PERSONAL AND JOINT OWNERSHIP OF IMMOVABLE PROPERTY ACQUIRED DURING THE SUBSISTENCE OF A MARRIAGE

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1.0.Introduction

"Counsel, is it possible to acquire and own property (ies) alone during marriage?"

As a legal practitioner, the writer has had to deal with questions of this nature which obviously come in many other forms, on several occasions. The reality is that, many married couples, and individuals in Ghana are under the belief that marriage places some limitation(s) on the rights of spouses owning property alone during the marriage. It is not surprising therefore that in recent times, there have been numerous discourses by Judges, Lawyers and persons dabbling in the legal field, on the ownership of property acquired during the subsistence of marriage. The concern of this article is with respect to immovable properties which basically is land. Land by definition includes the land and any structure and or building on it[1].

Obviously, classification and or ownership of property during a marriage may seem trivial and typically are not a factor or a cause for concern for spouses, probably with the view to sustaining the social cohesion. However, the classification of ownership of property becomes very important in the events of separation, divorce or death.

In this article, the writer reviews articles 18 and 22 of the 1992 constitution, the Lands Act, 2020 (Act 1036) specifically, sections 38(3), 38(4) and 47, and judicial decisions including Mensah v Mensah[2], Quartson v Quartson[3], Arthur v Arthur[4] and Fynn v Fynn[5], Peter Adjei v Margaret Adjei (Civil Appeal)(No.J4/06/2021) and Gilbert Anyetei v Sussana Anyetei (CA/J4/67/2021), with the aim of analyzing the legal position on individual ownership of property during marriage.

2.0.Phases of Property rights during marriage.

The law on property rights of spouses has gone through many phases of judicial development. The initial stages of the law on property rights of spouses was founded on customary law and was to the effect that, a wife was dependent on her husband, and as such, was required to work with or for him(her husband).[6] To this end, any property acquired with assistance from the wife was deemed the individual property of the husband.[7] In the case of Quartey v Martey, Ollenu J (as he then was) stated this customary law position at page 380 as follows:-

1 Section 135 of the Lands Act, 2020 (Act 1036)
2 [2012] 1 SCGLR 391
3 [2012] 2 SCGLR 1077
4 [2013-2014]
5 [2013-2014] 1 SCGLR 727
6 Frank Otoo, 'Property Rights of Spouses in Marital Relationships in Ghana - Is There the Need for Additional Legislative Intervention?' (16 December 2019) <https://papers.ssrn.com/abstract=3504800> accessed 11 January 2024.
7 ibid.

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> *"By customary law it is a domestic responsibility of a man's wife and children to assist him in the 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 children. The right of the wife and children is a right to maintenance and support."*[8]

This position supra, was accorded some judicial intervention when the courts introduced the substantial contribution principle in the case of *Abebrese v Kaah and Others*[9] where the court declared a house acquired during the subsistence of a marriage as a joint property, since the contribution of the wife was beyond mere assistance given by a wife under customary law to her husband.[10] The difficulty that came with the substantial contribution principle with time, was that it caused various injustices to spouses who assisted their husbands in ways other than financial contributions as was in the case in *Clerk v Clerk*[11]. In this case, the wife relied on her material and moral support to the husband in support of her claim of beneficial interest in the matrimonial property, but the court held that such contribution could not be relied upon by the wife to claim interest in the said property.

The court again, shifted from this substantial contribution principle to principle of equitable distribution when it applied the provisions of the Matrimonial Causes Act, 1971 (Act 367), particularly section 20 which provides as follows:-

> *"Property settlement*
>
> *(1)The Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision that the Court thinks just and equitable.*
>
> *(2)Payments and conveyances under this section may be ordered to be made in gross or by instalments"*

By this provision, the court is empowered to order a spouse to pay a sum of money or to convey to the other party movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision during the dissolution of marriage as the court thinks just and equitable. This provision was applied in the case of Ribiero v Ribiero[12]. In recent years, the courts have leveraged on this provision among others to move to the equality is equity principle for the distribution of properties upon the dissolution of marriage. A litany of cases have been decided at the backdrop of this principle including, *Mensah v Mensah*[13] , *Boafo v Boafo, Gladys Mensah v Stephen Mensah, Quartson v Quartson. Fynn v Fynn, Arthur v Arthur, Adjei v Adjei and Gilbert Anyetei v Gilbert Anyetei.*

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8 [1959] GLR 377
9 [1976] 2 GLR 76
10 [1976] 2 GLR 46
11 [1968] GLR 353.
12 [1987 - 1988] 2 GLR 464
13 [1997-98] 2 GLR 193

3.0. Property rights under 1992 Constitution

Under the 1992 constitution, the right to property is classified as a fundamental right equal in rank and stature to such other rights as the right to life, expression, speech, religion and a primary tool in the effort to resist distributive governmental measures.[14]

Article 18 of the 1992 Constitution – The Right to Property

It is provided in article 18 as follows:-

"

> *(1)Every person has the right to own property either alone or in association with others*
>
> *(2)No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others"*

From the above provision, a person can own property either alone or together with others and has the right to choose the manner in which the property is to be held. It is therefore unconstitutional for a person to be deprived of the right to own property alone if he so please. This right is however curtailed or interfered with in accordance with law as provided under article 18(2) supra. In the case of *Raphael Cubagee v Michael Yeboah Asare, K. Gyasi Company Limited, Assembly of God Church*[15], the court sought to provide a definition as to the extent of article 18(2) of the 1992 constitution in the following words:

> *"In construing Article 18 (2) of our Constitution to determine its scope in relation to the question referred to us, we wish to underscore the elements of the right of privacy we stated above. The right protects the individual against unwanted intrusion, scrutiny and publicity and guarantees his control over intrusions into his private sphere. This means that it is up to the individual, subject of course to statutory laws made for the public good as stated in Article 18 (2) itself, to decide if there should be any intrusion into, scrutiny or publicity of his private life including his communication".*

In essence, ownership of a property by a person, whether alone or jointly with others cannot and should not be interfered with whether by any other person, body, organization or enactment in force in the country as it is a constitutionally guaranteed right. The manner in which a person decides to hold property should be chosen by that person and not imposed unless reasonably necessary in the circumstances and permitted under the exceptions listed in article 18(2). If a person decides to own property alone, but a law seeks to unnecessarily limit his or her use of same, then that law falls squarely within the ambit of inconsistency with the constitution and hence should be declared null and void.

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14 Reginald Nii Odoi, 'The Right to Property and the Principle of Justifiable Interference: The Ghanaian Perspective' (6 December 2020) <https://papers.ssrn.com/abstract=3743798> accessed 11 January 2024.

15 (2018) JELR 68856 (SC)

It is the writer's belief that aside international treaties to which Ghana is a part, the decision to include article 18 in the Constitution recognized the case of Reindorf alias Sacker v Reindorf[16] , where the court held that, a spouse can own property independently of the other spouse. Hayfron Benjamin J in delivering the judgment of the court had this to say,

> *"Section 2 of the Married Women's Property Ordinance, Cap 131 (1951 Rev.), provides that:*
> *The wages and earnings of any married woman acquired or gained by her in any employment, occupation, or trade, in which she carries on separately from her husband, and all investments of such wages, earnings or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married…".*

With the advancement of the concept of gender equality, and acknowledging the fact that both women and men may be the subject of abuses of whatever form, the framers of the constitution in couching article 18 ensured that it applied to both men and women. Therefore, a husband can own property independently of his wife and a wife can own property independently of her husband.

Article 22- Distribution of spousal property upon the dissolution of a marriage

Spousal property rights and/or spousal property distribution upon dissolution of the marriage are more specifically provided under Article 22 of the 1992 constitution. Article 22 of the 1992 Constitution provides as follows:-

> "Spousal Property Distribution upon dissolution of the marriage.
>
> *(1)A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died leaving 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 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. "*

Article 22(1) is to the effect that, upon the death of a spouse, the living spouse is entitled to a reasonable portion of or a reasonable provision out of the estate of the deceased spouse. It is no surprise why such a provision would exist, considering the historical injustice against women when the estate of their deceased spouses is being distributed[17]. It was therefore necessary to ensure that a surviving spouse is not left without a reasonable provision out of the estate of the deceased.

Article 22(2) mandates parliament to enact legislation that regulates the property rights of spouses. Indeed, the words used in the Constitution are "as soon as practicable" but even now, 30 (thirty) years after the coming into force of the 1992 Constitution, no such law has

16 [1974] 2 GLR
17 Quartey v Martey [1959]

been promulgated. The result is that the main source of law on distribution of spousal property has been decided cases of the courts on the subject matter. Although this is a matter of importance and worthy of discussion, the present article will not dwell on same.

Article 22(3) (a) and (b) are instructive and of importance to this discussion. From the wording of these provisions, it can be said that any property *jointly* acquired by spouses during marriage should be equally accessible to them. It also adds that property *jointly* acquired by spouses to a marriage, upon dissolution of the marriage, should be shared equitably between them. These provisions define the scope of law concerning distribution of spousal property. Before the promulgation of the 1992 Constitution, the only reference to spousal property distribution was the Matrimonial Causes Act, 1971 and decided cases of the Courts.

Article 22(3) affirms the current position of the law on spousal property distribution, where there is a presumption that properties acquired during the subsistence of a marriage are jointly acquired properties. The Supreme Court, relying on Article 22 of the 1992 Constitution and the case of *Boafo v Boafo*[18], developed the current position of the law on distribution of spousal property in the case of *Gladys Mensah v Stephen Mensah supra*, thus signifying a departure from the customary law position as stated in *Quartey v Martey supra,* and the doctrine of substantial contribution as espoused in the cases of *Yeboah v Yeboah supra and Abebrese v Kaah supra.*

The position of the Supreme Court seemed to be that, property acquired during the subsistence of a marriage is the joint property of the parties and upon dissolution of the marriage, may be shared equally or equitably based on the peculiar facts of each case. Date-Bah JSC made this clear in *Gladys Mensah v Stephen Mensah supra* where he stated as follows:

> *"We are therefore of the considered view that the time has come for this court to institutionalize the principle of equality in the sharing of marital property by spouses, after divorce, of all properties acquired during the subsistence of a marriage in appropriate cases. This is based on the provisions in articles 22(3) and 33(5) of the 1992 constitution, 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 (supra). The wife should be treated as an equal partner even after the divorce in the devolution of the properties. The wife must not be bruised by the conduct of the husband and made to be in a worse situation than she would have been had the divorce not been granted. The tendency to consider women (spouses) in particular appendages to the marriage relationship, used and dumped at will by their male spouses must cease".*

The key phrase used in Article 22(3) (a) and (b) is *"jointly acquired"*. This is to say that the Constitution meant only that kind of property when it referred to the matters contained in the provision. It is therefore pertinent to know the scope and extent of the phrase "jointly acquired" as used by the Constitution.

3.1.What constitutes jointly acquired spousal property

This is not the first time the taxonomy *"jointly"* is used, particularly in discussions on the distribution of property upon dissolution of a marriage. Loosely, it can be used to connote an agreement between two or more people to work toward a common goal.

18 [2005-2006] SCGLR 705

In the revised 4th edition of the Black's Law Dictionary, *jointly* is defined as:-

> *"Unitedly, combined or joined together in unity of interest or liability… in a joint manner; in concert; not separately, in conjunction".*

From the above, it is the writer's position that where *"jointly"* is used, there must be a consensus or agreement to act together. The decision to own the property together may be express or presumed by the law. Expressly, two persons, in this case, spouses, may agree to acquire a property. Here, they jointly pull resources to acquire such property and normally the property is registered in both names. Usually in such cases, no dispute as to the joint ownership of such property acquired during the subsistence of marriage arises.

In other instances however, the courts presume the joint ownership of property by spouses in a marriage based on available evidence which shows that the property was intended to be owned by both spouses. For example, a spouse purchases a piece of land and starts to develop it with the help of the other spouse, which includes other contribution like taking care of the home and children etc., the court may presume that the property is jointly owned by both spouses despite it being in the name of one spouse.

The courts have been bedeviled with providing a definite meaning or scope of the term *"Joint Property"*. The courts have had to resort to evaluation of the peculiar facts of each case to determine when property can be said to be *jointly* owned. As stated above the Supreme Court in various decisions has outlined the relevant circumstances under which property may be classified as the *joint* property of spouses for which joint ownership would be presumed in the event of a dispute.

In the aforesaid *Gladys Mensah v Stephen Mensah,* the court held that the property acquired during the subsistence of a marriage is joint property provided that such property was acquired with contribution and or support of the other party. The court further held that support need not only be monetary and may be for example, taking care of the home, nurturing the children of the marriage etc. It is important to note that the court emphasized the fact that neither spouse in this case, had any property prior to the marriage and that all the property acquired by the husband was acquired during the subsistence of the marriage with the immeasurable support of his wife. The court therefore found it unfair for the husband to have all the property after the dissolution of the marriage. The case of *Quartson v Quartson supra* as well as *Arthur v Arthur supra* applied the principle in the aforesaid *Mensah v Mensah*.

Clarifying the Law on what constitutes Joint marital property

A bit of confusion arose following the decisions above, as same was said to introduce a rule that, it was not essential for a spouse to prove direct, pecuniary or substantial contribution in any form to the acquisition of marital property to qualify for a share in same and that it was only sufficient if the property was acquired during the subsistence of the marriage. Although the courts cannot be totally faulted due to the nature of the cases they were faced with, it can be seen that these cases did not really focus on the right of an individual to own property as enshrined in previous cases such as *Reindorf alias Sacker v Reindorf* and more crucially the provisions of article 18 of the 1992 constitution. It is not in dispute that under article 18 of the 1992 Constitution all persons whether married or single have a fundamental constitutional right to own property alone and or jointly.

The supreme court seem to have introduced as a rule that, property adjudged to be the held jointly by spouses was to be shared equally between the spouses irrespective of the magnitude of contribution given by a spouse. This view was expressed by Dotse JSC in the case *Mensah v Mensah supra* as he followed the decisions of the court in *Boafo v Boafo supra.* But same is not a true reflection of what is expressed in article 22 of the Constitution, and for this reason, the court sought to clarify same in subsequent cases.

The current position of the Law

In the case of *Fynn v Fynn supra,* the supreme court distinguished the presumption of joint ownership of property acquired during the subsistence of marriage from the right of a person to own property independently as enshrined in article 18 of the 1992 constitution. This decision affirmed the distinction between property jointly acquired and property owned privately by spouses in exercise of their rights as contained in the 1992 constitution. The court held as follows:-

> *"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. But, 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 1992 Constitution, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in the instant case".*

The court was of the opinion that, although in the existence of a marriage 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, parties may still acquire property in their individual capacities. This holding is based on article 18 of the 1992 Constitution, which per the court, gave all persons the legal capacity and or right to validly dispose of their individually acquired property. The court also noted that, the peace and well-being of any marriage thrives best in an environment of mutual affection, trust, and respect for one another as well as transparency, hence, a spouse may be under a moral obligation to apprise the other spouse of their intention to acquire and dispose of self-acquired property.

It is a truism in the view of the writer that not every property acquired during the subsistence of marriage is joint property of the spouses. It depends on a myriad of factors including the intention of the parties when the property was being acquired and or subsequently after its acquisition ; the contribution of spouses if any to the acquisition , whether or not the property was intended to be jointly held by both spouses or independently held by one spouse .

In the case of *Adjei v Adjei supra* the court sought to clear up discussions on what constitutes *"jointly acquired property"*. It held as follows:

> *"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 an equality is equity basis. This presumption of joint acquisition, is however, rebuttable upon evidence to the contrary – {see the Arthur v Arthur case supra, holding 3 at page 546} what this means in effect is that, it is not every single property acquired single-handedly by any of the spouses during*

> *the subsistence of a marriage that can be termed a "jointly acquired" property to be distributed at all cost on this equality is equity principle.*

The court stated further that:-

> *"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 in the case of Fynn v Fynn (supra), the presumption theory of joint acquisition collapses".*

The writer agrees with the Supreme Court definition of what constitutes 'joint property' but does not agree with the blanket presumption of property acquired during marriage as jointly acquired. It is not in doubt from the above cases that, the property that is to be distributed is property which is jointly acquired by the parties. "Jointly" may mean that they (spouses), together as a couple, thought up the idea, and worked together towards achieving it. "Jointly" can also mean that, one spouse had the idea to acquire the property, but the acquisition would not have been possible without the contribution, whether it is pecuniary, substantial, monetary or non-monetary contribution of the other spouse.

Article 22 is not a provision to just vest property in a spouse by reason of marriage as that would convert the institution of marriage into a property acquiring scheme where parties enter a marriage with a financially strong individual in order to secure some share in the asset of that spouse.

There will be an absurdity if a different interpretation is given to article 22 especially in a polygamous union where only 1(one) out of for example the 3(three) wives of a man contributes to the acquisition of property with the man.

4.0.Supremacy of the 1992 Constitution

The doctrine of constitutional supremacy is affirmed by articles 1(2) and 2(1) of the 1992 constitution. Article 1(2) provides as follows:-

> *"This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency be void,"*

Article 2(1) of the 1992 constitution further provides that:-

> "A person who alleges that –
>
> *(a)An enactment or anything contained in or done under the authority of that or any other enactment: or*
>
> *(b)Any act or omission of any person ,*
> *is inconsistent with, or is in contravention of a provision of this constitution, may bring an action in the Supreme Court for a declaration to the effect."*

In a plethora of cases decided by the Ghanaian courts, constitutional supremacy has been affirmed time without number. In the recent Supreme Court decision in *Justice Abdulai v The Attorney General*[19], the court commenting on the principle stated as follows:-

19 (2022) JELR 109669 (SC)

> *"It must be noted that the 1992 Constitution establishes constitutional supremacy as against parliamentary supremacy. Under parliamentary supremacy, as pertains in the United Kingdom, Parliament is sovereign and all laws, decisions, procedures of Parliament are final and cannot be subject to judicial review by the Courts. The courts merely apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional…Under our current constitutional dispensation, the sovereign people of Ghana have adopted for ourselves a Constitution, where it is expressly declared in Article 1(2) that the Constitution, not Parliament, shall be the supreme law of Ghana to which all other laws must conform. Accordingly, the Constitution, in Hans Kelson's Pure Theory of Law is the grundnorm, from which all acts or laws derive their validity. To this extent any law or act or omission, found to be inconsistent with the Constitution shall, to the extent of the inconsistency be void. To further reinforce this constitutional supremacy, the Constitution in Article 2 confers on any person who alleges that an act or omission of any person is inconsistent with any provision of the Constitution the right to apply to this Court for a declaration to that effect".*

In the case of *Occupy Ghana v The Attorney General*[20] the constitution was referred to as the *grundnorm* of Ghana. The 1992 Constitution is therefore the highest law of the land, hence any law made or yet to be made applicable in the country must conform to its provisions. Therefore, any enactment, act done pursuant to an enactment, act or omission which is contrary to the provisions of the Constitution or is inconsistent with the constitution or which contravenes the provisions of the Constitution is null and void to the extent of such inconsistency.

Considering the fundamental nature of the Constitution to the laws applicable in Ghana, only one court, that is the Supreme Court of Ghana has been given the power to interpret the constitution. This power of the Supreme Court is given in article 2(1) and 130 of the 1992 constitution. Article 130 of the constitution provides as follows:

"(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –

> *(a) all matters relating to the enforcement or interpretation of this Constitution; and*
>
> *(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.*
>
> *(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question, of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."*

All matters that require the interpretation and enforcement of the constitution must be referred to the Supreme Court or instituted in the Supreme Court.

Essentially, the constitution is the highest law of the land hence all laws enacted must ensure strict compliance with same. Not just a partial compliance, but one that reflects the dictates of the constitution.

20 (2017) JELR 68817 (SC)

4.1.Interpretation of the Constitution

The constitution is regarded as a special document, hence the normal rules employed in the interpretation of statues are not always applicable. When interpreting the constitution, consideration is given to the fact that it is *"sui generis''* – one of its kind and a flexible approach is taken in the interpretation of same. Over the years, the Supreme Court has embraced the Modern Approach to Interpretation (MOPA)[21] when interpreting the constitution. The constitution is referred to as a living organism capable of growth[22] and hence the use of MOPA in interpretation would be more suitable.

In MOPA, not just the text of the provision is considered when finding a meaning to the provision but the purpose of the legislation as relevant both at the time of the coming into force of the provision and the time of interpretation. It is therefore necessary that whilst interpreting the constitution, the sources beyond the text of the provision are considered.

It is for this reason that the writer, referred to decisions and historical antecedents that the provisions of the constitution herein-mentioned were based.

5.0.Property rights under the Land Act 2020 (Act 1036)

Pursuant to article 22(2) of the 1992 Constitution, the legislature is mandated to enact legislation regulating the property rights of spouses as soon as practicable upon coming into force of the 1992 constitution. Article 22(2) provides as follows:-

> "
>
> *(1)Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses."*

Pursuant to section 42 of the Interpretation Act, 2009, (Act 792) the word 'shall' when used in any document is to be interpreted as mandatory and the word 'may' as permissible. Section 42 of Act 792 provides as follows:-

> "
>
> *42. In an enactment the expression "may" shall be construed as permissive and empowering, and the expression "shall" as imperative and mandatory.*

It must be noted, however, that even though expressed in mandatory terms by the use of the word shall, after 30 (thirty) years upon the coming into force of the 1992 constitution, parliament is yet to comply with provisions of article 22(2) to enact a specific legislation regulating the property rights of spouses.

This notwithstanding, provisions pertaining to the property rights of spouses can be found in some statutes enacted after the constitution, including the Land Act 2020 (Act 1036) hereinafter called "Act 1036" and the Matrimonial Causes Act, 1971 (Act 367). One of the notable introductions in Act 1036 is a provision related to the rights of spouses in the distribution of marital property under sections 38(3), and (4), and 47. Section 38(3) and (4) of Act 1036 provides as follows:

> *"38. Parties to a conveyance*
>
> *(3) In a conveyance for valuable consideration of an interest in land that is jointly acquired during*

21 Asare v Attorney General [2003-2004] 1 SCGLR 823

22 Sowah JSC, Tuffuor v Attorney General [1980]

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."

Section 47 of Act 1036 also provides as follows:

"Restrictions on transfer of land by spouse

Except as provided in subsection (3) and (4) of section 38, in the absence of a written agreement to the contrary by the spouses in a marriage, the spouse shall not, in respect of land, right or interest in land acquired for valuable consideration during marriage

(a)sell, exchange, transfer, mortgage or lease the land, right or interest in the land
(b)enter into a contract for the sale, exchange, transfer, mortgage or lease in the land,
(c)give away the land, right or interest in the land intervivos, or
(d)enter into any other transaction in relation to the land, right or interest in the land without the written consent of the other spouse, which consent shall not be unreasonably withheld."

It is without doubt that the Lands Act sought to follow the 1992 constitution concerning the distribution of property acquired during the subsistence of marriage. These provisions however in the opinion of the writer are problematic in certain respects.

Challenges of the Lands Act 2020 (Act 1036)

As provided for in sections 38 (3), (4) and 47 of Act 1036 supra, where a property is jointly acquired by a couple during marriage, for valuable consideration , the spouses shall be deemed to be joint owners irrespective of the person in whose name the property was acquired unless a contrary intention is expressed in the conveyance. A spouse is restrained from dealing with property jointly acquired during marriage for valuable consideration without the written consent of the other spouse but such consent shall not be unreasonably withheld.

The law on spousal property rights was developed over the years primarily in divorce cases or cases involving the dissolution of marriages. The courts as stated above in presuming that a property is jointly owned by spouses considered the length their marriage, their routine and the type of contribution offered by each spouse be it financial or in kind among other factors.

The writer believes that the said provisions of Act 1036 referred to above affirms the principle of presumption of *joint* ownership of property acquired during the subsistence of marriage, but does not provide how the Land commission officials will determine whether the property acquired during marriage is *"joint property"* especially when the property is registered in only one name of a spouse. A consideration of the case of *Adjei v Adjei supra* which is a reflection of the current position of the law manifests the position that indeed, evidence of contribution, which may vary in form is necessary in making the presumption that property acquired during the subsistence of marriage is the *joint* property of the spouses.

Where spouses agree that the property is jointly owned by them, no problem results. Where however they (spouses) are not ad idem on the joint ownership of the property, certain challenges arise. It

is the opinion of the writer that the said provisions of the Act will encourage multiplicity of suits in court. This is so because, when a consent is withheld and both parties are in dispute about the ownership of the property, same may have to be referred to the court.

Furthermore, one is left to wonder which forum would be the best for the submission of disputes arising when a spouse refuses to give consent to the other in respect of property which is allegedly the joint property of the spouses. The determination of the question of whether a property is joint property or not is one that has bedeviled the highest court and is not one that is easily determined. Therefore, knowing that the determination of same may be relegated to an adjudicatory body formed under Act 1036 is problematic. The applicability of the provision may result in chaos, contrary to the intended purpose for Act 1036

The applicability of sections 38 (3), (4) and 47 of Act 1036 may prove difficult and be a recipe for chaos.

6.0.Conclusion

Quoting the learned judge, Date-Bah JSC in the case of Arthur v Arthur supra,

> *"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".*

The compliance of the mandate given parliament in article 22 of the constitution is long overdue and it is about time parliament takes steps to remedy same.

In the meantime, the writer's answer to the question asked at the beginning of this article is that, indeed, a spouse can own property alone during the subsistence of a marriage. This is as a result of the constitutionally guaranteed right of every individual as contained in article 18 of the 1992 constitution. This notwithstanding, the writer does acknowledge that spouses may during the subsistence of marriage decide to (expressly or implied from their conduct) *jointly* acquire property. It is at this point that the presumption of joint ownership of property acquired during the subsistence of marriage may arise. The fact of marriage should therefore not be used as a means to curtail one's right to own property independently of their spouse.

It is for this reason that the writer opines those sections 38 (3), (4) and 47 of the Lands Act 2020 (Act 1036) may raise problems with regards to the individual ownership of property due to the challenges above mentioned.