

A MATTER OF EQUALITY IN MATRIMONIAL RIGHTS: GLADYS MENSAH V. STEPHEN MENSAH CASE IN SUPREME COURT OF GHANA

UMA QUESTÃO DE IGUALDADE DE DIREITOS MATRIMONIAIS: O CASO GLADYS MENSAH V. STEPHEN MENSAH NA CORTE SUPREMA DE GANA, AFRICA

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Abstract: The Supreme Court of the Republic of Ghana has given value to gender roles of women (and men) in the home. For too long many courts had relied on the need to establish substantial contribution by spouses to joint property which many women could not prove, thereby being entitled to less than half of joint property. In matrimonial matters however, case law developed around the Matrimonial Causes Act 1971, (Act 367) acknowledge the weak financial contribution of a spouse to property acquisition. The courts in their application of equitable principles require a spouse claiming a share in joint property to provide proof of substantial contribution. This principle of proving substantial contribution has for decades being to the disadvantage of many women who, in performing their gender roles as wives, do not keep records of contribution made to joint property. However, in the last decade, some courts began recognising the value of a wife's contribution to matrimonial property even if the contribution was non-monetary. The Supreme Court case of *Gladys Mensah v. Stephen Mensah* now firmly establishes the principle of equality in property distribution. **Keywords:** Equality. Women matrimonial rights. Supreme Court of Ghana.

Resumo: A Suprema Corte da República de Gana, Africa, reconheceu, finalmente, direitos iguais às mulheres e homens na vida conjugal. Em matéria conjugal, a jurisprudência desenvolvida em torno da Lei das Causas Matrimoniais, de 1971, (Lei 367) estabelecia a presunção de que era pouca a contribuição financeira das mulheres para aquisição de bens durante o casamento. E para decidir sobre a divisão de bens em casos de divórcio, os tribunais de Gana costumam exigir que o cônjuge que reivindica uma participação na propriedade comum deve fazer *prova substancial* da sua contribuição. Esse *princípio da prova da contribuição substancial* vinha sendo aplicado, há décadas, em detrimento dos interesses das mulheres que, no desempenho de seus papéis de esposas, não costumam manter registros de suas contribuições para a formação de um patrimônio comum. Na última década, alguns tribunais começaram a reconhecer a participação da mulher na formação do patrimônio comum, mesmo que a contribuição não tenha sido de natureza monetária. O presente caso, decidido pela Suprema Corte de Gana em fevereiro de 2012 - *Gladys Mensah v. Stephen Mensah Case* - mudou o entendimento histórico contrário aos interesses das mulheres e estabeleceu, firmemente, o princípio da igualdade na partilha da propriedade comum adquirida durante o casamento.

Palavras-chave: Igualdade. Direito matrimonial das mulheres. República de Gana. Africa.

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1 Introduction

Within the Ghanaian context, marriage is a union between a man and woman, but also extends to a union between two families. Three types of marriage are legally recognised in Ghana namely customary marriage, marriage under the Marriage Ordinance and Islamic marriages. While customary and Islamic marriages are potentially polygamous, marriage under the Marriage Ordinance is monogamous. The practice is for couples who are married under customary or Islamic marriage to convert the marriage into a monogamous one, i.e. under the Marriage Ordinance. This requires that where there are multiple wives, a man must divorce any remaining wives to be able to marry one under the Marriage Ordinance.

Gender roles within marriage are prescribed by society. Therefore a woman is expected to perform certain roles in the home including cooking, cleaning, caring for children (if any) and supporting the husband's business. Recognising the consequences for non-performance of women's roles (domestic abuse, discrimination in property sharing at death, customary practices), the memorandum to some statutes allude to discrimination against women, even though these laws protect all persons. Examples are the Intestate Succession Law, Domestic Violence Act, Human Trafficking Act among others.

In matrimonial matters however, case law developed around the Matrimonial Causes Act 1971, (Act 367) acknowledge the weak financial contribution of a spouse to property acquisition. The courts in their application of equitable principles require a spouse claiming a share in joint property to provide proof of substantial contribution. This principle of proving substantial contribution has for decades being to the disadvantage of many women who, in performing their gender roles as wives, do not keep records of contribution made to joint property. *Quartey v Martey* [1959] GLR 377.

However, in the last decade, some courts began recognising the value of a wife's contribution to matrimonial property even if the contribution was non-monetary. Example is *Abebrese v. Kaah and Others* [1976] 2 GLR 46 HC, where the wife contributed substantially to building the matrimonial home. The husband had provided the purchase money for the land. She paid for the timber, and contributed to buying sand and iron sheets. She also supervised work done by labourers and helped to carry water to the site. However, she had not kept account of her contribution. The husband died intestate and his successor purported to sell the house. The court held that although the wife could not state in terms of cash how much her contribution towards the building was, it was clearly substantial.

The Supreme Court case of *Gladys Mensah v. Stephen Mensah* now firmly establishes the principle of equality in property distribution.

- b. *Identification of the case:* Gladys Mensah v. Stephen Mensah
- c. *Country:* Republic of Ghana, Africa
- d. *Identification of the Court.* Supreme Court of Ghana

e. *Date of decision.* Judgement delivered on 22nd February 2012.
f. *Page number where the case appears in the textbook.* Civil Appeal No. J4/20/2011 [unpublished]

2 Procedural history

This is an appeal from the judgment of the Court of Appeal dated 23rd July 2009 which affirmed the judgment of the High Court dated the 31st January 2003.

3 The facts

The couple was married under customary law in March 1989, though the Supreme Court found from the evidence that that marriage had actually taken place in 1987. In June of the same year, the customary marriage was converted into a marriage under the Marriage Ordinance. The couple started experiencing marital problems ten years after the Ordinance marriage. In 2000, after several efforts at reconciliation had failed, the wife (petitioner) filed for divorce at the High Court claiming an equal share in substantial property that was jointly acquired during the marriage. The property included several houses, plots of land, business, shops, cars and money. The trial court ruled in favour of the petitioner, who appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the trial court. The present appeal to the Supreme Court was filed by the husband (appellant) challenging the ruling of the lower courts.

3.1 The most significant procedural acts

Wife (petitioner) filed for divorce at the High Court. Husband (appellant) appealed the decision of the High Court by going to the Court of Appeal where he lost. Husband (appellant) again appealed to the Supreme Court.

4 The law

4.1 Explanation of the issue of law in dispute

The main issue for determination at the Supreme Court was whether the equality principle used by the trial and appellate courts in the distribution of the marital property acquired during the marriage was sustainable under the current state of laws in Ghana. These laws are the 1992 Constitution and Matrimonial Causes Act, 1971 (Act 367).

4.2 The measures taken by the parties and the appellate which was contested the decisions below

At the High Court, the judge determined, after reviewing the evidence, that the issue to be resolved was whether or not the petitioner is a joint owner of the property that the couple had acquired jointly and is therefore entitled to of 50% share in them. Petitioner had started a small trading business in their rented house. She had invested proceeds from her business wisely thereby leading to a bigger shop where she traded in many items including rice and palm oil. She had invested the money of the couple wisely in landed property with the consent of the husband. The trial judge found from the preponderance of evidence that the petitioner had contributed to the property acquired which entitled her to a 50% share. At the Court of Appeal the husband (respondent/appellant) averred that the trial judge had failed to adequately consider the evidence of the husband (respondent at the trial court) by placing unnecessary weight on the evidence of the petitioner. In addition the trial court had erred in assessing the amount of money to be paid to the petitioner as her share of the profits from a limited liability company that had been established by the couple. The Court of Appeal threw out the appellant's appeal.

5 The decision

The Supreme Court affirmed the decisions of the Court of Appeal and the High Court, that is, the parties had an equal share in the property.

The Supreme Court has institutionalised the principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the subsistence of a marriage.

6 Rule or legal principles applied. Equality is equity principle of sharing marital property

The Supreme Court decision in this case re-emphasised the principle of Equality is Equity in joint marital property distribution which had been applied in some cases. In an earlier Court of Appeal case of *Mensah v. Mensah* [1998-99] SCGLR 350 Wood JA affirming the judgement of the trial court held that

[...] Indeed in cases where the evidence clearly points to a joint ownership, I found no inflexible rule stipulating that a spouse's inability to identify clearly contribution automatically disentitles him or her from a half share. To the contrary, it does appear that the courts have been quick to apply the equality is equity rule, and so lean towards a half and half share, if from all the circumstances, such an approach would be justifiable.

On the above cases going on appeal to the Supreme Court, Justice Bamford-Addo JSC stated that equal sharing amounts to a “*just and equitable*” sharing. She further explained that

[...] 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.

The English case of *Rimmer v. Rimmer* [1952] 1 QB 63 provided a basis for this principle, in which Denning LJ’s view was that where it is clear that the matrimonial home or furniture belongs to one or the other of the married couple, then the courts would respect the proprietary rights of the particular spouse. But where it not clear to whom the beneficial interest belongs or in what proportions, then the equitable maxim of equality is equity would be applied.

7 Reasons. The most important reasons adopted by the court based its decision

The Supreme Court relied on national and international laws, as well as precedents of cases in arriving at its decision. The 1992 Constitution of Ghana provides in Article 22 that

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

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

(a) Spouses shall have equal access to property jointly acquired during marriage.

(b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.”

Further, Article 33(5) also provides that

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

According to the Supreme Court, Article 22 (3) (a) & (b) give an inkling of what the legislation by Parliament should contain, that is the principle of having equal access to property acquired during marriage and that of equitable distribution of property upon dissolution of the marriage. Furthermore, Article 33 (5) reinforces the guarantee and protection of all the fundamental human rights and

fundamental freedoms contained in Chapter 5 of the Constitution including property rights, economic rights and cultural rights. That Article further guarantee's other rights, duties, declarations not specifically mentioned in the Constitution as applicable by the courts in order to ensure the dignity of the human race.

Relying on international laws and standards to support its decision, the Supreme Court made reference to a definition of the Jurisprudence of Equality Principle by the International Association of Women Judges in their November, 2006 USAID Rule of Law Project in Jordan as "*the application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women.*" This implies that the rights of women will no longer be discriminated against and there will be equal application of laws to the determination of women's issues in all aspects of social, legal, economic and cultural affairs.

Again, in underscoring the importance of protecting the dignity and rights of all persons (including women) the Court referred to Article 1 of the Universal Declaration of Human Rights (1948) "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood.*" But the Court recognised that although the Universal Declaration of Human Rights is not a binding treaty, its principles and underpinning philosophy has been incorporated into national constitutions (including the 1992 Constitution of Ghana) and has been referred to by several national courts.

Ghana is a signatory to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). Article 1 of CEDAW provides a definition of discrimination as follows:-

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

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

On the basis of the above conventions and treaties and drawing a linkage between them and the Constitution 1992, the Supreme Court was of the view that the time had come for the integration of this principle of "*Jurisprudence of Equality*" into the Court's rules of interpretation such that meaning will be given to the contents of the Constitution 1992, especially on the devolution of property to spouses after divorce.

Using the Equality is equity principle as a guide the Supreme Court was of the view that it was unconstitutional for the courts in Ghana to discriminate against women in particular whenever issues pertaining to distribution of proper-

ty acquired during marriage come up during divorce. There should in all appropriate cases be sharing of property on equality basis.

The Supreme Court further relied on decided cases from Ghana and other African countries to support the principle of equality. Ghanaian cases referenced included *Boafo v. Boafo* and *Mensah v. Mensah*. The Supreme Court made reference to the Kenya Court of Appeals decision in the case of *Tabitha Wangeci Nderitu v Simon Nderitu Kariuki*, Civil Appeal No. 203 of 1997 where the Court of Appeal ruled for the wife, finding that the Married Women Property Act, superseded the customary law, that the husband had failed to show that the Caesarean surgeries had disabled her sufficiently to warrant a reduction to 30 percent, and that a housewife's contribution to the family in raising children counted as a contribution to the marriage." The Supreme Court of Ghana stated that the decision arrived by the Kenya Court of Appeals is not only in tandem with common sense and international human rights conventions and principles, but also in tune with our articles 22 (3) (a) and (b) of the Ghana Constitution of 1992.

8 Additional information

It is important that the Supreme Court has given value to gender roles of women (and men) in the home. For too long many courts had relied on the need to establish substantial contribution by spouses to joint property which many women could not prove, thereby being entitled to less than half of joint property. The Court stated in this case that *"the Petitioner should be treated as an equal partner even after divorce in the devolution of the properties. The Petitioner must not be bruised by the conduct of the respondent and made to be in a worse situation than she would have been had the divorce not been granted. The tendency to consider women (spouses) in particular as appendages to the marriage relationship, used and dumped at will by their male spouses must cease. Divorce as Lord Denning stated long ago, should not be considered as a stigma."*

Property Rights of Spouses Bill

In following through with the Article 22 (2) of the 1992 Constitution there is presently a Property Rights of Spouses Bill (2011) which has remained in Parliament for two years. The Bill incorporates the principle of equality by stating that joint property will be distributed into equal parts between spouses. Sadly there has been resistance to this Bill by some Parliamentarians and some sections of the public because of this principle. It is unlikely Parliament will pass the Bill by December 2012, when the tenure of the present Parliament comes to an end.

Nevertheless, this Case (plus those of *Boafo v. Boafo* and *Mensah v. Mensah*) establishes the case law that protects spouses especially women in property distribution at divorce. By this case, 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."*

9 Personal criticism

The challenge with this equality principle is its application to polygamous marriages under customary law and Islam. It is quite simple to divide property equally between two parties, but it may not be that easy to divide joint property between a man and two, three or four wives.

Case study length: the desired case length is 15.000 to 250.000 characters with spaces and footnotes, A4 paper, continuous line numbering and consecutive page numbering, illustrations and tables included.

Artigo convidado

Data da submissão: 7 de novembro de 2012

Aceito em: 09 de novembro de 2012