



## Constitutional and legal treatment of matrimonial property in Ghana: Going backwards to go forward

Kwame Gyan

Senior Lecturer, University of Ghana School of Law, Ghana

### Abstract

The failure of the Parliament of Ghana to comply with the constitutional directive to enact legislation regulating the property rights of spouses has, as can be expected, presaged numerous problems in the distribution of properties acquired during the subsistence of a marriage upon its dissolution. Consequently, the judiciary has resorted, in what may be considered a clear case of judicial legislation, to evolving various parameters for regulating the property rights of spouses, especially upon divorce. The Land Act, 2020 (Act 1036) made an attempt to provide for the regulation of the property rights of spouses with particular reference to land or interests in land, albeit in lamentably scanty provisions. This paper analyses the principles discernible from the judicial decisions and the brief rules provided by the Land Act for regulating the property rights of spouses to determine whether they meet the requirement of the Constitution. In the final analysis, the paper demonstrates that the Land Act and the judicially engineered principles do not meet muster. Consequently, there is the need for Parliament to act swiftly to enact legislation that would sufficiently and efficiently regulate the property rights of spouses.

**Keywords:** Ghana, land Act 2020, property rights of spouses, distribution of matrimonial property

### Introduction

Over the years, one of the most notoriously complex issues that constantly arises when the love that once existed between spouses is rent asunder and their marriage is dissolved is the determination of their property rights. Broadly speaking, there have been three distinct periods of the treatment of the property rights of spouses in Ghana. Each of these periods was characterised by judicial decisions which solidified and gave legal validity to the dominant pattern that prevailed in that particular period. Mindfully, the judiciary has had a free hand to engage in a litany of guesswork in this area due to the absence of any concrete legislation regulating the property rights of spouses.<sup>[1]</sup>

The first period, dominated by the position at pristine customary law, essentially relegated the woman in a marital union to the status of a depersonalized entity. She was unable to acquire properties jointly with her husband. During this period, regardless of whatever contributions a married woman made towards the acquisition of properties by her husband during the subsistence of the marriage, those properties were exclusively the properties of the man.

The realization of the unfairness of the customary law position informed some new judicial thinking. This led, inexorably, to the development of the substantial contribution doctrine. This doctrine had the effect that where a woman made “substantial contribution” to the acquisition of properties during the subsistence of a marriage, she was entitled to a share of same. The development of the substantial contribution doctrine was the second major phase in the evolution of the law on the regulation of property rights of spouses.

The 1992 Constitution mandated Parliament to enact legislation for the regulation of the property rights of spouses. This was to address the neglect of the past, where questions relating to spousal property were left to be

determined by judges with unevenly applied and indeterminate rules. It has been over three decades since the coming into force of the Constitution but Parliament has yet to comply with this mandatory constitutional duty. The inaction of Parliament has gingered up Ghanaian judges to put on their cloaks of judicial activism to develop some guidelines, prominently the equality is equity principle, for the distribution of property jointly acquired during marriage upon its dissolution. This represents the third phase of the treatment of spousal property in Ghana. Curiously, Ghana’s recently passed Land Act, 2020 (Act 1036) contains provisions which, though cursory, seek to regulate the property rights of spouses as regards land and interests in land.

This paper points out the problems associated with the judicial treatment of the question of spousal property and how the judiciary, in its bid to move the country forward in this area, seems to be retrogressing as it fails to meet constitutional standards. It also points out the problems that the Land Act’s treatment of property rights of spouses may potentially occasion, thereby calling on Parliament to take appropriate steps towards complying with its constitutional duties to put the matter to rest.

### The position at customary law

Attempts by the judiciary to regulate the property rights of spouses, in the absence of concrete legislation on same, began with Justice Ollennu’s formulation of the position of the law at customary law in *Quarthey vs. Martey and Another*<sup>[2]</sup> in 1959. Ghana is traditionally a largely patriarchal community, as is the case in most parts of the African continent. As a largely patriarchal society, women were generally relegated to an inferior position under customary law. That a woman could acquire property jointly with her husband in the context of marriage was considered alien to customary law, at least in some parts of Ghana. The view

was predominantly held at customary law that persons who were not related by blood (such as husband and wife) could not jointly acquire property. Thus, it was believed that a wife, as a dependent of her husband, was duty-bound to work with or for her husband in whatever station of life he found himself. At customary law, properties acquired with the joint effort of the spouses were the properties of the man exclusively.<sup>[3]</sup> The woman's contribution amounted to nought except the title of a "good wife".<sup>[4]</sup>

So, in *Quartey vs. Martey*, a spouse had made a claim for a share of the property of her husband who died intestate. She argued that she had helped the husband financially and otherwise in the acquisition of the properties that stood to his credit at the time of his death and was therefore entitled to a share of same. With intemperate haste, Ollennu J (as he then was), in dismissing the claim of the wife, laid down the rule at customary law thus:

"... 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 the children. The right of the wife and the children is a right to maintenance and support from the husband and father."<sup>[5]</sup>

As at 1959 when Ollennu summarized the position at customary law, this statement had lost its shine and lustre due to the influence of the social conditions of the time.<sup>[6]</sup> Even so, for a long time, subsequent judicial decisions regrettably toed the line of this customary law position, which was out of touch with modernity at the time.<sup>[7]</sup>

### **Substantial contribution doctrine**

The development of the "substantial contribution" doctrine was a direct reaction to the customary law position as exemplified by Ollennu J in *Quartey vs. Martey*. Prodigious opposition was mounted by gender advocates and academics against the customary law position.<sup>[8]</sup> To redeem the image of the judiciary, new light shone upon the courts and they were compelled to redirect the course of the law to ensure a measure of protection for women. Accordingly, the "substantial contribution" doctrine was developed. The import of this doctrine was that where the woman's contribution exceeded the threshold of what was expected of a married woman under customary law, she would be entitled to a share of those properties acquired with her joint effort.

The doctrine of "substantial contribution" was birthed fully in *Abebreseh vs. Kaah*.<sup>[9]</sup> The plaintiff wife in this case contributed half the price of a parcel of land jointly purchased with her husband, on which their matrimonial home was built. She bought some of the building materials, including sand, stones, sawn timber and corrugated iron sheets. Additionally, she supervised the construction of the building and engaged the labour used in building the house at her own expense. Upon the death intestate of the husband, his customary successor obtained letters of administration and secretly sold the house to a third party who bought the house in the name of his nephew, Kaah.

The wife instituted an action against the customary successor, the third party and his aforementioned nephew

for a declaration that the sale was null and void. She argued that she had jointly acquired the property with her husband, and being the last survivor of the joint owners, she was now the sole owner of the property. As can be expected, the defendant argued that under customary law, properties acquired by a husband with the help of the wife became the exclusive properties of the husband.

The Court held that the wife was a joint owner of the property by dint of the fact that she had made "substantial contribution" to the acquisition of the property, far beyond what was expected of a wife under customary law. The Court, however, refused to declare that the property devolved completely on her as the last survivor of the joint owners, on the basis that customary law did not recognize the right of survivorship. Essentially, the Court excepted this case from the categories of cases to which the customary law principle that a wife's contribution to the acquisition of properties by her husband did not make her a joint owner was applicable. It is interesting to note that even while the Court gave life to the substantial contribution doctrine, it did not declare the position at customary law as espoused in *Quartey vs. Martey* to be out of touch with reality and the changing circumstances. Rather, the Court created an exception to the *Quartey vs. Martey* principle, that where the wife contributed substantially to the acquisition of properties, in such manner as exceeds the scope of the duty of a wife to her husband under customary law, she becomes a joint owner of those properties with her husband.

Although the doctrine was given life in *Abebreseh vs. Kaah*, traces of it were found in the much earlier decision in *Yeboah v Yeboah*.<sup>[10]</sup> In that case, the wife's father had paid a deposit on her behalf so that she could be allocated a land by the State Housing Corporation. When she got married, upon agreement of the spouses, the land was allocated to the husband. This was necessary to make him eligible for a loan facility from their common employer for the purpose of putting up a house, ostensibly for the mutual benefit of the spouses. Realizing that the loan amount was enough to cover the entire cost of construction, the woman's initial deposit was refunded to her. Before the commencement of the construction, however, the husband was transferred to London and was soon joined by his wife. While they were still in London, construction commenced and the wife flew to Ghana at her own expense to supervise the building of the house. She made some structural changes to the building with her husband's consent. When they returned to Ghana and were living in the house, the wife made substantial improvements to the house. Among other things, she tiled the walls of the kitchen, constructed some built-in cabinets on the walls of the kitchen and constructed a concrete and metal gate, all at her own expense. When the marriage broke down beyond reconciliation and was dissolved a few years later, the wife claimed a joint share of the property. The Court held that she was a joint owner of the property, taking into account the nature of her contribution as established by the facts and the evidence.

This substantial contribution doctrine prevailed for quite a long time and was subsequently applied in many judicial decisions.<sup>[11]</sup> Progressive though the substantial contribution doctrine was, the domestic services of a spouse, usually the female, were usually disregarded and could not be considered as amounting to any substantial contribution. Nevertheless, whatever the deficiencies were in this

substantial doctrine proposition, there can be no gainsaying that it played a great role in elevating the status of women in the Ghanaian society.

### **The rise of the gender movement and the new constitutional thinking**

The many injustices that women have had to endure in the past, and presently in more subtle and sinister ways, including the poor treatment of women in the area of property rights in the context of marriage, were spotlighted by the activities of gender rights groups and advocates. Notable among these are the 31<sup>st</sup> December Women Movement, the African Women Lawyers Association (AWLA), International Federation of Women Lawyers (FIDA), Women in Law and Development in Africa (WiLDAF), Leadership and Advocacy for Women in Africa (LAWA, Ghana) and Alumnae Incorporated. Their advocacy brought to the fore what should have been obvious since time immemorial.

It thus became necessary for the Constitution, the supreme law of the land, to lead the charge in bringing women to a more deserving and dignifying status. As the Committee of Experts whose proposals formed the foundation for the formulation of the 1992 Constitution stated in their Report, “fundamental human rights become particularly significant if they are translated into prohibition of social and economic practices that otherwise exploit or degrade certain sections of the population, such as women and children.”<sup>[12]</sup> Consequently, the 1992 Constitution, for the first time in Ghanaian constitutional history, deemed it necessary to include provisions on the property rights of spouses upon divorce.

It is noteworthy that the 1978 Proposals that gave birth to the 1979 Constitution did not pay so much attention to the property rights of women, particularly upon divorce. All that the Constitutional Commission’s proposals did was to treat, albeit cursorily, the rights of women and children in different provisions of the Constitution, contrary to the prior Constitution.<sup>[13]</sup> The Constitutional Commission thought that it was unnecessary to make elaborate provisions on the rights of women, noting that the “women’s representatives asked for no more.”<sup>[14]</sup>

The Committee of Experts thought otherwise. As the Committee put it, “the women members of the Committee this time did ask for more, which in the view of the Committee is quite legitimate.”<sup>[15]</sup> Thus, the Committee made the following proposals on the property rights of spouses:

“Parliament should enact legislation regulating the property rights of women in marriage. With a view to achieving the full realization of these rights:

- a) women should have equal access as their spouses to property jointly acquired during the marriage; and
- b) assets which are jointly acquired during marriage should be distributed equitably between the spouses upon the dissolution of the marriage.”<sup>[16]</sup>

These proposals, though generally accepted into the 1992 Constitution, were not embraced completely. The nomenclature of the Constitution took a gender-neutral turn, presumably to make the Constitution more enduring. Accordingly, the word “women” as used in the proposals was replaced with “spouse” in the final Constitution. So, we find in article 22 of the Constitution the following:

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

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article spouses shall have equal access to property jointly acquired during marriage;

assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.”

In fact, Parliament has not only a constitutional mandate to make appropriate legislation on the distribution of marital property, but it also has an international obligation to do so.<sup>[17]</sup> After three decades, Parliament is yet to perform its constitutional mandate under article 22 of the Constitution. The Property Rights of Spouses Bill, which was laid before Parliament in 2009, is yet to progress beyond the Committee Stage of the parliamentary law-making process.

Quite clearly, Parliament is to blame for its blatant disregard of this constitutional imperative. Pausing for a moment, however, one would realise that Parliament is not exclusively to blame for its failure to make the appropriate legislation; the makers of the 1992 Constitution are equally blameworthy. The framers of the Constitution appeared to have attached little significance to property rights of spouses. Hence, the framers used the words “as soon as practicable after the coming into force of [the] Constitution” in mandating Parliament to enact legislation on the property rights of spouses.

Curiously, the framers of the Constitution gave strict timelines in the Constitution when they required that something be done by Parliament or some other body after the coming into force of the Constitution. On the establishment of the National Media Commission, the Constitution provides that “There shall be established by Act of Parliament within six months after Parliament first meets after the coming into force of [the] Constitution, a National Media Commission...”<sup>[18]</sup> The same language is adopted regarding the establishment of the Commission on Human Rights and Administrative Justice<sup>[19]</sup> and the National Commission on Civic Education.<sup>[20]</sup> The Constitution equally adopts that language in mandating Parliament to establish the natural resources commissions, namely the Minerals Commission, the Forestry Commission, the Fisheries Commission and such other Commissions as Parliament may deem necessary.<sup>[21]</sup> Remarkably, the Constitution also mandated Parliament to prescribe the jurisdiction of Regional Tribunals and to establish lower courts or tribunals “within six months after the coming into force of [the] Constitution”.<sup>[22]</sup>

One therefore cannot but wonder why the framers of the Constitution did not adopt the same rendition-providing strict timelines within which Parliament should enact legislation to regulate the property rights of spouses. It is not out of place, then, for one to conclude that the makers of the Constitution attached little significance to the property rights of spouses, hence the use of the phrase “as soon as practicable”. But the choice of words of the framers of the Constitution may be understandable. There are different forms of marriages-Customary, Mohammedan and Ordinance marriages. In ethnically-plural Ghana, marriage under customary law and the incidents arising therefrom also vary from community to community. This would therefore require that all the nuances of the institution of

marriage, especially the non-uniform rules of customary law on marriage, are considered in the enactment of the legislation. For as one scholar puts it, “history shows that, when a state legislates for a radical departure from customary practice, the legislation is apt to be disregarded.”<sup>[23]</sup>

Hence, any legislation regulating the property rights of spouses that is enacted in flagrant disregard of the customary realities can be expected to be ignored. No doubt, the continued validity of customary law depends on its consonance with the Constitution.<sup>[24]</sup> Given that statute law jostles with various customary legal systems in the regulation of diverse aspects of our lives, the nuances of customary marriages must not be ignored in any law seeking to regulate spousal property, so long as those customary laws do not conflict with the Constitution.

That said, if we must avoid the need for another legislation in the not-too-distant future, the enactment of any comprehensive legislation on the property rights of spouses would require that the intricacies of the different forms of marriage and the customary law rules of marriage applicable in various matrilineal and patrilineal communities are taken into account in the making of such legislation. Doing this may require a considerable amount of time. This may be why the framers of the Constitution did not provide strict timelines for the passage of legislation to regulate property rights of spouses. But that does not exonerate them entirely. Possibly, they made a value judgement as to what the key priorities were and property rights of spouses may not have been one of them. If they attached the needed significance to it, they could have set some timelines that were flexible enough to enable Parliament to consider all relevant matters but also rigid enough not to give Parliament the leeway to fail to comply with it.

In order to correct this mistake of the past, the Constitution Review Commission of 2011 unsurprisingly recommended that “Parliament should pass legislation to regulate the property rights of spouses as required by the Constitution within six months of the constitutional amendments proposed in [its] report.”<sup>[25]</sup> It is rather unfortunate that the proposed constitutional amendment has to this day—more than two decades after the report was submitted—not been carried out.

### **The new judicial light: article 22 of the constitution in retrospect**

The position of the law began to change with the coming into force of the 1992 Constitution. Owing to the failure of Parliament to enact legislation as required by the Constitution, the judiciary directed, on a case-by-case basis, how properties jointly acquired during a marriage are to be shared.

In *Quartson vs. Quartson*<sup>[26]</sup>, the Court of Appeal held that the petitioner should bear the brunt of Parliament’s inaction. In other words, the failure of Parliament to enact legislation regulating the property rights of spouses disabled the courts from applying the constitutional directives in the distribution of matrimonial property. On further appeal, the Supreme Court took a different view, rejecting the overly formalistic approach taken by the Court of Appeal. In the Supreme Court’s opinion, Parliament’s inaction could not operate to the detriment of the petitioner, debarring the courts from giving effect to constitutionally guaranteed rights. The Supreme Court observed that:

“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. We do not think that this court is usurping the role of Parliament, especially in cases where the inaction of Parliament results in the denial of justice and delays in the realization of constitutional rights.”<sup>[27]</sup>

Indeed, a constitutionally guaranteed right cannot be discarded done away with due to the inaction, advertently or inadvertently, of the body that is mandated to provide clear guidelines for its regulation. Accordingly, in an attempt to give effect to the constitutional rights of spouses, the Supreme Court has had numberless opportunities to develop some parameters to guide the courts in the determination of issues pertaining to matrimonial property upon divorce.

The first case in which the Supreme Court gave new meaning to the question of matrimonial property, after the coming into force of the 1992 Constitution, is that of *Mensah vs. Mensah*,<sup>[28]</sup> which was decided in 1998. In *Mensah vs. Mensah*<sup>[29]</sup>, the Supreme Court, speaking through Bamford-Addo JSC, created the impression that once it is found that spouses jointly acquired some property, it is to be shared equally among them upon divorce. Hence, upon finding that the house in dispute was jointly acquired by the parties, it went ahead to hold that the properties were to be shared equally between the parties. The court was of the view 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”.<sup>[30]</sup> And from then, the equality is equity principle began to take on the glow of truth.

Subsequently, the case of *Boafo v Boafo*<sup>[31]</sup> presented itself in 2005. Here, the Supreme Court, speaking through Date-Bah JSC, sought in earlier pages of the judgement to correct the wrong impression created by Bamford Addo JSC in *Mensah v Mensah*. He indicated that it was not necessarily the case that once any property is established to be jointly acquired it is to be shared equally between the spouses upon divorce. He noted that such a blanket rule would be iniquitous in some circumstances. Yet, in subsequent parts of the judgement, he was quick to hold that “where there is a substantial contribution by both parties, the respective shares of the spouses will not be delineated proportionally like a shareholding in a company. For the marriage relationship is not a commercial relationship. Where there is a substantial contribution by both spouses, equality is equity will usually be an equitable solution to the distribution issue.”<sup>[32]</sup>

Although the equality is equity principle gained widespread recognition in judicial thought from the days of *Mensah vs. Mensah*, the substantial contribution doctrine was not done away with. The equality is equity principle was merely a judicially devised formula for distributing spousal property once it was found that both spouses contributed substantially to the acquisition of such property. This is evident in the decision in *Boafo vs. Boafo*, where the Court insisted on substantial contribution, except that the ordinary rules of commerce would not be allowed to dictate the manner of sharing jointly acquired marital property. It is this gap in the formula for sharing marital property that the equality is equity principle came to fill.

Fast forward to 2012, another *Mensah vs. Mensah* <sup>[33]</sup> case was decided by the Supreme Court. Here, Dotse JSC relied on *Boafo v Boafo* and the earlier *Mensah vs. Mensah* to officially sound a death knell to the substantial contribution doctrine. He interpreted the decision in *Boafo vs. Boafo* to mean that the Court recognized that a half and half sharing is usually the solution to correct imbalances as regards the distribution of spousal property. However, that half and half sharing may not be just and equitable in certain circumstances, thus giving room for a flexible application of the rule on a case-by-case basis. Even so, he proceeded to add that “the paramount goal of the court would be to achieve equality.” <sup>[34]</sup> Mindfully, the contribution need not be monetary. Here, the Court held that “the wife’s contributions even as a housewife, in maintaining the house and creating a congenial atmosphere for the husband to create the economic empire he has built, are enough to earn her an equal share in the marital properties on offer for distribution upon the grant of a decree of divorce.” <sup>[35]</sup> Ultimately, the Court came to the intriguing conclusion that “the time has come for (the) court to institutionalise 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.”

Beginning from this second *Mensah vs. Mensah* case, the Supreme Court, by implication, redefined the domestic services rendered by spouses. Hence, to be deemed to have jointly acquired property with one’s spouse, one need not have made any financial contribution. It is enough if such spouse could show that he or she, whether as housewife or househusband, maintained the home, thus enabling the other spouse to work freely to acquire some properties.

Then, in *Arthur (No. 1) vs. Arthur (No. 1)* <sup>[36]</sup>, decided in 2013/2014, the tide began to change. The Supreme Court created a presumption that properties acquired during the subsistence of a marriage are joint properties regardless of whether each spouse contributed in any way towards their acquisition. Hence, it is not necessary for a spouse to prove a contribution to the acquisition of property; it is sufficient if the property was acquired during the subsistence of the marriage. The Court, however, recognized as an exception instances where property is acquired by gift during a marriage, as well as other exceptions that may be set out subsequently by the courts or by Parliament.

Basing itself on the decision in *Arthur (No. 1) vs. Arthur (No. 1)*, the Supreme Court, in agreeing with the Court of Appeal, created another exception in the case of *Adjei v Adjei* <sup>[37]</sup>, which was decided in 2021. The exception created was that where a spouse takes a loan during the subsistence of a marriage to develop a self-acquired plot of land, the property does not presumptively constitute property jointly acquired during the marriage so long as the loan remains not fully liquidated or paid off. The Court’s reasoning was that so long as the loan remains unpaid, the property is a liability and stands the risk of being lost if the borrower is unable to liquidate the loan. Such property cannot presumably form part of spousal property unless the loan is liquidated while the marriage still subsisted. This exception was affirmed in the March 2023 decision of the Supreme Court in the case of *Anyetei vs. Anyetei*. <sup>[38]</sup>

It is noteworthy that the cases highlighted above are not the only cases in which the Supreme Court has had occasion to make pronouncements on the meaning and scope of article 22 of the Constitution, which provides parameters to guide

Parliament in enacting the legislation on property rights of spouses. However, these cases thoroughly represent the general viewpoints expressed by the Court in the many cases that have come before it on this issue since the Constitution came into force.

### **An overstatement of article 22: questions of constitutionality?**

Rationalizing the decisions of the Supreme Court discussed above, two significant issues emerge, which raise questions as to whether the Supreme Court has properly interpreted and applied article 22 of the Constitution or not. The first is the Court’s conclusion that all properties acquired during the subsistence of a marriage constitute matrimonial property. The second is the presumption of an equal sharing between spouses of such property acquired during the subsistence of a marriage upon its dissolution unless the equities dictate otherwise.

From the decisions of the Supreme Court, a potentially constitutionally problematic answer was given to the question of what constitutes matrimonial property. The Court’s answer was that all properties acquired during the subsistence of a marriage are jointly acquired properties. This position seems to be out of harmony with the language adopted by the Constitution. It is an overstatement of the constitutional provision. The framers of the Constitution must have been deliberate with their usage of the word “jointly” in article 22(3)(b) as reproduced above. Hence, to assume that all properties acquired during the subsistence of a marriage constitute matrimonial property conflicts outright with one’s constitutionally guaranteed right to own property “either alone or in association with others.” <sup>[39]</sup>

The poignant question that arises is whether the fact of marriage terminates one’s right to choose to acquire properties “alone” in exercise of his or her constitutional right. Compellingly, the answer is in the negative. The right to own property alone and the joint acquisition of property with one’s spouse are not irreconcilable opposites, such that the fact of marriage necessarily debars one from acquiring property alone. As the Supreme Court itself recognized in *Fynn vs. Fynn and Osei* <sup>[40]</sup>, the mere fact of marriage does not take away one’s constitutionally guaranteed right to acquire property alone.

It is fair to say that the Supreme Court’s conclusion that all properties acquired during a marriage are matrimonial property is clearly not based on the language of the Constitution. It is rather a judicially engineered presumption for the treatment of property rights of spouses. So, in his concurring opinion in *Adjei vs. Adjei*, Pwamang JSC noted rightly that article 22(2)(b) clearly makes reference to properties “jointly” acquired during a marriage, and the impression must not be created that “it is the 1992 Constitution that says that property acquired during a marriage is joint property”. <sup>[41]</sup> On the contrary, that presumption was espoused in judicial decisions. Even after this admission, the Court still failed to redirect the flow of the law to bring it in tandem with the Constitution. Interestingly, Pwamang JSC who made this recognition, applauded the presumption as “commendable and progressive”. <sup>[42]</sup>

One would readily agree with the Court that the inaction of Parliament should not preclude the courts from respecting and giving effect to the property rights of spouses. Nevertheless, in so doing, the courts must be cautious in

order not to sidestep the very words of the Constitution guaranteeing those rights.

The second of the two-pronged malady that has afflicted the Supreme Court on the issue of property rights of spouses is the presumption of equal sharing. In sum, the Court's position is that in matters relating to the sharing of matrimonial property, a court must begin on the assumption that the properties are to be shared equally but would only adjust the percentages where it is convinced that the equal sharing is inequitable. Thus, the equitability or otherwise of the sharing is taken as a secondary consideration, to be activated only if the equality assumption becomes inequitable in any given case. Even so, it would appear from the words of Dotse JSC in the Court's 2012 decision in Mensah vs. Mensah that the Court seems to have a penchant for achieving equality at all costs in all instances. Here is what he says: "the paramount goal of the court would be to achieve equality."<sup>[43]</sup>

Examined within the normative paradigm and general tenor of the Constitution, this position is clearly not within the intendment of the Constitution. It must not be lost on us that in paragraph (a) of article 22(3), the Constitution uses the word "equal" in relation to access to properties jointly acquired during marriage. In clear and unmistakable contrast, the Constitution uses the word "equitably" as regards the sharing of jointly acquired matrimonial property. By using the word "equal" in paragraph (a), the framers of the Constitution must have been deliberate in their choice of words in paragraph (b) of the same article. Thus, respectfully, presuming an equal sharing ratio with the view of altering the ratios if the equities of the case allow is a juvenile position which is out of touch with the Constitution's thinking. The Court's application of the equality is equity principle therefore seems to have reversed the position of the law. The Constitution guarantees equitable sharing, not an equal sharing.

In that respect, it would be more in tune with the dictates of the Constitution to say that in some circumstances, equitable sharing may lead to equal sharing. Put differently, it is rather the law that the courts begin with an assumption of equitable sharing, while being ready to resort to an equal sharing if the equities of any given case so require.

### Deficiencies in the judicial opinions

Notwithstanding the potential constitutional digressions associated with the principles outlined by the Supreme Court for the distribution of properties jointly acquired during marriage, there is no denying that the Supreme Court has made remarkable progress, shaking off the prior constraints that defeated the property rights of spouses. Even so, the amplitude of judicial pronouncements and the principles espoused therein are quite limiting in their effect. First, there are untold difficulties in applying the rules espoused by the Court to polygamous marriages. Interestingly, all the cases that have come before the Supreme Court for determination have been monogamous marriages. The principles applicable to the distribution of properties acquired in a monogamous marriage may prove ineffectual in the case of a polygamous marriage. Indeed, the Supreme Court itself admitted this difficulty in the case of Mensah vs. Mensah, noting that "those complications can be tackled on a case-by-case basis in subsequent case law development, or by direct statutory intervention."<sup>[44]</sup>

Another difficulty is the application of the rules espoused by the Court to concubinous relationships. The Supreme Court has held in the case of Mintah vs. Ampeyin<sup>[45]</sup> that concubinage does not carry the incidents of marriage, so as to bring it under article 22 of the Constitution. Even though concubinage is not marriage strictly so called, the law should seek to ensure that persons who jointly acquire properties with their cohabiting partners are given a fair deal. In clear instances where there was no marriage to the knowledge of both cohabiting parties, it may be reasonable to exclude such parties from the incidents of marriage as far as the property rights of spouses are concerned. The mischief would arise where parties live together under the mistaken assumption that they are validly married, only for it to turn out that as per the law their marriage was invalid due to a failure to fulfil one of the essential prerequisites of a valid marriage, whether under the ordinance, customary law or the Mohammedan order.

One can understand the Supreme Court in its refusal to extend the incidents of marriage under article 22 of the Constitution to concubinage. The clear language of the Constitution, in choosing the word "spouses", ordinarily excludes concubines from its intendment. Hence, it is only Parliament that may take all these realities into account in the appropriate legislation regulating the property rights of spouses.

### The overreaching effect of the land act

While generally failing to comply with the constitutional mandate to enact legislation on the property rights of spouses, Parliament in enacting the Land Act, 2020 (Act 1036) introduced some provisions which have some bearing on the property rights of spouses. Section 38 of Act 1036 provides:

"(3) In a conveyance for valuable consideration of an interest in land that is jointly acquired during the marriage, the spouses shall be deemed to be parties to the conveyance, unless a contrary intention is expressed in the conveyance.

(4) Where contrary to subsection (3) a conveyance is made to only one spouse that spouse shall be presumed to be holding the land or interest in the land in trust for the spouses, unless a contrary intention is expressed in the conveyance."

Curiously, the Land Bill that was originally submitted to Parliament was not framed in these terms. Sub-clauses (3) and (4) of clause 38 of the Bill as originally submitted to Parliament read:

"(3). In a conveyance for valuable consideration of an interest in land to a spouse during 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 land in trust for the spouses, unless a contrary intention is expressed in the conveyance."

The net effect of the provisions as appeared in the Bill was to deprive an individual of the fundamental right to own property alone, since every conveyance for valuable consideration made "during marriage", without more, would come under that provision. This is patently incongruous with the intendment of the Constitution. Thankfully, some members of Parliament expressed their legitimate dissatisfaction with such a mechanical treatment of the property rights of spouses. In reaction to these provisions, Mr. J. Osei-Owusu, the First Deputy Speaker Parliament,

succinctly captured these concerns during the debate in Parliament in the following apposite words:

“Mr. Speaker, what it [the requirement in clauses (3) and (4)] suggests is that as soon as a person gets married, he is no longer by law, permitted to hold property in his or her personal name. That in my view is changing the norm; the norm is that the party may agree to hold properties together. Otherwise, each person holds the property he or she provides consideration for or applies for. ...Mr. Speaker, it appears that rather than focusing on what the Constitution says, we are trying to use every other means to create the property rights of spouses not in a way as expressed in the Constitution. ...I think if we hinge on article 22(2) to create this here, we are misinterpreting or misapplying the Constitution. ...Mr. Speaker, I think this one is smuggling a requirement in a manner which is not anticipated and we should not encourage it.”<sup>[46]</sup>

Ultimately, an amendment was proposed that the words “that is jointly acquired during the marriage” be inserted after the word “land” to bring it in consonance with the tenets of the Constitution, so that what was finally passed is what is found in the final section 38 of the Act.

Even so, there are still challenges with the present phraseology of section 38. It is undoubtedly on all fours with the Constitution to require that the conveyance of land or interest in land jointly acquired during a marriage be presumed to have the parties that jointly acquired the land or interest therein as parties to the conveyance. However, this well-intentioned provision is watered down by the concluding words of subsections (3) and (4), namely, “unless a contrary intention is expressed in the conveyance”. Is this provision implying that one of the spouses may solely validly convey land or an interest in land that is jointly acquired with another spouse merely by expressing an intention to that effect in the conveyance? That would simply defeat the purpose of the provision, which is aimed at protecting the property rights of spouses.

Similarly, the provision in section 97(4) which provides that “an application for registration of land or an interest in land jointly acquired for valuable consideration during marriage shall state the spouses in the marriage as the applicants unless a contrary intention is expressed in the conveyance” suffers the same defect. The concluding phrase essentially has the effect of empowering one spouse to register land or an interest thereof jointly acquired by spouses during the pendency of a marriage in his or her name solely, merely by expressing an intention to that effect. That also defeats the need to protect the property rights of spouses.

Another difficulty that characterizes section 97(4) is that it may pose numerous challenges in polygamous marriages. If a husband-applicant has five wives and is applying for the registration of his land or interest in land, must he list all the wives? There are obviously some difficulties associated with such a position if that is the law.

Section 47 of the Land Act, which also has some bearing on the property rights of spouses, is also problematic in its wording. It provides:

“Except as provided in subsections (3) and (4) of section 38, in the absence of a written agreement to the contrary by the spouses in a marriage, a 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 of the land, right or interest in the land,
- c) give away the land, right or interest in the land *inter vivos*, 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 no doubt a well-disposed idea to ensure that the property rights of spouses are not adversely affected by the actions of another spouse. However, a plethora of hidden difficulties arise in respect of this provision in the Land Act. In the first place, it appears that the chapeau of the provision, quite similar to what was previously provided in clause 38 of the Land Bill and which was fiercely resisted in Parliament, seems to unreasonably restrict the rights of spouses to acquire land or an interest in land individually. This is made evident in the use of the phrase “acquired for valuable consideration during marriage” while omitting the word “jointly”. This makes the provision so far reaching in its consequences as to include every land or interest in land acquired during the pendency of a marriage without regard to whether the said land or interest thereof was acquired jointly by the spouses.

Again, as regards polygamous marriages, difficulties arise where, for instance, the male spouse desires to transfer land or an interest in land that he acquired during the marriage and all the wives but one agree to the transfer. Does that disallow the male spouse from making such transfer of his acquired assets? Furthermore, where one of the wives acquires land or an interest in land alone, or even jointly with the husband, is the written consent of the other wives needed to effect a transfer of such land or interest in land? These are potential questions that arise, to which no answers are readily available from section 47 of the Land Act.

## Conclusion

This paper has demonstrated that despite the pride of place given to the property rights of spouses under the Constitution, Parliament has failed to comply with the constitutional directive to enact legislation regulating the property rights of spouses. The Supreme Court capitalized on the inaction of Parliament to develop some guidelines for the regulation of spousal property rights. Nevertheless, the problem has still not been solved satisfactorily by the Supreme Court due to the limiting effect of the principles espoused by the Court as well as the fact that principles digress from the language of the Constitution.

Additionally, the provisions in the Land Act cannot be a satisfactory solution to the unavoidably complicated problems associated with matrimonial property. The best the Act could do was to make a presumption in trust for spouses where one spouse seeks to conceal jointly acquired properties, or where one spouse seeks to make a transfer of land or an interest in land acquired during a marriage, among other things. Yet, the presumptions made by the Act are still fraught with challenges.

It appears that only legislation, as mandated by the Constitution, can take into account the nuances and complexities of the marital relationship in its regulation of the property rights of spouses. It is precisely why Parliament needs to act swiftly to ensure that legislation is enacted, as required by the Constitution, to deal adequately with the property rights of spouses.

## References

1. The Matrimonial Causes Act, 1971 (Act 367) did not do much. Two main sections of it (sections 20(1) and 21) touch directly on the property rights of spouses upon divorce. Section 20(1) did no more than merely give the courts the discretion to settle the proprietary rights of parties to a divorce on a just and equitable basis. Section 21 also empowers the court, where the court deems it equitable, to award a monetary or proprietary relief or both to a party.
2. *Quartey v Martey*. GLR 377, 1959.
3. Sarbah JM. *Fanti Customary Laws*. Thoemmes Press and Edition Synapse. 3rd edn, 2004.
4. *Clerk vs. Clerk*. GLR 353, 1968.
5. *Quartey vs. Martey*. GLR 377, 1959, 380.
6. Mensa-Bonsu HJAN. *Ensuring Equitable Access to Marital Property When the Holy Estate Becomes an Unholy Ex-State: Will the Legislature Walk the Road Paved by the Courts'*. University of Ghana Law Journal, 2011-2012:25:99-151:100.
7. See *Clerk vs. Clerk*. GLR 353, *Odoteye vs. Odotey*. 1 GLR 6, 1984-1986.
8. Fiadjoe AA. *Clerk vs. Clerk*. Review of Ghana Law, 1969:1(1):66.
9. *Abebreseh vs. Kaah, et al.* 2 GLR 46, 1976.
10. *Yeboah vs. Yeboah*. 2 GLR 114, 1974.
11. *Achiampong vs. Achiampong*. GLR 1017; *Anang vs. Tagoe*. [1989-1990] 2 GLR 8; *Mensah vs. Mensah* SCGLR 350, 1998-1999.
12. Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana. Paragraph 163, 1991. Available: <http://ir.parliament.gh/handle/123456789/1546>. (Accessed: 5 May 2023).
13. Constitution of Ghana, Article 13(a), 1969.
14. Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, Paragraph 166, 1991. Available: <http://ir.parliament.gh/handle/123456789/1546>. (Accessed: 5 May 2023).
15. Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana. Paragraph 166, 1991. Available: <http://ir.parliament.gh/handle/123456789/1546>. (Accessed: 5 May 2023).
16. Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana. Paragraph 166, 1991. Available: <http://ir.parliament.gh/handle/123456789/1546>. (Accessed: 5 May 2023).
17. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), which in Article 7 enjoins member states to enact appropriate legislation to regulate the property rights of spouses upon divorce.
18. Constitution of Ghana. Article 166(1), 1992.
19. Constitution of Ghana. Article 216, 1992.
20. Constitution of Ghana. Article 231, 1992.
21. Constitution of Ghana, Article 269(1), 1992.
22. Constitution of Ghana, Paragraph 6 of the Transitional Provisions, 1992.
23. Woodman G. Ghana Reforms the Law of Intestate Succession. *Journal of African Law*, 1985:29:2:118-128:127.
24. Constitution of Ghana. Article 11, 1992.
25. Report of the Constitution Review Commission: From a Political to a Developmental Document, 2011, 681.
26. *Quartson vs Quartson*, DLCA 4581, 2010.
27. *Quartson vs. Quartson*. 2 SCGLR 1077, 2012, 1089.
28. *Mensah vs. Mensah*. SCGLR 350, 1998-1999.
29. *Mensah vs. Mensah*. SCGLR 350, 1998-1999.
30. *Mensah vs. Mensah*. SCGLR 350, 1998-1999, 359.
31. *Boafo vs. Boafo*. SCGLR 705, 2005-2006.
32. *Boafo vs. Boafo*. SCGLR 705, 2005-2006, 716.
33. *Mensah vs. Mensah*. 1 SCGLR 391, 2012.
34. *Mensah vs. Mensah*. 1 SCGLR 391, 2012, 408.
35. *Mensah vs. Mensah*. 1 SCGLR 391, 2012, 415.
36. *Arthur (No. 1) v Arthur (No. 1)*. 1 SCGLR 543, 2013-2014.
37. *Adjei vs. Adjei* Civil Appeal No. J4/06/2021 (Unreported).
38. *Anyetei vs Anyetei* Civil Appeal No. J4/67/2021 dated 2/03/2023 (Unreported).
39. Constitution of Ghana, Article 18(1), 1992.
40. *Fynn vs. Fynn*. 1 SCGLR 727, 2013-2014.
41. *Peter Adjei vs. Margaret Adjei*. DLSC10156, 2021, 19.
42. *Peter Adjei vs. Margaret Adjei*. DLSC10156, 2021, 18.
43. *Mensah vs. Mensah*. 1 SCGLR 391, 2012, 408.
44. *Mensah vs. Mensah*. 1 SCGLR 391, 2012, 413.
45. *Mintah vs. Ampeyin*. 2 SCGLR 1277, 2015-2016.
46. Parliamentary Debates: Official Report of Tuesday, 2020, 012-016.