IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD. 2025

CORAM: LOVELACE-JOHNSON (MS) JSC PRESIDING

PROF. MENSA-BONSU (MRS) JSC

KULENDI JSC

ASIEDU JSC

GAEWU JSC

CIVIL APPEAL
NO: J4/17/2025

9TH JULY, 2025

MRS. ABENA POKUA …. PETITIONER/RESPONDENT/APPELLANT

VRS

YAW KWAKYE …. RESPONDENT/APPELLANT/RESPONDENT

JUDGMENT

ASIEDU JSC.

[1.0]. My lords, the Petitioner/Respondent/Appellant, Abena Pokua, (hereafter referred to as the Petitioner), celebrated a customary law marriage with the Respondent/Appellant/Respondent, Yaw Kwakye, (hereafter referred to as the Respondent) in 1998. At the time of the marriage, the Respondent had other wives and children to the knowledge of the Petitioner. The couple had three children. Alleging

that the marriage had broken down beyond reconciliation, the Petitioner filed the instant petition at the High Court for a dissolution of the marriage. The Petitioner also prayed the High Court for "an order for all matrimonial properties to be shared". At paragraph 14 of the petition which can be found at page 2 of volume 1 of the record of appeal (ROA), the Petitioner pleaded that:

> "14 The parties acquired the following properties in the course of the marriage:
> a) Self-contained House, Ajara Jn. Kade
> b) House, near CAC Church, Kade
> c) Commercial House, Prankese
> d) Ten (10) acre oil palm plantation, Prankese
> e) Five (5) acre oil palm plantation Prankese
> f) Four-acre oil palm Plantation, Prankese
> g) Two (2) rented market stores, Kade
> h) One rented shop, Kade
> i) Birim Court Restaurant (rented)
> j) Commercial house of two shops at Boadua
> k) Dabi Asem Hotel, Akrantebesa, Konongo
> l) Self-contained House, Dr Wood, Ekooso, Konongo
> m) Ten (10) plots of land at opposite Juaso cemetery Road
> n) Three (3) excavators
> o) Two (2) Landcruiser Prado
> p) Gold Office, Konongo Odumase
> q) Storey building, Tipper Jn, Bawjiase Road, Kasoa
> r) One (1) plot of land Tipper Jn, Bawjiase Road, Kasoa
> s) Six (6) plots of land, Kweikuma
> t) Two (20 stores, Kasoa market
> u) Uncompleted House, Topreman

v) Uncompleted House, Akyem Akyease"

In his Answer, the Respondent denied virtually all the averments in paragraph 14 of the petition and prayed, by way of property settlement, at paragraph 42 of the Answer, that "the self-contained house at Ajara, Kade be given to the Petitioner. The marriage was eventually dissolved by the High Court.

[2.0]. JUDGMENT OF THE HIGH COURT:

My lords, after hearing the matter, the trial Judge, found in his judgment, delivered on the 9th day of May 2022, at page 250 of the record of appeal, that the following properties were acquired during the pendency of the marriage between the parties: Dabi Asem Hotel at Akrantebesa, Konongo; House located at Dr. Wood, Ekooso, Konongo; House situate at Topreman near Akyem-Kade; Storey building located at Tipper Junction, Bawjiase road, Kasoa; One Excavator machine; Uncompleted House at Akyem-Achiase; Six plots of land Kweikumah, Kasoa and One plot of land at Tipper Junction, Bawjiase road, Kasoa. Consequently, the trial Judge ruled, in respect of the properties that: "The Dabi Asem Hotel situate at Akrantebesa, Konongo is to be divided into two halves with each party having one-half. However, each party is at liberty to buy out the other. The uncompleted house at Akyem Achiase and the Storey building situate at Tipper Junction, Bawjiase road, Kasoa be handed over to the Petitioner together for her to live in with the children of the marriage with a push off sum of GH₵150,000.00.

The Respondent is to be responsible for the education and health needs of the two children of the marriage while the Respondent is to be responsible for the feeding, clothing and accommodation of the children"

[3.0]. JUDGMENT OF THE COURT OF APPEAL:

Aggrieved by the judgment of the High Court, the Respondent lodged an appeal with the Court of Appeal, which, on the 25th July 2024, found that the parties engaged in a polygamous marriage and that they engaged in separate businesses and kept the proceeds from their businesses to themselves. By virtue of these facts, the Court of Appeal reasoned that "there was an implied agreement that properties acquired by them shall be owned individually as it is their guaranteed right under article 18(1) of the Constitution". Flowing from the above, the learned Justices of the Court of Appeal held that the presumption that properties acquired during marriage was joint property, was effectively rebutted by the Respondent herein and that, therefore, there was the need for the Court to determine whether or not the Appellant herein made monetary or non-monetary contribution to the acquisition of the properties which the High Court found to have been jointly acquired during the marriage.

[3.1]. In respect of the Dabi Asem Hotel at Konongo, the Court of Appeal found that the Appellant made no contribution to its acquisition. The Court found, with regard to the House at Dr. Wood, Ekooso, Konongo, that the Respondent acquired it for his wife Rukaya Abdil and that the Appellant could not even tell when and how that house was acquired. The Court also questioned the basis of the trial Court's rejection of the evidence in respect of the House at Topreman, that because a brother of the Respondent gave evidence to corroborate the testimony of the Respondent that the said House was gifted by his deceased father to them, the evidence of the brother could not be relied upon because he stands to gain from the House. The Court of Appeal found that the Topreman House was not jointly acquired by the Petitioner and the Respondent herein. With regards to the Storey building at Tipper Junction, Bawjiase Road, Kasoa, the six plots of land at Kweikuma, Kasoa, and the one plot of land at Tipper Junction, Bawjiase Road, Kasoa, the Court of Appeal found that the evidence adduced by the Respondent successfully rebutted any claim to joint acquisition by the Appellant herein and that the evidence given by the Appellant was a bare assertion without any concrete proof.

The Court also found, with respect to the Excavators, that the Appellant could not prove that these were jointly acquired by the parties herein and that the Respondent was able to produce evidence of receipts to show that two of the Excavators were rented by the Respondent herein from A. A. Minerals Limited for his gold business. The Court of Appeal found that the Appellant produced no evidence to support her claim of joint acquisition of the Excavators. The Court reasoned that, since the receipts tendered by the Respondent showed that at least two of the Excavators were rented, the claim of the Appellant that the three Excavators were purchased should have been rejected by the trial Court, especially, when the Petitioner stated that she was present when the Excavators were purchased, given that she had the opportunity to invite representatives of the vendors to give corroborative evidence in support of her claim.

[3.2]. The Court of Appeal found the following facts to have been successfully proved: (i) that the Respondent herein renovated the family house of the Petitioner in her hometown in order that the Petitioner will get a place to sleep when she visits her hometown, (ii) that the Respondent gifted the Ajara House with a store therein to the Petitioner, (iii) that the Respondent built a house (uncompleted) at Achiase for the Petitioner, (iv) that the Respondent gave a vehicle to the Petitioner, (v) that the Respondent also gave GH₵100,000.00 to buy trade in her gold business, (vi) that the Respondent also gave a store at the Kade market together with stock of goods worth GH₵200,000.00 to the Petitioner. The Court of Appeal considered the above as sufficient settlement of property on the Petitioner. Consequently, the Court of Appeal reduced the financial settlement of GH₵150,000.00 made in favour of the Petitioner by the High Court to GH₵100,000.00. The Court of Appeal also affirmed the decision of the trial High Court that the Respondent be responsible for the educational and health expenses of the children of the marriage whilst the Petitioner takes care of the feeding, clothing and accommodation of the children. The Court of Appeal, therefore, substantially, set aside the judgment of the High Court.

[4.0]. APPEAL BEFORE THE SUPREME COURT:

The Petitioner, through her counsel, filed the instant appeal on the 6th August 2024, before this Court for an order to set aside the judgment of the Court of Appeal and a further order restoring the judgment of the High Court.

[4.1]. GROUNDS OF APPEAL:

Before this Court, the Petitioner/Appellant has urged the following grounds of appeal:

a. The Judgment is against the weight of evidence.

b. The Court of Appeal erred in law when they allowed ground (c) of the Respondent/Appellant/Respondent's Ground of Appeal, when he had abandoned the said ground in his Written Submissions.

PARTICULARS OF ERROR OF LAW

i. The Respondent/Appellant/Respondent stating ground (c) as one of the grounds or basis upon which he is challenging the judgment of the learned Trial Judge.

ii. The said ground (c) of the Grounds of Appeal bothering on the hotel at Konongo, Ashanti Region and residential house at Kasoa.

iii. The Respondent/Appellant/Respondent however woefully failing to argue the said ground (c) of his ground of Appeal (in his written Submissions).

iv. The said ground (c) of the Respondent/Appellant/Respondent therefore deemed to have been effectively abandoned.

v. The Court of Appeal as such not entitled to vacate the order made by the learned trial Judge in respect of the properties listed in the said ground (c) of the Grounds of Appeal.

vi. The Court of Appeal however under the guise of the omnibus Ground of Appeal (that judgment is against the weight of evidence), allowing the said ground (c) of the Grounds of Appeal.

c. The Court of Appeal erred in their review of the award of GH₵150,000.00 as financial settlement by the learned trial Judge to GH₵100,000.00.

d. The Court of Appeal erred in law when they failed to determine the Appeal filed by the Respondent/Appellant/Respondent on the basis of his Grounds of Appeal and this has occasioned substantial miscarriage of justice to the Petitioner/Respondent/Appellant.

PARTICULARS OF THE ERROR OF LAW

i. Rule 8 of C.I. 19 requiring the Respondent/Appellant/Respondent to file and specify specific Grounds on which his appeal was based and to be determined.

ii. The Respondent/Appellant/Respondent having filed his said Grounds of Appeal which formed the basis of the challenge of the judgment of the learned trial Judge.

iii. The Respondent/Appellant/Respondent having duly filed his Written Submissions based on his said Grounds of Appeal.

iv. The Court of Appeal therefore obliged to examine the appeal based on the Grounds of appeal and the Written Submissions in support of the Grounds of Appeal.

v. The Court of Appeal however in this case not basing its judgment on the Grounds of Appeal but on the basis of issues which it had suo motu raised outside of the Grounds of Appeal.

vi. The Court of Appeal thus delivering a judgment as if they were the trial Court thereby ignoring the submissions of the parties and their Counsel.

vii. The said decision by [the] Court of Appeal thereby occasioning very grave and substantial miscarriage of justice to the Petitioner/Respondent/Appellant.

e. The Court of Appeal erred when it failed to rule on the objection raised against ground 'B' of the Grounds of Appeal filed by the Respondent/Appellant/Respondent and this has also occasioned substantial miscarriage of justice to the Petitioner/Respondent/Appellant.

f. The conclusion by the Court of Appeal that during the pendency of the marriage the parties intended to run their respective businesses and independently acquire their respective properties from each other is not borne out by the record.

g. Additional Grounds of Appeal would be filed upon the receipt of the Record of Appeal.

[4.2]. THE LAW ON DISTRIBUTION OF PROPERTIES AFTER DIVORCE:

Before we discuss the merits or otherwise of the grounds of appeal, it is necessary for this Court to discuss and put into perspective the recent developments on the law governing the distribution of properties after divorce. My lords, on the 22nd December 1986, the High Court, in Mensah vs. Mensah, declared the respondent wife the sole owner of house number M9 South Effiakuma Estate, Takoradi. Dissatisfied with that judgment, the petitioner husband appealed to the Court of Appeal. After the hearing, the Court of Appeal held that "Since on the evidence, there was a clear intention on the part of the parties to purchase the house jointly for themselves and their children, that intention, coupled with the contributions the petitioner had made towards the acquisition of the house, made the parties joint owners of the property. And since it was very difficult to determine how much each of them had contributed, they would be held to have contributed equally because equality is equity". In coming to this conclusion, the Court of Appeal found from the evidence on record that the main house was acquired with contributions from the couple, but that the extension to the house was solely funded by the wife. So, the Court of Appeal declared that the main house was jointly owned by the couple whiles the extension belong to the wife alone. See Mensah vs. Mensah [1993-94] 1 GLR 111, for the decision of the Court of Appeal. The husband petitioner, still not satisfied with the judgment of the Court of Appeal, lodged

a further appeal with the Supreme Court. After hearing the appeal, the Supreme Court held, as reported in Mensah vs. Mensah [1997-1998] 2 GLR 193 that:

> "It was clearly established from the evidence on record not only that H contributed towards the cost of the extension works but also the parties acquired the extensions for their joint use. Hence, in the absence of any evidence of a prior agreement between H and W that the extensions to the house were to belong solely to one party, the principle that property jointly acquired during marriage became joint property applied; and such property was to be shared equally on divorce as the ordinary incidents of commerce had no application in marital relations between husband and wife who jointly acquire property during marriage. This principle of equitable sharing of joint property on divorce had been given statutory expression in the provision of section 20 (1) of the Matrimonial Causes Act, 1971 (Act 367) which empowered the court in a divorce case to settle proprietary rights of the parties on "joint and equitable basis;" and was also given constitutional effect and force in article 22 (3) (b) of the Constitution, 1992 which provided, inter alia, that assets which were jointly acquired during marriage should be distributed equitably between the spouses upon the dissolution of the marriage. Accordingly, the principle of equitable sharing of joint property which was applied by the Court of Appeal to the main house in the instant case was to be applied also to the extension works and the parties were consequently entitled to equal share of the whole house on the dissolution of the marriage".

It is very clear from the holding of the Court that the Court found as a fact that both husband and wife contributed to the acquisition of the house together with the extension made to the house and that this was done during the period that they were married. From the evidence before the Court, it was established that the contribution

by the parties was pecuniary and that the intention behind the acquisition of the house was to benefit the husband and the wife together. From the above, the Court recognised pecuniary contribution as a basis for a share, after divorce, in property acquired during marriage. To the extent that none of the parties could state with specificity the extent of his or her contribution, the Court decreed equal sharing of the property jointly acquired, after divorce.

[4.3]. My lords, the case of Boafo vs. Boafo [2005-2006] SCGLR 705, was decided by this Court on the 9th March 2005. It is a case involving a couple married under the Marriage Ordinance who sought dissolution of the marriage and the distribution of property after the marriage had broken down beyond reconciliation. The Court held, with respect to the principles regulating the distribution of property after the dissolution of the marriage, that:

> *"The principle of equitable sharing of property jointly acquired by a married couple would ordinarily entail the equality principle, unless one spouse could prove separate proprietorship or agreement or a different proportion of ownership"*
> *"The provision in article 22(3)(b) of the 1992 Constitution and section 20(1) of the Matrimonial Causes Act, 1971 Act 367, only made provision for the equitable distribution of property jointly acquired without laying down the proportions in which such property might be distributed. The reason for that omission was that the question of what was "equitable", in essence what was just, reasonable and accorded with common sense and fair play, was a pure question of fact, dependent purely on the particular circumstances of each case. The proportions would, therefore, be fixed in accordance with the equities of any given case".*

At page 716 of the report, the Court stated, among others, that:

"Where there is a substantial contribution by both spouses, the respective shares of the spouses will not be delineated proportionally like a share holding 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"

Here again, the principle of equitable or equal sharing of properties acquired jointly during marriage was emphasised by the Court. And, as long as the parties contributed substantially to the acquisition of such properties during the marriage, the Court will share the properties equally between them upon the dissolution of the marriage. However, if one spouse is able to lead evidence to prove "separate proprietorship or agreement or a different proportion of ownership", the Court will respect that proprietorship or agreement or the different proportion of ownership. The decision in this case is not substantially different from the decision of the Court in Mensah vs. Mensah (supra). Indeed, the Court specifically endorsed the decision in Mensah vs. Mensah (supra).

[4.4]. In the second Mensah vs. Mensah case reported in [2012] 1 SCGLR 391, which was decided in February 2012, this Court expressed the view that:

"The provisions in article 22(3)(a) and (b) of the 1992 Constitution had espoused the principle of having equal access to property jointly acquired during marriage and that of equitable distribution of such property upon divorce. Consequently, the issue of proportions is to be fixed in accordance with equities of each case. Therefore, even though Boafo v. Boafo affirmed the equality is equity principle as used in Mensah v. Mensah, it gave further meaning to section 20(1) of Act 367 and article 22(3)(b) of the 1992 Constitution. Consequently, the issue of proportions is to be fixed in accordance with the equities of each case. The court duly recognized the fact that an equal (half and half)

distribution, though usually a suitable solution to correct imbalances in property rights against women, may not necessarily lead to a just and equitable distribution as the Constitution and Act 367 envisage. The court made room for some flexibility in the application of the equality is equity principle by favouring a case by case approach as opposed to a wholesale application of the principle".

Clearly, the emphasis has been on couples having equal access to properties jointly acquired during marriage and on the equitable distribution of jointly acquired properties after the dissolution of the marriage. Indeed, the concept of equitable distribution of properties jointly acquired during marriage does not mean equal distribution of such properties. It is only when the couples are unable to identify the ratio of their respective contributions to the acquisition of the joint property that the rules of equity presume that they contributed equally to the acquisition of the properties and therefore the concept of equal sharing or distribution must be invoked to share the properties in the interest of equity and justice. This implies that once a couple could adduce evidence in respect of their respective contributions to the acquisition of the jointly acquired properties, it will be inequitable for a court of law to order equal distribution in spite of clear evidence to the contrary.

[4.5]. This Court was again confronted with the distribution of properties between the Quartsons in October 2012 reported as Quartson vs. Quartson [2012] 2 SCGLR 1077. In coming to its judgment, the Court held that:

"It was well established that where a spouse had made substantial financial contribution to the acquisition of property during marriage, pursuant to an agreement or inferred intention by the couple, the property acquired should be jointly owned. What would amount to substantial contribution by a spouse was usually gleaned from the facts of each case; and the courts would decide, in the exercise of their discretion and on the facts

of each case, in which proportion the joint property would be shared, without prejudice to the fact that there might not have been any hard evidence of the exact amount of financial contribution made or in which mathematical proportions the contributions had been made".

The ratio espoused in this case is not different from the ratio in the earlier cases like Mensah vs. Mensah and Boafo vs. Boafo. However, at page 1090 of the report, the Court, speaking through Ansah JSC, made an interesting observation with respect to access to property acquired during marriage to the effect that:

"The Supreme Court's previous decision in Mensah vs Mensah [2012] 1 SCGLR 391 is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case. The decision, as we see it, should be applied on a case by case basis, with the view to achieving equality in the sharing of marital property. Consequently, the facts of each case would determine the extent to which the decision in Mensah vs Mensah applies".

Indeed, the contest from the decisions of the Courts have been between the use of the words 'equity' or 'equitably' as used in article 22 of the Constitution and 'equality'. In Quartson vs Quartson, emphasis was, once again, brought to bear on substantial contribution towards the acquisition of property during marriage. Indeed, it is the fact of contribution by the couples that makes the properties acquired joint property. Thus, as used in article 22 of the Constitution, without a spouse proving that he or she had made contribution towards the acquisition of property during marriage, any such property cannot bear the stamp of jointly acquired property in order that automatic access may be had thereto. The problem which has confronted the Court has been the defined content of the contribution. What activity shall be recognised as amounting to

contribution to enable a spouse equal access to property acquired during marriage? Should the fact of the existence of the marriage per se be recognised as amounting to contribution? In Mensah vs Mensah [2012], the Court recognised the performance of household chores as amounting to contribution so as to qualify a spouse to an equitable share in the property acquired by the other spouse during marriage. In the Quartson case, the Court recognised the assistance of a spouse towards the construction of the House as contribution towards the acquisition which qualified her for a share, though not on an equal basis, of the house after the dissolution of the marriage. It must be stated in no uncertain terms that the Court in the Quartson case did not consider the effect of article 18(1) of the Constitution which gives right to a person to acquire property either alone or in partnership with other persons.

[4.6]. The Court stated in Arthur (No.1) vs. Arthur (No.1) [2013-2014]1 SCGLR 543 that:

> *"The Supreme Court in Mensah v Mensah had interpreted the provision in article 22(3) (b) of the 1992 Constitution liberally and purposively to mean that joint acquisition of assets was not limited to property that had been acquired as joint or as common tenants; but rather any property acquired by the spouses during the course of their marriage was to be presumed to be jointly acquired. In other words, property acquired by the spouses during marriage was presumed to be marital property. Thus, marital property was to be understood as property acquired by the spouses during the marriage, irrespective of whether the other spouse had made a contribution to its acquisition. The Supreme Court would affirm that concept of marital property. However, consideration of cases and statutes in the United States would suggest that property acquired by gift during the marriage should be excluded from the concept of marital property. That exception seemed sound in principle. Indeed, other exceptions might need to be carved out to the broad definition of marital property. Mensah v Mensah [2012] 1 SCGLR 391 at 401 affirmed.*

In this very case, the Supreme Court expanded the meaning of the term 'jointly acquired property' or 'joint acquisition of assets'. Thus, in the words of the Court, 'any property acquired by the spouses during the course of their marriage was to be presumed to be jointly acquired. In other words, property acquired by the spouses during marriage was presumed to be 'marital property'. Again, in coming to this conclusion, the Court did not consider the effect of article 18(1) of the Constitution, 1992 which states that:

> *"18. Protection of privacy of home and other property*
> *(1) Every person has the right to own property either alone or in association with others".*

In my humble opinion, to state that every property acquired during marriage is presumed to be marital property is to deprive couples of their constitutional right to acquire property either alone or in association with others as guaranteed by article 18(1) of the Constitution, 1992. As a Court, we must not be seen to deprive Ghanaians or anybody resident within our borders of their right to independently acquire and enjoy properties just because they decided to marry. Marriage must not be an instrument of deprivation or a burden but must be an institution that human beings must enjoy. The Court must not trample upon constitutional rights in its quest to ensure equity and justice in the distribution of property acquired during marriage. The definition given by the Court to 'marital property' in Arthur (No.1) vs. Arthur (No.1) has the potential to provoke injustice. The decision does not conform to the doctrine of harmonious interpretation of statutes as espoused in National Media Commission vs. Attorney-General [2000] SCGLR 1 where this Court stated that:

> *"In interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form rational, internally consistent frame work. And because the frame work has a*

purpose, the parts are also to work dynamically, each workings accomplishing the intended goal."

At any rate, article 22(3)(b) which the Court interpreted in that case does not say what has been attributed to it. Marriage does not take away from any couple the right bestowed under article 18(1) of the Constitution.

[4.7]. It is, therefore, not surprising that in delivering the Judgment in Fynn vs. Fynn & Osei [2013-2014]1 SCGLR 727, the Court did not even consider the case of Arthur (No.1) vs. Arthur (No.1) (supra). Nonetheless, the Court held, among others, that:

"During the existence of the marriage union, it would be most desirable for the couple to pool their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular. However, there could be situations where within the union, parties might still acquire properties in their individual capacities as, indeed, was 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 individually-acquired property by way of sale, for example, as happened in this instant case … In the instant case it was not proven that the plaintiff/appellant, the wife of the first defendant/respondent, had made some direct financial contribution to the acquisition of the disputed property; nor was it proven that the second defendant, the purchaser of the distributed property, had known that the property had been jointly acquired by the couple as family property"

Apart from the fact that this case upholds the right given under article 18(1) for a person to individually acquire and hold property for his or her sole benefit or for the benefit of others and either alone or in association with other persons, this case also re-iterates that legal position of the need for a spouse to show that he or she contributed

to the acquisition of property in order to cause the property to be marital property. This is in consonance with the provisions in article 22 which states that:

> *"22. Property rights of spouses*
>
> *(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.*
>
> *(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.*
>
> *(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article,*
>
> *(a) spouses shall have equal access to property jointly acquired during marriage;*
>
> *(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage".*

[4.8]. In re-affirming the above position of the law, this Court in Adjei vs Adjei [2021-2022] 1 SCGLR 431 held that:

> *"(a) The combined effect of the decisions by the Supreme Court regarding the distribution of jointly acquired properties of marriage upon divorce was that, any property acquired during the subsistence of a marriage was presumed to have been jointly acquired by the couple, and upon divorce was to be shared between them on the equality is equity principle. That presumption of joint acquisition was however rebuttable and where a spouse was able to lead evidence in rebuttal during trial, the presumption theory of joint acquisition collapsed.*
>
> *(b) The Court of Appeal's holding was sound reasoning, relying on the Arthur (No 1) case on the existence of other exceptions from the general presumptive joint ownership principle that, where a spouse took an individual loan to develop their self-acquired plot during the subsistence of a marriage the property should not be considered family*

property jointly acquired until the loan had been fully paid whilst the marriage subsisted. It fell within the exceptions envisaged under the Arthur (No 1) case. Arthur (No 1) v Arthur (No 1) [2013-2914] 1 SCGLR 543 and Fynn v Fynn & Osei [2013-2014] 1 SCGLR 727 applied.

Thus, in the Fynn case (supra), this Court distinguished the right of an individual to acquire property exclusively during the subsistence of a marriage, from its earlier decisions in Mensah and Quartson cases (supra). This Court held that there are situations where, within the marital union, parties may acquire property in their individual capacities as envisaged under article 18 of the Constitution, 1992 which provides under clause (1) as follows: 'Every person has the right to own property either alone or in association with others.'

Again, in the Arthur case (supra), this Court affirmed the position that properties acquired by gift or through succession cannot be described as jointly acquired marital properties. If a spouse acquires property by gift from a donor or through succession (either intestate or testate), the other spouse who was not a beneficiary in any way under any of the circumstances, cannot be described as a joint or part owner just because the donation, bequest or devise was made during the subsistence of the marriage between the donee or successor and his or her partner. Such property cannot be termed jointly acquired marital property since it was not acquired through the sweat of any of the spouses with the support of the other, either financially or in kind or by the provision of marital services. In situations like this, there is no correlation between the acquisitions of the said property by any of those means, i.e. either by gift or succession, and the proper keeping of the home by the other spouse whose duty it is to do so. The Court went further to suggest that there might be other exceptions that need to be carved out outside the broad definition of marital property. It was in line with the reasoning of this Court in

the Arthur and Fynn cases (supra) that the Court of Appeal appeared to have buttressed its decision in the instant case on appeal before us".

[4.9]. The decision in Adjei vs Adjei (supra) has recently been affirmed in the unreported case of Dr. Gilbert Anyetei (substituted by Emmanuel Tamatey Opai-Tetteh) vs. Mrs. Sussana Anyetei. Civil Appeal No. J4/67/2021 delivered on 2nd March, 2023. In that case, the Supreme Court held that:

"Under clause 3 of article 22…the framers of the Constitution chose to use the word 'equal' in relation to access to property jointly acquired during the marriage but they used the word 'equitably' in respect of distribution of property jointly acquired upon dissolution of the marriage. Where the text of the Constitution is plain and unambiguous like clause 3 of article 22 is, the principles of constitutional interpretation do not permit a judge to replace the language with her opinion of what she would have said if she was the one making the Constitution."

"So, simply put, what the Court said above in Mensah v Mensah (No.2) is that, in some circumstances, equitable distribution may end up like 60-40 or some other proportion. Stated the other way round, 50-50 distribution in some circumstances may be equitable but in other circumstances, it may be inequitable. A distribution of property upon dissolution of marriage that is inequitable would violate the clear provisions of clause 3(b) of article 22. Therefore, the proportions of distribution shall be on a case by case basis.

This plain provision of article 22 of the Constitution which was clarified by the statement quoted from Mensah v Mensah (No. 2) (supra) has nevertheless been subjected to unending litigation, largely because lawyers of some litigants, (so far, mostly those for women) usually submit and urge our Courts to replace the word 'equitably' used by the framers of the Constitution in clause 3(b) of article 22 with the word 'equally', which is not used by the text of the Constitution."

Further, in Electroland Ghana Limited vs. Madam Paulina Adomako and Another. Civil Appeal No. J4/47/2023 (unreported), delivered on 28th February, 2024, this Court pointed out that:

> *"Counsel for the claimant makes reference to Article 22(3)(a) of the 1992 Constitution which states as follows:*
> *'spouses shall have equal access to property jointly acquired during marriage.'*
> *The emphasis here is 'property jointly acquired'. Seeing that Article 18 entitles each person to own property alone or in association with others, it goes without saying that a spouse can solely acquire a property within marriage."*

[5.0]. From the foregoing, the position of the law with respect to the distribution of property after the dissolution of marriage can be summarized as follows:

(a). Where the couple make contribution and together acquire property during the pendency of the marriage, the property shall be recognised as jointly acquired property with the incidence that each spouse shall have equal access to the property so acquired during the marriage.

(b). After the dissolution of the marriage, any property jointly acquired shall be shared equally between the couple if they are unable to state with any specificity the proportion of their respective contribution to the acquisition of the property.

(c). However, where any of the couple is able to prove with cogent evidence his or her proportionate contribution to the acquisition of the said property it will be equitable for the property to be shared in accordance with the proportionate contribution.

(d). Parties to marriage in Ghana reserve the right to individually or in association with others acquire and hold property to the exclusion of their spouses. In any such case, a spouse should be able to adduce evidence to prove that he agreed with the other spouse that a particular property was acquired for his or her exclusive benefit. In the absence of direct agreement, a spouse who claims the exclusive acquisition and use of any particular property should be able to adduce evidence of other surrounding circumstances which show that that property was acquired for his exclusive use or benefit.

[5.1]. It must be placed on record that the above statement of the law applies seamlessly to monogamous marriages where the marriage is between one wife and one husband. The position may be different with respect to a factually polygamous marriage recognised by the customary laws and practices of the different tribes in this country which are part of our laws as stated in article 11 of the Constitution, 1992. The parties to such polygamous marriage may be a man with several wives. Where this is the case, it will surely be inequitable for one wife to insist on taking a particular percentage of property acquired during the subsistence of the marriage unless she could show by cogent evidence the proportion of her contribution to the acquisition of a particular property. In any such instance, the courts are expected to use their discretion to ensure that the wife who is divorcing is given a reasonable, just and equitable share of the property in such a way as not to jeopardise the overall interest of both the husband and the other wives of the marriage.

[5.2]. We have considered the provisions in section 38 (3) and (4) of the Land Act, 2020, Act 1036 which states that:

"(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".

We are of the view that section 38(3) and (4) of Act 1036 does not conflict with the right of couples guaranteed under article 18(1) of the Constitution to independently acquire and hold property for their individual benefit.

[5.3]. At any rate, notwithstanding the intentions behind the acquisition of any property during marriage, this Court has power, in appropriate cases, to exercise its discretion given under section 20 of the Matrimonial Causes Act, 1971, Act 367 which provides that:

"20. 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".

The Court's exercise of its discretionary power under this section is independent of the intentions behind the acquisition of any property by any spouse. Thus, guided by the principles of equity and justice, the Court may order any property, movable or immovable, irrespective of the intentions behind its acquisition, to be settled on either spouse, as settlement of property rights or in lieu thereof or as part of financial provision that the Court thinks just and equitable.

[6.0]. CONSIDERATION OF THE APPEAL:

We now turn to consider the appeal before us. We propose to discuss ground (b) of the grounds of appeal first. Ground (b) states that "the Court of Appeal erred in law when they allowed ground (c) of the Respondent/Appellant/Respondent's ground of appeal when he had abandoned the said ground in his Written Submissions".

My lords, the said ground (c) forms part of the grounds of appeal in the Notice of Appeal which the Respondent filed before the Court of Appeal, Kumasi, after the judgment of the trial High Court. The said notice of appeal can be found on pages 273 to 276 of volume 1 of the record of appeal. Ground (c) of the said notice of appeal states that: *"The trial High Court Judge erred when he held that the Hotel at Konongo, Ashanti Region and the residential House at Kasoa, Central Region, which were Appellant's [Respondent's herein] personal properties were jointly acquired by the parties".*

The Petitioner's criticism as formulated in ground (b) of her Notice of Appeal before this Court, is that the Court of Appeal erred in its judgment by granting or allowing ground (c) of the notice of appeal filed by the Respondent before the Court of Appeal even though the Respondent herein failed to argue the said ground (c) in his Written Submission filed before the Court of Appeal. According to the Petitioner, the failure by the Respondent to proffer arguments in his Written Submission before the Court of Appeal constitutes a breach of rule 20 of the Court of Appeal Rules, 1997, CI.19, and the subsequent judgment of the Court of Appeal in allowing ground (c) of the notice of appeal before it also constitutes a breach of rule 8(8) of the Court of Appeal Rules. According to the Petitioner, rule 8(8) of CI.19 "clearly frowns on the Court of Appeal basing any part of their decision or judgment on any facts or grounds which a party has not canvassed in the Appellant's case [and that] if the Court is minded to do so, then the other party must be offered the opportunity to respond to the said arguments or ground". In sum, the Petitioner argued that the Court of Appeal breached the rule of natural justice by not granting her a hearing before allowing the appeal on ground (c). It is also the Petitioner's argument that, since the Respondent failed to advance

arguments on ground (c), the Respondent must be presumed to have abandoned that ground of appeal. The Petitioner relied on Owusu Another vs. Anane & Others [1994-1995] 2 GBR 716.

[6.1]. In response, Respondent conceded that ground (c) of his grounds of appeal before the Court of Appeal was not separately argued in his Written Submission but that "the arguments canvassed pursuant to ground (a) of the grounds of appeal at the Court of Appeal covered ground (c) of the grounds of appeal and therefore no miscarriage of justice was thereby occasioned to the Petitioner". According to Counsel, both grounds A and C of the Respondent's grounds of appeal at the Court of Appeal, in substance, were the same and both had the same legal effect and consequence and therefore, grounds C could be said to have been subsumed under ground A of the grounds of appeal. Counsel submitted finally that the Court of Appeal, overall, did not commit any error of law which had occasioned substantial miscarriage of justice to the Petitioner.

[6.2]. My lords, by the leave of the trial High Court dated 11th January 2023, the notice of appeal earlier filed by the Respondent before the Court of Appeal was amended as shown on page 273 of volume 1 of the record of appeal. Ground A of the Amended Notice of Appeal states at page 274 of volume 1 that:

> *(a) "The trial High Court Judge erred when he declared some properties in this case as jointly acquired despite documentary and testimonial evidence to the contrary"*

Ground C of the grounds of appeal of the said amended notice of appeal also states that:

> *(c) "The trial High Court Judge erred when he held that the Hotel at Konongo, Ashanti Region and the residential House at Kasoa, Central Region, which were Appellant's [Respondent's herein] personal properties were jointly acquired by the parties".*

It is clear that both grounds A and C of the amended grounds of appeal filed before the Court of Appeal, complained about the same thing. The only difference between the two grounds of appeal is that whereas ground A was general in outlook, ground C was specific. However, one cannot reasonably deny the fact that ground C could be conveniently subsumed under ground A without any miscarriage of justice being done to any of the parties to the appeal.

In his Written Submissions before the Court of Appeal which can be found from page 277 to page 324 of volume 2 of the record of appeal, the Respondent's Counsel devoted arguments to ground A of his grounds of appeal. In the Written Submissions, the Respondent argued that the Petitioner did not adduce evidence to prove her claim that the properties listed in her Petition were indeed marital properties acquired during the subsistence of their marriage. The Respondent also criticized the wholesale endorsement by the trial Judge that the alleged listed properties were indeed properties acquired during the marriage. See page 299 of volume 2 of the record of appeal. In her Written Submission in response before the Court of Appeal which can be found from page 325 to 359, Counsel for the Petitioner argued in response to ground A of the grounds of appeal before the Court of Appeal. For instance, at page 332, Counsel for the Petitioner argued that "there is a presumption that properties that were acquired during the subsistence of a marriage are all presumed to be matrimonial properties". At page 336 to 341, Counsel for the Petitioner quoted copiously from the cross examination to support his argument. It stands to reason, therefore, that the Petitioner herein was never deprived of the opportunity to be heard on challenges to properties acquired during marriage or outside marriage. Counsel's submission before this Court that the Petitioner was not heard by the Court of Appeal before allowing ground C of the grounds of appeal before the Court of Appeal, cannot be factually correct notwithstanding that ground C was not set out separately and argued independently.

[6.3]. One of the criticisms leveled by Counsel for the Petitioner against the judgment of the Court of Appeal is that their lordships breached rule 8(8) of the Court of Appeal Rules CI.19 and thereby committed a breach of the rules of natural justice. Rule 8(8) of the rules of the Court of Appeal states that:

> *"8(8) The appellant shall not, without the leave of the Court, argue or be heard in support of a ground of objection not mentioned in the notice of appeal, but the Court may allow the appellant to amend the grounds of appeal on the terms that the Court thinks just".*

In our view, rule 8 sub-rule 8 of the Court of Appeal Rules does not in any way support the case or the argument being made on behalf of the Petitioner/Appellant. For, it is not the submission of the Petitioner/Appellant that the Respondent herein was heard by the Court of Appeal on a ground of appeal which was not included in the grounds of appeal contained in the Notice of Appeal filed before the Court of Appeal. Rather, the argument by Counsel for the Petitioner herein is that before the Court of Appeal, the Respondent failed to make arguments on ground (c) in his Written Submissions filed before the Court of Appeal and yet, the Court of Appeal allowed that ground of appeal in favour of the Respondent. See page 11 of the Statement of Case filed before this Court on behalf of the Petitioner/Appellant on the 17 December 2024. This implies that, first, the Respondent raised ground C as one of the grounds of appeal in his Notice of Appeal before the Court of Appeal save that he failed to argue that ground of appeal in his Written Submissions. It is good advocacy for Counsel to make clear their arguments in their statements of case filed before the Courts. The proper rule which ought to be considered is rule 8 (9) of the Court of Appeal Rules, CI.19 which states that:

> *"(9) Despite sub rules (4) to (8), the Court in deciding the appeal shall not be confined to the grounds set out by the appellant but the Court shall not rest its decision on a*

ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground".

This Court had the occasion to consider the meaning and effect of rule 8(9) of the Court of Appeal Rules in Dora Boateng vs. McKeown Investment Ltd [2019-2020] 2 SCLRG 477. In that case, a circuit court delivered judgment in a matter before it. The Defendant who was aggrieved by the judgment, caused a notice of appeal to be filed on the 13th November 2015 in which the sole ground of appeal was the omnibus ground that the judgment was against the weight of evidence. A new lawyer engaged by the Defendant filed yet another notice of appeal on the 26th January 2016 in which he set out three grounds of appeal. The lawyer for the Plaintiff invited the Court of Appeal to strike out the new notice of appeal. The Court of Appeal turned down the invitation and adopted the three grounds of appeal contained in the second notice of appeal as additional grounds of appeal and after hearing the appeal, the Court of Appeal reversed the judgment of the trial Circuit Court and entered judgment for the Defendant. Upon a further appeal to the Supreme Court, it was noted in respect of the second notice of appeal that:

"The import of rule 9 of C.I. 19 is that the jurisdiction of the Court of Appeal is invoked when a 'notice of appeal' is filed in the registry of the court. Only one notice of appeal is contemplated by the rule. After a valid notice of appeal has been filed any addition to the notice in the form of additional grounds or amendments must comply strictly with rule 8(7). The rule, however, vests the Court with power to determine an appeal outside the grounds stated in the notice of appeal but this is a discretion granted to the court and not to the parties. An appellate court, therefore, should not without leave of the court permit any party to amend the grounds or argue grounds of appeal not stated in the notice of appeal…. No leave of the court was sought to amend the notice of appeal or argue additional grounds of appeal in compliance with the rules. The second notice of

appeal filed by the Defendant is, therefore, alien to the rules and should have been struck out by the Court of Appeal…. It is our understanding that the discretion given to the court to grant relief against noncompliance with the rules should be exercised on a case-by-case basis having regard to the facts of a particular case, the conduct of the parties, the wording of the rules breached and the justice of the case. There are some breaches of the rules which the ever-loving arms of the saving grace provided in the non-compliance provisions will embrace. Other breaches which are cardinal ought to be strictly enforced to save the rules from the danger of being wiped off the statute books for non-compliance. In the case before us, the rules were deliberately or recklessly ignored by the Defendant. The approach adopted by the Defendant was not a breach of the rules so to speak but a line of action unknown to the rules…. In the appellate courts, submissions are made based on each ground of appeal stated in the notice of appeal or additional grounds of appeal permitted by the court. Apart from the grounds in the notice of appeal, an Appellant cannot argue any ground not listed in the notice of appeal in compliance with Rule 8(7) of C.I. 19 and 6(7) of C.I. 16. Such a default on the part of an Appellant cannot be cured by any purposive interpretation of the rules or the comfort granted by the court in some cases of non-compliance with provisions of the rules."

Indeed, in Ankumah vs. City Investments Co. Ltd. [2007-2008] 2 SCGLR 1064, the Supreme Court pointed out that though the Court of Appeal may suo motu raise issues not set out in the notice of appeal, the court is enjoined to give the party the opportunity to be heard on those issues before pronouncing upon them. Nonetheless, it has been held in Kwaku vs. Serwah and Others [1993-94] 1 GLR 429 "that a point of law arising on the record could be canvassed in an appellate court even though it had not been raised in the court below if it involved a substantial point of law and would not require the adduction of further evidence. The Supreme Court, again, came out clear in the case of Akufo-Addo v. Catheline [1992] 1 GLR 377 and held that:

"The proviso to rule 8(6) of the Court of Appeal Rules, 1962 (L.I. 218) [same as rule 8(9) of CI.19] which required the Court of Appeal not to rest a decision on a ground not canvassed by the Appellant unless the Respondent had been given sufficient opportunity to controvert that ground, should not be given an interpretation which would inhibit or stultify the rule that an appeal "shall be by way of rehearing." The proviso could not be said to imply an absolute prohibition; in certain special or exceptional circumstances, it would not apply. Accordingly, it could be said that the Court of Appeal should not decide in favour of an Appellant on a ground not put forward by him unless the court was satisfied beyond doubt, first, that it had before it all the facts or materials bearing upon the contention being taken by it suo motu; and secondly, that the point was such that no satisfactory or meaningful explanation or legal contention could be advanced by the party against whom the point was being taken even if an opportunity was given him to present an explanation or legal argument."

[6.4]. My lords, a careful consideration of the said ground C which the Petitioner complains about will reveal that that ground of appeal before the Court of Appeal complained about the holding by the trial Judge that the Dabi Asem Hotel at Konongo and the residential House at Kasoa, Central Region were jointly acquired. In effect, what the Respondent complained about, by that ground of appeal before the Court of Appeal, was the factual evaluation of the evidence placed before the trial Court. That ground of appeal indeed called for re-evaluation or re-consideration of the evidence adduced before the trial Judge. It is a matter of fact as opposed to law, and it falls squarely within the appellate jurisdiction of the Court of Appeal. It is part of the core duties of an appellate court. Hence, whether that fact was set out as a ground of appeal or not and whether it was specifically argued or not, it was the duty of the Court of Appeal to evaluate the evidence adduced in that regard in order to determine whether or not on the law, the trial judge reached the correct conclusion. The duty of the Court of Appeal to take a second look at the evidence adduced before the trial Court does not

arise from the grounds of appeal per se but arises from the duty imposed upon the Court of Appeal by virtue of the fact that that Court is an Appellate Court. It arises from the very constitution of the Court as an appellate court. Rule 8(1) of the Court of Appeal Rules, does not mince words on this. It states in unambiguous language that:

> *"8. Notice and grounds of appeal*
> *(1) An appeal to the Court shall be by way of rehearing and shall be brought by a notice of appeal".*

Rehearing has been explained to mean a duty by an appellate court to consider and re-evaluate the whole evidence, the totality of the evidence: oral and documentary, adduced before the trial court vis-à-vis the relevant law applicable, and come to its own conclusion that the conclusion arrived at by the trial court is not only supported by the evidence but also by the applicable law.

This principle was forcefully drummed home when in the case of Adu Bediako vs. Kwame Acheampong (unreported) Civil Appeal No. J4/42/2018 dated 28th November 2018, this Court held that:

> *"In this instant appeal, we realize that, the Defendant herein never used the magic words 'judgment is against the weight of evidence.' However, we are satisfied that, the principle encompasses all appeals as being by way of re-hearing as was stated in the case of Tuakwa v Bosom and stated earlier in the Akufo-Addo v Cathline line of cases thus: "an appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court is against the weight of evidence."*
>
> *From the combined effect of the grounds of appeal referred to supra, it is clear that, since an evaluation of the entire record of appeal shows conclusively that, what the Defendant requires is a re-hearing of the matter based on the evidence on record, we feel emboldened*

to look at the entire record, the lack of the use of the magic words "judgment is against the weight of evidence" notwithstanding.

Where from the grounds of appeal, it is clear that an appellant invites the appellate court to consider the appeal as a re-hearing based on the evidence such as in the instant case, an appellate court is obliged to consider the appeal as such". See [2018] DLSC 4128.

For all the reasons advanced herein, we do not find any merit in ground (b) of the grounds of appeal filed before this Court and the same is hereby dismissed.

[7.0]. The next ground which we wish to consider is ground (d), to the effect that "the Court of Appeal erred in law when they failed to determine the appeal filed by the Respondent Appellant/Respondent on the basis of his grounds of appeal and this has occasioned substantial miscarriage of justice to the Petitioner/Respondent/Appellant".

[7.1]. Under this ground of appeal, Counsel for the Petitioner/Appellant virtually rehashed part of his submissions made under ground (b) above and submitted that the Court of Appeal failed to comply with rule 8(8) of the Court of Appeal Rules. Counsel submitted that the Court of Appeal is not entitled 'to rest their decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground". See page 17 of the Statement of Case filed on behalf of the Petitioner. In addition, Counsel submitted at page 18 of his Written Submission that, "one would expect that it is the trial Court that would make findings of fact after trial. However, the Court of Appeal … purported to have made its findings and conclusions". Counsel submitted finally that the Court of Appeal violated rule 8(8) of CI.19 and that that has occasioned miscarriage of justice to the Petitioner/Appellant and for that reason the judgment of the Court of Appeal ought to be set aside.

[7.2]. Counsel for the Respondent submitted that 'the Court of Appeal is procedurally and jurisdictionally empowered to evaluate and thoroughly assess the entire evidence and facts of any case before the court, and may come to its own conclusion where an appeal is lodged against the weight of evidence adduced at the trial as a ground pf appeal. Counsel invited this court to dismiss this ground of appeal.

[7.3]. My lords, the point has already been made above that by virtue of rule 8(1) of the Rules of the Court of Appeal, an appeal is by way of rehearing. The oft cited case of Praka vs. Ketewa [1964] GLR 423 SC @ 426 explains what is meant by the phrase 'appeal is by way of re-hearing'. It was stated in that case that:

> *"It is true that an appeal is by way of rehearing, and therefore the appellate court is entitled to make up its own mind on the facts and to draw inferences from them to the same extent as the trial court could; but where the decision on the facts depends upon credibility of witnesses, the appeal court ought not to interfere with findings of fact except where they are clearly shown to be wrong, or where those facts are wrong inferences drawn from admitted facts or from the facts found by the trial court. Therefore, if in the exercise of its powers, an appeal court feels itself obliged to reverse findings of fact made by the trial court, it is incumbent upon it to show clearly in its judgment where it thinks the trial court went wrong. It goes without saying that if an appeal court sets aside the findings of a trial court without good ground, or upon grounds which do not warrant such interference with the findings made by the trial court, a higher court will set that judgment aside".*

In Akufo-Addo vs. Catheline [1992] 1 GLR 377, this Court quoted with approval the conception of the phrase "appeal is by way of rehearing" given by Osei-Hwere JA. (as he then was) in Nkrumah vs. Ataa [1972] 2 G.L.R. 13. At page 391 of the report, the Court stated that:

"In the case of Nkrumah v. Ataa [1972] 2 G.L.R. 13 at 14, Osei-Hwere J. (as he then was) conceived the rule that an appeal is "by way of rehearing" to mean this:
'Whenever an appeal is said to be 'by way of re-hearing' it means no more than that the appellate court is in the same position as if the rehearing were the original hearing, and the appellate court may receive evidence in addition to that before the court below and may review the whole case and not merely the points as to which the appeal is brought, but evidence that was not given before the court below is not generally received.'"

My lords, this position of the law has received constitutional support, as far as the Court of Appeal is concerned, in article 137(3) of the Constitution 1992 which states that:

"(3) For the purposes of hearing and determining an appeal within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any appeal, and, for the purposes of any other authority expressly or by necessary implication given to the Court of Appeal by this Constitution or any other law, the Court of Appeal shall have all the powers, authority and jurisdiction vested in the Court from which the appeal is brought".

By virtue of case law and article 137(3) of the Constitution, therefore, the Court of Appeal has all the powers of the trial High Court from which the instant appeal came to the Court of Appeal with the consequence that, the Court of Appeal is entitled to scrutinise all the evidence led before the High Court and weigh them against the relevant and applicable law in order to determine whether the decision of the trial High Court was correct. The criticism leveled by Counsel for the Petitioner against the judgment of the Court of Appeal under ground (d) of its grounds of appeal herein is completely misplaced and it is therefore dismissed.

[8.0]. The next ground argued by the Petitioner through her Counsel in her Statement of Case, is ground E which states that "the Court of Appeal erred when it failed to rule on the objection raised against ground 'B' of the Grounds of Appeal filed by the Respondent/Appellant/Respondent and this has also occasioned substantial miscarriage of justice to the Petitioner/Respondent/Appellant".

[8.1]. The Petitioner says that this ground of appeal is about the failure of the Court of Appeal to rule on an objection raised by the Petitioner/Appellant herein against ground B of the grounds of appeal filed by the Respondent herein before the Court of Appeal. The said ground B of the grounds of appeal filed before the Court of Appeal is captured at page 274 of volume 1 of the record of appeal and it reads that: "the principle of equity pursuant to article 22 of the 1992 Republican Constitution of Ghana was not (respectfully) judiciously applied by the trial High Court Judge". The Petitioner/Appellant's complaint before this court under this ground of appeal is that although the Court of Appeal, recounted the Petitioner's objection at page 373 of its judgment, the Court failed to rule on the objection resulting in a miscarriage of justice to the Petitioner/Appellant herein.

[8.2]. The Respondent argues that ground B of their grounds of appeal before the Court of Appeal complained about the failure of the High Court to judicially apply the principle of law that 'equality is equity' pursuant to article 22 of the Constitution, 1992. In the view of Counsel, their complaint before their lordships at the Court of Appeal was not that the High Court Judge *'erred'* in his application of the 'equality is equity principle'. Counsel submitted that it is the duty of the Court to do substantial justice and not just to apply mere technicalities. According to Counsel, what the Court of Appeal did in their judgment was to do substantial justice and not arid technicality.

[8.3]. Rule 8(4) of the Court of Appeal Rules, CI.19 states that:

> *"(4) Where the grounds of an appeal allege* ***misdirection*** *or* ***error in law****, particulars of the misdirection or error shall be clearly stated".*

A provision similar in nature to rule 8(4) of the Court of Appeal Rules is contained in rule 6(2)(f) of the Supreme Court Rules, 1996, CI.16. This rule provides that:

> *"6(2) A notice of civil appeal shall set forth the grounds of appeal and shall state*
> (f) the particulars of a misdirection or an error in law, if that is alleged".

In applying rule 6(2)(f) of CI. 16, this Court stated in Tetteh vs T Chandiram & Co. Gh. Ltd & Others [2017-2020] 2 SCGLR 770 that:

> *"By rule 6(2)(f) of the Supreme Court Rules, 1996, CI.16, an appellant alleging error of law as a ground of appeal must provide the particulars of the error alleged. In the instant case, the appellant failed to particularize the errors alleged by the grounds of appeal to enable the court effectively address same as required by law. Also, the errors alleged, could not be inferred sufficiently from the wording of the grounds to enable the court address same. In the circumstance, grounds (1) to (10) of the grounds of appeal would be struck out as they were non-compliant with and offended the rules of the Supreme Court".*

In our opinion, the consequence for flouting rule 8(4) of CI.19, like rule 6(2)(f) of CI.16, is very grave; that is, striking out the offensive ground of appeal and therefore, there must be a clear violation of the said rule before an appellate court proceeds to strike out a ground of appeal for violating the rule. In the instant matter, the Respondent is accused of stating as a ground of appeal before the Court of Appeal that "the principle of equity pursuant to article 22 of the 1992 Republic Constitution of Ghana was not

(respectfully) judiciously applied by the trial High Court Judge". Although we concede that that ground of appeal could have been couched in a manner more elegant than it was done, we do not think that the ground of appeal offends rule 8(4) of CI.19 as to attract the sanction of having to be struck out by the Court of Appeal for non-compliance with the Rules of Court. At any rate, the Petitioner/Appellant was not denied an opportunity to be heard on that ground of appeal and therefore, it cannot be correct for Counsel to argue that the failure of the Court of Appeal to rule on an objection taken against that ground of appeal resulted in a miscarriage of justice against the Petitioner/Appellant. We will, therefore, dismiss ground E of the grounds of appeal.

[9.0]. In ground (f) of the grounds of appeal, the Petitioner/Appellant says that "the conclusion by the Court of Appeal that during the pendency of the marriage the parties intended to run their respective businesses and independently acquire their respective properties from each other is not borne out by the record".

[9.1]. Under this ground of appeal, Counsel for the Petitioner/Appellant criticizes the Court of Appeal's conclusion that the parties herein ran separate businesses and kept their profits to themselves with each acquiring his or her property separate from the other party with the result that the properties listed by the Petitioner/Appellant in her petition were not jointly acquired as alleged. Counsel further submitted that the current position of the law is that any property acquired during the subsistence of the marriage became matrimonial property unless the party claiming otherwise is able to bring it under any of the exceptions given by the Supreme Court. In the words of Counsel, at page 24 of his Statement of Case, "marriage is a joint business or enterprise and as long as there is the subsistence of a marriage, one party cannot claim to be conducting a separate business from the other except where there is a clear and undisputed evidence on record to that effect". Counsel says that all properties acquired

during the marriage is presumed to be marital property which must be shared equally. Counsel cited Mensah vs Mensah [2012] (supra) in support. Counsel, therefore, invited this Court to set aside the conclusion reached by the Court of Appeal on this issue of property acquisition and ownership.

[9.2]. Counsel for the Respondent submitted that the Petitioner/Appellant was not the only wife married to the Respondent, and that the Respondent was married to three women at the time the Petitioner filed for divorce. Counsel for the Respondent submitted that there is no law in this country that compels an equal sharing of properties acquired during marriage upon the dissolution of the marriage.

[9.3]. It must be pointed out that, the statement of the law by this Court in some cases to the effect that all properties acquired during the subsistence of marriage is presumed to be marital property is subject to the provision in article 18(1) of the 1992 Constitution which guarantees the right of every individual to acquire and hold property in his right as an individual to the exclusion of all other persons or in association with other persons. That is the reason why under article 22(3)(b) of the Constitution, there is the need for a spouse claiming to have acquired property jointly with the other spouse to adduce evidence to prove that claim and again, there is a duty imposed upon a spouse claiming the sole ownership of property acquired during marriage to also adduce evidence to prove that such property was acquired solely by him or her for his exclusive benefit. There is no principle of automatic equal sharing of property acquired during marriage after the marriage has come to an end. Each case must be resolved on its peculiar facts. Where it is shown that property was jointly acquired during the subsistence of marriage, the Constitution only guarantees equal access of such property to the spouses. However, when the marriage is dissolved, there is no such principle of equal sharing of any property acquired during marriage. The Constitution never said so in article 22(3)(b). Rather, the Constitution speaks of equitable distribution of assets

acquired jointly during marriage after the marriage has been dissolved. It is at this stage that the parties need to adduce evidence to show their respective contribution to the acquisition of the property to enable the Court do what is equitable in accordance with the contribution of each spouse towards the acquisition of the property. Thus, in the words of Pwamang JSC in Adjei vs. Adjei (supra):

> *"Article 22(3)(b) of the Constitution, 1992 does not say assets which are acquired during a marriage shall be distributed equitably between the spouses upon dissolution of the marriage. It is explicit in referring to properties jointly acquired so the impression should never be created that it is the Constitution, 1992 that says that property acquired during a marriage is joint property. If the framers of the constitution had wanted to cover all property acquired in the course of a marriage, they would have said so expressly. It is a judicially created presumption and as such it is a rule of evidence only and does not confer substantive rights as the trial judge sought to imply. When sufficient evidence in rebuttal is introduced by the spouse who is the ostensible owner of the property or a party challenging the presumption, the evidential burden shifts onto the other spouse to also introduce any evidence of her contribution to the acquisition of the property. It is here that the decisions say that non-pecuniary contribution in the form of emotional support, unpaid domestic services such as cooking, washing and caring for children of the marriage are admissible as proof of contribution. In that situation W had a duty to introduce evidence of her contribution for the consideration of the court and not hang onto the mantra of the property was acquired during the marriage."*

It must be emphasised that the law does not prescribe an automatic right to a fifty-percent share of property acquired during marriage. The Constitution is not prescriptive on this notion and does also not sanction any idea of fifty-fifty sharing of any property acquired during marriage when the marriage comes to an end. It is only when the parties to the marriage, after divorce, are unable to marshal evidence to prove

their specific contribution to the acquisition of property acquired during the subsistence of the marriage, that the Court invokes the principle or the maxim of equity to the effect that equality is equity to share the property equally between the divorced spouses. If ever there was any such notion or impression created by the cases, of a fifty-fifty sharing of property acquired during the subsistence of marriage after the dissolution of the marriage, then, let it be noted that the Court has moved away from that impression in accordance with the provisions of the 1992 Constitution. As stated in the unreported case of Dr. Gilbert Anyetei (substituted by Emmanuel Tamatey Opai-Tetteh) vs. Mrs. Sussana Anyetei (supra):

> *"Under clause 3 of article 22…the framers of the Constitution chose to use the word 'equal' in relation to access to property jointly acquired during the marriage but they used the word 'equitably' in respect of distribution of property jointly acquired upon dissolution of the marriage. Where the text of the Constitution is plain and unambiguous like clause 3 of article 22 is, the principles of constitutional interpretation do not permit a judge to replace the language with her opinion of what she would have said if she was the one making the Constitution."*

[9.4]. Even so, it must be pointed out that in a factually polygamous marriage, such as the instant matter, where the Respondent has as many as three wives, it will be most unreasonable and inequitable for the Petitioner/Appellant wife to expect that whatever property that was acquired during her marriage with the Respondent herein should be shared equally between her and the Respondent. What happens to the interest of the remaining wives of the marriage? In such instances, this Court will rather apply the provisions under section 20 of the Matrimonial Causes Act and settle, in a reasonable manner, property on the divorcing wife, the Petitioner herein, taking into consideration all the surrounding circumstances of the case. Their lordships at the Court of Appeal

did not fail in this regard and for that matter, the instant ground of appeal will be dismissed.

[10.0]. Counsel for the Petitioner/Appellant argued grounds (a) and (c) of his notice of appeal together. These grounds are that: "(a) the Judgment is against the weight of evidence" and (c) the Court of Appeal erred in their review of the award of GH₵150,000.00 as financial settlement by the learned trial Judge to GH₵100,000.00".

[10.1]. Under this ground, Counsel for the Petitioner/Appellant continued to repeat his assertion that the Hotel at Konongo and the House at Kasoa were all acquired during the subsistence of the marriage and therefore ought to be shared equally between the Petitioner and the Respondent. According to Counsel, it was wrong for the Court of Appeal to state that the Petitioner failed to establish that these properties were matrimonial properties. Counsel submitted in addition that it was wrong for the Court of Appeal to reduce the sum of GH₵150,000.00 awarded to the Petitioner by the High Court and award GH₵100,000.00 instead. In the words of Counsel, it was wrong for the Court of Appeal to use the fact that the Respondent has another wife as a basis to reduce the financial award. The reason for this argument, according to Counsel, is that the case had been pending in the Court for long and that if the other wives had any interest in the properties, they would have applied to join the suit in order to protect their interest.

[10.2]. Counsel for the Respondent described the above line of reasoning by the Petitioner's lawyer as weird, and submitted that the fact that the other wives of the Respondent did not join the suit does not imply that they have no interest in the properties in question. According to the Respondent's Counsel, 'what the Appellant's Counsel was complaining about was the fact that once the Kasoa house and the hotel at Konongo were both acquired during the subsistence of their polygamous marriage,

the Court of Appeal was wrong to have held that the two properties were exclusively owned by the Respondent. Counsel says that given the reasons advanced by the Court of Appeal before arriving at that conclusion, the Court of Appeal committed no error of law or of fact.

[10.3]. In Solomon Tackie & Another vs. John Nettey & Another [2021-2022]1 SCLRG 620, the Court gave some useful guidelines in dealing with the ground of appeal that the judgment is against the weight of the evidence on record.

> *"In determining the ground of appeal that the judgment is against the weight of evidence, an appellate court must; (i) consider the case as one of re-hearing, which requires an evaluation of the entire record of appeal; (ii) consider the reliefs claimed by the plaintiff and a counterclaim by the Defendant if any; (iii) evaluate the evidence led by the parties and their witnesses in support of their respective cases, especially, the cross-examination, as this is the evidence which elicited from the parties and their witnesses after the tendering of the witness statements; (iv) evaluate of the documents tendered during the trial of the case and assess how they affect the case; (v) evaluate the application of the facts of the case vis-à-vis the laws applied by the trial court and the intermediate appeal court; (vi) evaluate whether the trial court and Court of Appeal correctly or wrongly applied the evidence adduced during the trial; and, (vii) additionally, the burden on the final appellate court, such as the supreme court is generally to carefully comb through the record of appeal and ensure that both in terms of substantive law and procedural rules, the judgment appealed against can stand the test of time. In other words, that the judgment can be supported having regard to the record of appeal. The above criteria are by no means exhaustive, but constitute a useful guide to appellate courts in their determination of such appeals".*

[10.4]. There is no dispute from the record of appeal before this Court that the Petitioner and the Respondent herein were married in a polygamous marriage. Indeed, in addition to the Petitioner, the Respondent has two wives. Given the fact that the marriage was factually polygamous as opposed to a monogamous marriage, there are certain incidents which are peculiar to it which cannot be found in monogamous marriages. For instance, the Respondent husband has other wives in addition to children with those wives. The Respondent has a responsibility of maintaining the other wives of the marriage as well as all the children of the marriage. All these factors must be taken into consideration in deciding on distribution of the properties of the marriage. There is evidence on record that the Respondent gave a shop together with stocks of wares worth about GH₵200,000.00 at the market at Kade to the Petitioner in 2009. In the year 2016, the evidence shows that the Respondent advanced an amount of GH₵100,000.00 to the Petitioner herein to enable her start the business of trading in gold. There is evidence on record that the Respondent renovated the Petitioner's family house in her hometown to enable the Petitioner get a decent place to sleep when she visits her hometown. There is evidence to the effect that the Respondent made a gift of the Ajara House to the Petitioner herein. The Respondent also built a house on a parcel of land acquired by the Petitioner at Achiase. The trial Judge found at page 249 of his judgment that several of the properties owned by the Respondent were acquired before his marriage to the Petitioner. Again, the trial Judge found that some of the properties listed by the Petitioner as having been jointly acquired during the subsistence of the marriage did not in fact belong to the Respondent. The Petitioner also admitted during cross examination that the Respondent bought a car, a Ford Escape, which he gifted to her. See page 140 of volume 1 of the record of appeal. In the light of all the evidence on record, we think the settlement of the Uncompleted House at Achiase and the Self-contained House, situate at Ajara junction, Kade, together with the sum of GH₵100,000.00 on the Petitioner/Appellant herein by the Court of Appeal, is reasonable having regard to all the circumstances of this case.

[10.5]. In conclusion, we find that the judgment delivered by the Court of Appeal on the 25th July 2024, is supported by the evidence adduced before the trial Court. For the avoidance of doubt, we affirm the settlement of the uncompleted House at Achiase and the self-contained House, situate at Ajara junction, Kade, together with the sum of GH₵100,000.00 on the Petitioner/Respondent/Appellant herein by the Court of Appeal. We do not find any merit in the appeal which is therefore dismissed. The judgment delivered by the Court of Appeal on the 25th July 2024 is hereby affirmed.

(SGD.) S. K. A. ASIEDU
(JUSTICE OF THE SUPREME COURT)

(SGD.) A. LOVELACE-JOHNSON (MS)
(JUSTICE OF THE SUPREME COURT)

(SGD.) PROF. H. J. A. N. MENSA – BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

(SGD.) E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

(SGD.) E. Y. GAEWU
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