ghana.

16 [2012] 2 SCGLR 1077; [2013] 54 GMJ SC 56
17 [2013-201] SCGLR 543
18 [2021] 172 G.M.J 1 SC

Judicial creation of equitable principles

In the absence of a legislation to regulate the property rights of spouses in Ghana, the Supreme Court decided to take the bull by the horn to implement the policies imbedded in the provisions of Article 22. Thus, the Supreme Court decided not to throw its hands in despair when faced with cases involving the rights of spouses to property believed to be matrimonial property. By the power of constitutional interpretation, the Supreme Court has sought to formulate principles to effectuate the property rights of spouses in Ghana. The first in the chain of cases decided by the Supreme Court under Article 22 of the Constitution is *Mensah v Mensah.*[19] In that case, the husband filed a petition for divorce and sought custody of children and declaration of ownership of a house. The wife also cross-petitioned for the same reliefs. The undisputed evidence before the court was that both spouses contributed towards the acquisition of the property. The Supreme Court held that on the principle of equitable sharing of joint property, the parties were entitled to equal share of the house on the dissolution of the marriage. The court ordered that the house in dispute be valued and sold and the proceeds shared equally between the Appellant and Respondent. 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.

It is important to stress that *Mensah v Mensah* preferred equality in the sharing of jointly acquired property upon divorce. However, the court later held that "the principle of equitable sharing of joint property which was applied by the Court of Appeal in this case to the main part of the house is applicable also to the extension works and therefore the parties are entitled to equal share of the whole house on the dissolution of the marriage." The Supreme Court seemed to be using "equally" interchangeably with "equitably". The equality principle relied on by the court was distilled from the English cases of *Rimmer v. Rimmer*[20] and *Fribance v. Fribance*[21] and the local case of *Achiampong v. Achiampong*.[22] The question that begs answer is whether those cases established a general principle of equal sharing of property jointly acquired by spouses? It would appear that the application of equality in those cases was based on the respective contributions of the spouses towards the acquisition of the property involved. For instance, in *Achiampong v. Achiampong*, the learned judge held that having regard to the extent of the wife's contribution, her beneficial interest in the property should be nothing less than a half-share. Even though the court applied the substantial contribution principle, the justice of the case required equal sharing. The respective facts of the cases favoured equal sharing of the property. It is submitted that the Supreme Court's reference to a principle of equality cannot be justified.

---

19 [1998-99] SCGLR 350
20 (1952) 1 QB 63 at 73
21 (1957) 1 W.L.R. p.384
22 (1982-83) GLR 1017

In the subsequent case of *Boafo v Boafo,*[23] the Supreme Court sought to restate and clarify the law as earlier espoused in *Mensah v Mensah* (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 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 dismissing the appeal, Dr. Date-Bah JSC referred to the decision in *Mensah v. Mensah* and explained the position of the court:

> 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) and observed that an equal division will often, though not invariably, be a solution to the imbalance between men and women in ownership of property. According to the judge, the proportions must be fixed in accordance with the equities of any given case. What is significant here is that even though *Boafo v. Boafo* affirmed the equality is equity principle as used in *Mensah v. Mensah,* it emphasized that the issue of proportions are to be fixed in accordance with the equities of each case. The court therefore 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.

Relying on the exposition of the law by Date Bah JSC in *Boafo v Boafo,* Dotse JSC in the 2012 case of *Mensah v Mensah*[24] introduced the principle of "Jurisprudence of Equality", which favours equality in the distribution of matrimonial property upon divorce. In his judgment, the learned judge referred to a number of international conventions and treaties on gender equality and held that "[t]here should in all appropriate cases be sharing of property on equality basis." In this case, Dotse JSC noted that the performance of domestic chores by a wife is sufficient to entitle her to an equal share of matrimonial property. On this point, the learned judge held that even if the court had held that the petitioner had not made any substantial contributions to the acquisition of the matrimonial properties, the court would still have come to the same conclusion that the petitioner was entitled to an equal share in the properties so acquired during the subsistence of the marriage. This is because the court recognised the valuable contributions made by her in the marriage like the performance of household chores, and the maintenance of a congenial domestic environment for

23 [2005-2006] SCGLR 705
24 [2012] 1 SCGLR 391

the husband to operate and acquire properties. Besides, the constitutional provisions in Article 22(3) of the Constitution 1992, must be so construed to achieve the desired results which the framers of the Constitution intended.

What is significant about the 2012 case of *Mensah v Mensah* is that it expressly, like the previous cases, abolished the substantial contribution principle. On this point, Dotse JSC said:

> 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.

By this statement, one would be quick to assume that never again would matrimonial property be shared on the basis of the contributions of the spouses. But as it will soon be revealed, the current theory of the court hinges on contributions of spouses, whether in monetary terms or otherwise. Again, the theory sought to be propounded is that the mere fact that a marriage exists is enough to confer beneficial interest in a property acquired during the marriage on a spouse. Thus, once it is established that property has been acquired during the subsistence of the marriage, that property becomes a marital property to be shared between the spouses. However, in *Quartson v Quartson,* the court held that the decision in *Mensah v. Mensah* should "*not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case.*" In that case, the evidence was abundantly clear that the wife satisfactorily performed her supervisory tasks over the construction of the disputed house. Even though she was a housewife, she single-handedly took charge of the household when her husband, the appellant, was incarcerated for years in Liverpool. The inability to adequately quantify the appellant's wifely assistance towards the construction and upkeep of the matrimonial home did not in itself bar her from an equitable sharing of the matrimonial property. Even though the court took account of the equality principle laid down in *Mensah v. Mensah* and *Boafo v. Boafo,* the court held that the equality principle may be waived if in the circumstances of a particular case, the equities of the case would demand otherwise.

The theory clearly laid down by the Supreme Court in the litany of cases is that any property acquired during the subsistence of a marriage 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 is however rebuttable upon evidence to the contrary[25]. Thus, where a spouse is able to lead evidence that he single-handedly acquired a property during the subsistence of a marriage, the presumption of joint ownership is displaced.[26] The presumption of joint ownership was introduced in 2012 in *Mensah v Mensah* to cure the confusion that was caused in the 1998 case of *Mensah v Mensah.* The presumptive ownership principle was affirmed and became rooted in *Arthur v Arthur* to the effect that every property acquired during the subsistence of a marriage was presumed to be a marital property, except those acquired by gift, succession and by personal loan. It is significant to note that the principle settled in decisions of *Mensah v Mensah,*[27] *Quartson v Quartson* and *Arthur v Arthur* was

25 See Arthur (no 1) v Arthur (no 1) [2013-2014] SCGLR 543
26 See Fynn v Fynn (2014) 77 GMJ 43 SC
27 [2012] 1 SCGLR 391

that it was no longer essential for a spouse to prove a direct pecuniary or substantial contribution in any form to the acquisition of the property to qualify for a share. Again, Date-Bah JSC observed in *Arthur v Arthur* that there is a presumption in Ghanaian law in favour of the sharing of marital property on an equality basis in all appropriate cases between spouses after divorce. The learned judge made it clear that the Supreme Court was evolving a norm of equal sharing of property acquired during the subsistence of a marriage. According to Date-Bah JSC, marital property is 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. This definition was endorsed by Dotse JSC in the recent case of *Tony Lithur v Nana Oye Lithur*.[28]

In the recent case of *Adjei v Adjei*,[29] the Supreme Court seems to have modified the presumptive ownership principle. This decision seems to say that a spouse is not automatically entitled to a property acquired by during the subsistence of the marriage. Some evidence must be led to establish that the property was jointly acquired. The contribution of the spouses may be in cash or in kind. In this case, the wife's claim for joint ownership failed because she could not lead evidence to establish how the property in question was acquired. She did not even know the work her husband was doing at the time of the marriage. Thus she did not know how the man raised the money to acquire the property.

Concurring with the lead judgment, Pwamang JSC held that it is imperative to understand that the presumption that property acquired during a marriage is jointly acquired is not stated by the constitutional provisions in Article 22. The learned judge cautioned that Article 22 explicitly refers to property jointly acquired during the marriage, so the impression should never be created that property acquired during a marriage is joint property. If the framers of the Constitution had wanted to cover all property acquired in the course of marriage, they would have said so expressly. Significantly, the learned judge stated that the presumptive ownership principle was a judicially created presumption or mantra and as such it was a rule of evidence only and does not confer substantive property rights on spouses. Being an evidential principle, it was rebuttable by the spouse whose ostensible property is in question to prove that the other spouse contributed nothing in the acquisition of the property. Indeed, when evidence is produced to rebut the presumption, the onus shifts onto the other spouse to also introduce evidence of her contribution to the acquisition of the property in dispute. Explaining what contributions are legally recognized, Pwamang JSC observed at p. 63:

> It is here that the decisions say that non-pecuniary contributions in the forms of emotional support, unpaid domestic services such as cooking, washing and caring for children of the marriage are admissible as proof of contribution.

The chaotic jurisprudence laid down in in the two *Mensah v Mensah* cases, *Quartson v Quartson* and *Arthur v Arthur* informed the dissenting view of Dordzie JSC in *Adjei v Adjei*. In this case, the learned judge extensively quoted from the old decisions and observed at p.77:

---

28 [2021] 172 G.M.J 321
29 [2021] 172 GMJ 1

> Thus the current position of the law as stated above is once a property is acquired during the subsistence of a marriage it becomes a marital property that entitles the other spouse to it whether the said spouse made any contribution towards acquiring it or not.

The learned judge grounded her judgment on the earlier view expressed by Date-Bah JSC in *Arthur v Arthur* where he said at p.565:

> It should also be emphasized that, in the light of the decision of the Supreme Court in *Mensah v Mensah,*[30] it is no longer essential for a spouse to prove a contribution to the acquisition of marital property. *It is sufficient if the property was acquired during the subsistence of the marriage.*

Indeed, the error sought to be cured by the recent decision in *Adjei v Adjei* is that whether or not a property can be said to be a marital property is based on whether the property was acquired during the subsistence of the marriage. This typifies the presumptive ownership principle, which has been denied its initial force and vigour in recent decisions. This view overlooks the exceptions created by the Supreme Court to the presumptive ownership principle and the fact that a spouse may own a property exclusive of the other spouse.

The introduction of the presumptive ownership principles in *Mensah v Mensah* in 2012 was clearly a judicial attempt to protect women, who were believed to be discriminated against by their husbands. The international conventions and treaties extensively relied upon by Dotse JSC protected women from discrimination. Concluding his judgment, Dotse JSC observed that the time had come for the court to institutionalise the 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. He argued further that a wife should be treated as an equal partner even after divorce in the devolution of the properties. According the judge, 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.

This reasoning by Dotse JSC, respectfully, overlooks the fact that men too deserve the protection of the law especially in abusive marriages. It is common to find wives who abuse their husbands and waste matrimonial property. In such cases, it will be unfair to seek to apply the law in protection of abusive wives. For instance, in *Adjei v Adjei,* the petitioner alleged that the respondent was torturing him emotionally in the marriage and that was the reason he filed for divorce. Moved by this piece of evidence, Pwamang JSC underscored the need for the law to protect men in abusive marriages, at p.64:

> The highest policy of the law is to be fair to all parties who come before the court. Our thoughts ought not to focus only on protecting female spouses where the ostensible owner is the male spouse, which is more frequent, but the principles we evolve should equally aspire to protect a female spouse when she is the ostensible property owner and a male spouse wants to take advantage of her. That explains why the Constitution uses the gender neutral term spouse.

30 [2012] 1 SCGLR 391

What is clear from the Supreme Court decisions is inconsistent jurisprudence. Even though in all the decisions decided under Article 22 of the Constitution the Supreme Court has created the impression that the substantial contribution principle has been abandoned, in reality, that principle is alive and rules from the shadows of its grave. The idea of recognizing the unpaid domestic services of women as contribution lends support to the fact that some contribution is still required to be established by both spouses towards the acquisition of the property before that property may be considered to be marital property. The jurisprudence so forcefully propounded by the Supreme Court seems to be malleable, fluid and uncertain. Whilst some of the judges are of the view that every property acquired during the subsistence of a marriage is marital property, others think spouses are able to acquire individual property during the marriage. *Fynn v Fynn* made it abundantly clear that spouses have the right to acquire and dispose of individual property whilst in marriage without the consent of their partners. Thus, where there is evidence that the property was acquired by one spouse alone, that property is not a marital property.

The exclusion of property acquired through gift and succession from the definition of marital property emphasizes that, for a property to be classified as a marital property, both spouses must have contributed towards its acquisition. The basis of this exclusion was offered by Appau JSC in *Adjei v Adjei* when he said such property cannot be termed jointly acquired marital property since it was not acquired through the sweat of any of the spouses with the support of the other, either financially or in kind or by the provision of marital services. The court may have to delineate the limits of this principle as certain gifts to one spouse may be predicated on services rendered with the influence of the other spouse. For instance, when a meritorious work or service by one spouse, which is obviously influenced by the services or support of the other spouse, attracts a gift, how will the law treat that gift?

The authorities clearly extend the exception to marital property to property acquired by one spouse from personal loan. The authorities recognize that where a spouse takes an individual loan to acquire a property during the subsistence of the marriage, the property so acquired cannot be classified as a marital property until the loan has been fully paid whilst the marriage subsists.[31] The rationale for this principle is that the repayment of the loan by the borrowing spouse during the subsistence of the marriage would be influenced by role of the other spouse. Again, this exception is justified on the basis that until the loan is fully repaid, the lender may liquidate the loan by taking the property when the borrowing spouse defaults. This principle has multiple conceptual challenges. The argument that a loan fully paid is influenced by the services of the other spouse is a rebuttable presumption. Where there is evidence that the other spouse did not support in the repayment of the loan, the property may be held to be self-acquired property of the borrowing spouse. Again, where there is evidence that the loan was adequately secured with some other property or collateral other than the property acquired with the loan, the risk that the property may be taken to liquidate the loan upon default may be absent.

The court has never developed any approach of determining how a property acquired by an individual loan should be treated when the loan is substantially paid off at the time of the divorce.

31 Arthur (no 1) v Arthur (no 1) [2013-2014] SCGLR 543; Adjei v Adjei [2021] 172 GMJ 1

For instance, when a husband builds a house from a personal loan, and the marriage is dissolved at the time when 90% of the loan has been paid off, can the wife claim any share in that property on the basis that her domestic services influenced that substantial repayment of the loan? In such a situation, will it be just to strictly apply this principle that a property acquired with a personal loan is not a marital property unless the loan has been fully paid? It is submitted that a sweeping application of this principle is likely to cause injustice in some cases. It is submitted that, where with the support of one spouse, the other has substantially repaid the personal loan, the property acquired with the loan must be treated as a marital property, or the supporting spouse should be given some share of the property.

Another conceptual difficulty arises from attempting to lay down a general rule on how property acquired with a personal loan should be treated. Given that not every spouse is supportive of the other or performs his/her marital role satisfactorily, no general rule can be laid down that a loan contracted by one spouse and repaid during the subsistence of the marriage was automatically influenced by the role of the other spouse. There are instances of wasteful spouses whose abusive and unreasonable conduct clog the energies of their partners in making money to service personal loans or acquire property. Some spouses dissipate property acquired in their marriages. In such instances, it will be unjust to say such a wasteful partner is automatically entitled to a share of the property once the loan has been fully paid. It is submitted that the manner of repaying the loan should be considered in determining whether the property can justly be regarded as a marital property upon full settlement of the loan.

The Supreme Court's treatment of property acquired from individual loan by a spouse overlooks instances where the loan is exclusively repaid out of the proceeds from the property itself. For instance, when a spouse buys a commercial vehicle and engages a driver to use the vehicle so that the proceeds from the vehicle would be applied to settle the loan, it cannot be said that the repayment of the loan was influenced by the other spouse. In such situation, it would be wrong to argue that the loan was repaid through the sweat or contribution of either of the spouses. It is common for people to use loans to build houses for rent, whereby the loan is exclusively settled by rents from the premises. This was the situation in *Adjei v Adjei*. The evidence in that case was that the house in dispute was exclusively built by the husband with a personal loan. At the time of the petition, the balance outstanding was Ghc300,000.00. The evidence also was clear that the man had completed the house and had given some apartments for rents, and was paying the loan from the rents. On the strength of this evidence, the trial judge ruled that one of the flats should be given to the wife (respondent), so that the rent from the other flats could be used to repay the loan. The Supreme Court faulted the trial judge, and ruled that once the loan had not been fully repaid, the wife was not entitled to any share of the house. Justifying this conclusion, Appau JSC noted at p.59 as follows:

> It could only qualify to be termed jointly acquired marital property after the loan that was contracted single-handedly by the Petitioner for its construction, had been fully liquidated whilst the marriage was subsisting. In that situation, it could be said that the Petitioner's ability to liquidate the loan was influenced by the role of the Respondent played as a good

> wife in cooking meals, cleaning and doing laundry and all associated chores for the Petitioner during the period.

This reasoning by the Supreme Court is a recipe for injustice. Still assuming on the example of the commercial vehicle, that the driver is able to use the vehicle and pay off the loan whilst the marriage subsists, it will be absurd to argue that the vehicle should be considered as a marital property on the false presumption that the repayment of the loan was influenced by the contribution of the other spouse. It is clear that a personal loan used by one spouse to acquire a property may be repaid without the efforts of any of the spouses. It is possible that the loan may be repaid by a third party for whatever reason. It is submitted that the Supreme Court should define the parameters within which the rule can apply, having due regard for the diverse ways of repaying a loan without the influence or contribution of the non-borrower spouse.

What makes the Supreme Court's jurisprudence fatally chaotic is that since the 1998 case of *Mensah v Mensah,* the court has only been modifying the equitable principles in subsequent cases without necessarily overruling previous ones. It is significant that none of the cases decided after *Mensah v Mensah* in 1998 has been overruled. Meanwhile, each one of the subsequent decisions seems to establish their own theories. The disturbing consequence of this is that lower courts are left in confusion to pick and choose between conflicting decisions. In *Adjei v Adjei,* Appau JSC observed that the sweeping definition of marital property in 1998 brought about some confusion, which prompted the introduction of the presumptive ownership principle. In that case, the court conceded that the wife was not automatically entitled to property acquired during the marriage. She needed to provide evidence to establish her contributions towards the acquisition of the property.

Notwithstanding the Supreme Court's claim to have abandoned the substantial contribution principle as a guiding principle, that principle seems to show signs of life, vitality and resilience. In her dissenting judgment in *Adjei v Adjei,* Dordzie JSC noted at p.76 that "*to qualify as a joint owner and to be entitled to a share in property acquired during the subsistence of a marriage does not depend solely on substantial money contribution. Domestic services offered by a wife in the marriage qualify her to have a share in property acquired during the subsistence of the marriage.*" The unimpeachable meaning of this statement is that the substantial contribution principle has not been abandoned. Rather, the law has evolved to place value on domestic services rendered by wives which aid their husbands to acquire property. Thus, the substantial contribution principle seems to be working hand in hand with the presumptive ownership theory. In addition to the substantial contribution principle, domestic services are regarded as a basis for giving a wife a share in a property acquired during the subsistence of a marriage. It is submitted that the substantial contribution principle has not been abolished. Rather, it has been expanded to include domestic services of wives, so that to be entitled to a share of a property acquired during marriage, a wife may prove either that she made financial contribution or that she rendered domestic services which aided in the acquisition of the property.

A major difficulty with the present position of the law on spousal rights to property is that it recognizes acquisition of individual property by spouses. Some of the authorities, like *Fynn v Fynn,*[32] make it clear that where a spouse leads evidence to establish that, that spouse acquired a particular

32 (2014) 77 GMJ 43 SC

property single-handedly, the presumption theory of joint acquisition collapses. This position seems to be rooted in Article 18 of the Constitution which allows every person to own property either alone or in association with others. If spouses are able to exercise their right to own property alone under Article 18 of the Constitution, then it stands to reason that marital property must be defined on the basis of spousal contribution towards its acquisition, whether in financial terms or in kind. In an agreement providing for joint ownership of property, every property acquired in a marriage may have been acquired solely by one spouse or in association with the other. Where the property is acquired solely by one spouse, the authorities permit that spouse to make a claim for exclusive ownership. On the other hand, where the property is acquired in association with the other spouse, there is a presumption of joint ownership, unless one party denies the right of the other to the property. Where there is dispute over ownership of the property upon divorce, the authorities require evidence to be led by the parties to assist the court to determine the proportions of the property for each spouse. This boils down to ascertaining the respective contributions of each spouse to the acquisition of the property. This exercise is a function of the substantial contribution principle, which the Supreme Court purports to have abandoned.

It is submitted that the Supreme Court, as judicial body, has not evolved a meaningful theory to guide the distribution of marital property upon divorce. There is still lingering confusion regarding the definition of matrimonial property. The cases continue to turn on individual contributions of spouses to the acquisition of property. A spouse who fails to demonstrate clearly that he or she contributed to the acquisition of the property cannot be held to be a joint or part owner of the property. A review of the matrimonial cases that go on appeal from the High Court to the Court of Appeal and then to the Supreme Court shows a regrettable trend of confusion amongst both trial and appellate judges. This confusion does not arise from lack of appreciation of the law. Rather, the confusion arises from the lack of consistency and coherence in the theory espoused by the Supreme Court on property rights of spouses. Even judges of the Supreme Court are divided on the proper theory to apply in resolving ownership claims of spouses to property. Dissenting judgments in matrimonial cases in the Supreme Court amply show that individual judges have their own understanding, biases, choices and idiosyncrasies on how property should be shared between spouses upon divorce. The result is an untidy and messy jurisprudence on the subject.

The chaotic state of the law offers no clear guide to lawyers and judges on what constitutes matrimonial property and the mechanisms to apportion ownership between spouses. The current state of the law on property rights of spouses in Ghana is sadly incoherent, unpredictable and disorderly. This is attributable to the absence of a legislation on the subject, coupled with the Supreme Court's unbridled activism to fill the void created by Parliament's inaction. Clearly, the Supreme Court has gone ahead of the legislature in a search for theory and principle to determine the property rights of spouses. One thread of caution that seems to run through the authorities is that the equitable principles evolved should apply on a case-by-case basis. This suggests clearly that there is the absence of a binding precedent on the property rights of spouses. The regrettable consequence is that there is lack of coherent growth of judicial precedents on the subject.

Given the gender-sensitive nature of property rights of spouses, every individual judge is bound to have his or her own view(s) on the matter. Concerning property rights of spouses, the law seems to have created tension between *"the rights of wives"* and the *"rights of husbands"*, with each pulling the jurisprudence in opposing directions. Every decision of the court is either a win for wives and a loss for husbands, and vice versa. This situation continues to deepen the incoherence that has bedeviled the law in this area. The desire of some judges to break the traditional dominance of men over women in marriage has had a strong pull of the law not only on the definition of the matrimonial property but also on the introduction and application of the doctrine of equality in sharing matrimonial property.

What the Supreme Court has failed to do is to distinguish between ***"equal access"*** and ***"equitable sharing"*** in the wording of Article 22(3) of the Constitution. Clause 3 of Article 22 of the Constitution provides as follows:

> (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.

It is clear from this provision that the use of *"equal access"* relates to the right of spouses to have uninterrupted access to enjoy property jointly acquired in the marriage. This right is enjoyed during the subsistence of the marriage. On the other hand, equitable distribution of property jointly acquired during the marriage relates to the right of the spouses to a fair share of the property upon divorce. This right cannot be exercised while the marriage subsists. It is only upon divorce that a spouse can claim an equitable share of the property. As far as spousal rights to property upon divorce are concerned, Article 22(3) of the Constitution never mentions equality. The constitutional approach for sharing jointly acquired property is to share it equitably. While conceding that what is equitable in some cases may require equal sharing of property between the spouses, it is farfetched to institutionalize a jurisprudence of equality within the context of Article 22(3). Concluding his judgment in *Mensah v Mensah*,[33] this is what Dotse JSC said:

> 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.

From the wording of the Article 22(3) of the Constitution, this view by the learned judge cannot be justified. Equally, no principle of presumptive ownership can be justified under that provision. It is submitted that the presumptive ownership doctrine and the jurisprudence of equality principle are judicial creations that cannot be justified within the context of Article 22(3) of the Constitution. It is

33 [2012] 1 SCGLR 391

significant to repeat that Pwamang JSC in *Adjei v Adjei,* has authoritatively reduced the presumptive ownership principle to a mere *"judicially created presumption", "mantra"* or *"evidential presumption"* which does not confer substantive rights on spouses. It is submitted that the presumption of joint ownership of property acquired in marriage lacks constitutional basis. It is a product of untrammeled judicial activism inconsistently forged on the anvil of judicial lawmaking. On this point, I am in full agreement with the following words of Pwamang JSC at p. 62 of his judgment in *Adjei v Adjei:*

> It is imperative to understand that the commendable and progressive presumption that property acquired during a marriage is jointly acquired is not stated by the constitutional provisions in Article 22 which is abundantly clear.

It is submitted that the interpretation placed on Article 22(3) of the Constitution by the Supreme Court has created an embarrassing trend of contradictions and conflicts in judicial theory and reasoning.

CONCLUSIONS AND THE WAY FORWARD

This Article has successfully exposed the contradictions and conflicts in the Supreme Court's interpretation of Article 22(3) of the Constitution, whilst emphasising that the jurisprudence evolved is in fatal disarray and anarchy. The so-called jurisprudence of equality is influenced by the tendencies of individual judges to achieve gender equality of spouses and not to do justice per se. The law is in hopeless confusion and there seems to be no hope that the Supreme Court can return to the path of coherence and consistency. What we have now is a chaotic jurisprudence which offers no meaningful guide for the distribution of matrimonial property upon divorce. It is submitted in conclusion that the recent decision of the Supreme Court in *Adjei v Adjei* has exhumed the substantial contribution principle from its quietus, and its ghost continues to haunt the Supreme Court as it rules from the shadows of its supposed grave.

It is clear from the foregoing analysis that the decisions of the Supreme Court on property rights of spouses decided under Article 22(2) and (3) of the Constitution, have not established a consistent judicial precedent. Article 22(2) and (3) of the Constitution does not create any substantive property rights in spouses. These constitutional provisions only cast a duty on Parliament to enact a legislation to provide for property rights of spouses. The fact that Parliament has not enacted any legislation to implement Article 22(2) and (3) is not in doubt. Given the necessity of having a legal framework to regulate spousal rights to property in Ghana, it is suggested that Parliament of Ghana should take steps to enact a law to regulate the property rights of spouses. There is an urgent need for statutory principles, norms and guidelines on the criteria for classifying property as marital property, joint property and the mechanisms for sharing such property upon divorce. This call is urgent in view of the inconsistencies in the decisions of the Supreme Court on property rights of spouses. A legislation on the property rights of spouses will give a clear guide to all stakeholders on what to expect upon divorce.