**ABENA POKUA**

*(PETITIONER)*

**vs.**

**MR YAW KWAKYE**

*(RESPONDENT)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/118/2024 DATE: 25TH JULY 2024

**COUNSEL**

HANSON KWADWO KODUAH ESQ., FOR RESPONDENT/APPELLANT.

MATHEW APPIAH ESQ. FOR PETITIONER/RESPONDENT.

**CORAM**

SUURBAAREH, J.A (PRESIDING)

BAAH, J.A

OWUSU-OFORI, J.A

**JUDGMENT**

**BAAH, J.A**

**BACKGROUND**

On 5 July 2019, the petitioner (hereafter respondent), filed a petition with the High Court, Nsawam, seeking the following reliefs:

1. *Dissolution of the marriage contracted on in (sic) the year 2003 between the parties.*
2. *An order for all matrimonial properties to be shared.*
3. *Such further order(s) or relief(s) as the court may deem fit*.

The suit was eventually transferred to the High Court, Kumasi. On 8 May 2020, the respondent (hereafter appellant) filed his answer to the petition. A reply from the respondent was filed on 21 May 2021. The suit was set down for trial on 1 June 2020.

In the ensuing plenary trial, the respondent testified and called three witnesses. The appellant testified and called two witnesses.

On 9 May 2022, the trial judge delivered himself of a judgment that largely went in favour of the respondent. Dissatisfied with the judgment, the appellant challenged it with a notice of appeal filed on 18 May 22.

**CASE OF RESPONDENT**

The case of the respondent who identified herself as a self-employed was that she got married to the appellant under customary law in 1998. The parties cohabitated at Kade. While the appellant formerly kept a shop with the respondent, he is currently a gold dealer who buys and sells gold in the Ashanti and Eastern Regions of Ghana. The marriage has been blessed with three issues aged 19, 17 and 10. She claimed that the appellant kept in the matrimonial home, four children from outside of the marriage, in addition to one niece. She also brought into the marriage one child.

She claimed that the marriage has broken down beyond reconciliation on account of the following:

1. The appellant caused his girlfriend and others to mercilessly beat her up when she visited the appellant in Konongo.
2. The appellant has deserted the matrimonial home and abandoned the family since 2017 after notifying the respondent of his intention not to continue with the marriage. By her calculation, the appellant has financially abandoned the matrimonial home and the upkeep of all the children for 10 years.
3. That in pursuance of his intention to end the marriage, the appellant purported to present customary drinks to her family in 2019.
4. That the acts of the appellant have caused her much anxiety, distress and embarrassment to the extent that she could not reasonably be expected to continue with the marriage.

In paragraph 14 of the petition, she listed the properties acquired in the course of the marriage which she prayed the court to distribute in accordance with the law.

**CASE OF APPELLANT**

The appellant admitted being customarily married to the respondent but claimed that he was already a married man at the time he met the respondent. The customary marriage with the respondent he claimed has been dissolved, for which reason he considered the prayer for dissolution of the marriage incompetent. He blamed the breakdown of the marriage on the behaviour of the respondent, including allegedly hiring people to assassinate him under the guise of robbery.

According to him, an agreement was reached between the two that each will engage in his/her business and acquire their properties separately since the appellant was already married. He claimed to have given a loan of GH¢100,000.00 to the respondent to start her own gold business, as he established his own gold business, but she has refused to repay the loan.

According to the appellant, he was a store keeper at the time he met the respondent, and established for her a store, which was distinct from the one he operated. He claimed that the respondent collapsed the store and he had to transfer his store with the goods valued at GH¢200,000.00 to her in 2009. He thereafter went into the gold business.

He admitted to having had in their house four other children and a niece but claimed to have also looked after a child of the respondent brought to the home from another relationship. He claimed that his niece left in 2013 and none of the children ever stayed with the respondent. He claimed to have been responsible for the upkeep of his children.

On the issue of the alleged assault on the respondent, he explained that the respondent unlawfully entered the house of his wife around 4 am and caused damage to her door with the intention of causing harm to her, resulting in her arrest and current prosecution before the Circuit Court, Juaso.

He disputed the claim of joint acquisition of the properties listed by the respondent, thereby joining issues with the respondent on the nature of the said properties and the rights and liabilities attached thereto.

**HIGH COURT JUDGMENT**

The decision of the trial court dated 9 May 2022, can be summed up as follows:

1. That the presumption raised by articles 22 (2) and 33 (5) of the Constitution and section 20 of the Matrimonial Causes Act, Act 1971 (Act 367) and the cases of **Mensah v Mensah [1998-1999] SCGLR 350; Boafo v Boafo [2005- 2006] SCGLR 705; Mensah v Mensah [2012] 1 SCGLR 391; Quartson v**

# Quartson [2012] 2 SCGLR 1077; Arthur v Arthur (No. 1) [2013-14]

**SCGLR 543 and Fynn v Fynn [2013-2014] 1 SCGLR 727**, is that property acquired under any kind of marriage, irrespective of whether there was direct, pecuniary or substantial contribution from both spouses in the acquisition, is jointly acquired by the couple and upon divorce, are to be distributed between them on the equality is equity principle.

1. That the Supreme Court has now endorsed the “*equality is equity*” principle in the sharing of marital property upon divorce.
2. That the presumption of joint acquisition is rebuttable for the reason that not all property acquired during marriage may be jointly acquired, in the context of article 18(1) of the constitution which guarantees the right to individual property.
3. That the averment by the appellant that the property situate at Topreman was gifted to him and his siblings, corroborated by appellant’s own brother (PW1) could not be proved because PW1 was an interested person who stood to benefit from that claim, and the appellant failed to produce at least one member of their father’s family who witnessed the gift and the “*aseda*” therefor.
4. That whereas the respondent averred that the couple purchased three excavators in the course of the marriage, the appellant tendered Exhibit 2 to prove that his Dabi Asem Enterprise rented two excavators from A.A. Minerals Company Limited in March 2013. He seemed not persuaded by Exhibit 2 because it mentions two excavators, whereas the respondent claimed that three excavators were acquired by the couple.
5. That the respondent could not controvert the appellant’s claim that the following properties were acquired before the marriage between the parties:
   1. Self-contained house situated at Ajara junction, Kade.
   2. Terrazzo house near CAC Church at Kade.
   3. The commercial house made up of two store rooms at Boadua.
   4. A10-acre oil palm plantation at Prankese now in disuse.
   5. 5-acre oil palm plantation at Prankese now in disuse.
   6. 4-acre oil palm plantation at Prankese now in disuse.
6. That the following properties were found not to belong to the appellant.
   1. Two out of the three excavator machines.
   2. The rented building known as Birim Court Restaurant.
   3. The two rented market stores at Kasoa.
   4. The rented shop at Kade.
   5. The gold offices at Konongo and Nkawie.
7. That the following properties were jointly acquired properties of the parties.
8. Dabi Asem Hotel at Akrantebesa, Konongo.
9. House located at Dr. Wood, Ekooso, Konongo.
10. House situated at Topreman near Akyem-Kade.
11. Storey building located at Tipper junction, Bawjiase Road, Kasoa.
12. One excavator machine.
13. Uncompleted house at situated at Akyem-Achiase.
14. Six (plots) of land at Kweikuma, Kasoa.
15. One (1) plot of land at Tipper Junction, Bawjiase Road, Kasoa.
    1. That the petitioner acquired a plot of land at Achiase during the subsistence of the marriage.
    2. That the jointly acquired properties be distributed as follows:
       1. Dabi Asem hotel to be shared on 50-50 basis with a right on each side to buy the other out.
       2. The uncompleted house at Akyem Achiase and the storey building at Tipper Junction, Bawjiase road, Kasoa, to be settled on respondent.
       3. A lump sum settlement of GH¢150.000.00 on the respondent.
       4. The appellant to be responsible for the educational and health needs of the children whiles the respondent is to be responsible for their feeding, clothing and accommodation.

**GROUNDS OF APPEAL**

The grounds of appeal, as amended with leave of the court dated 11 January 2023, are as follows:

1. *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.*
2. *The principle of “equality is equity” pursuant to article 22 of the 1992 Republic constitution of Ghana was not (respectfully) judiciously applied by the trial High Court Judge.*
3. *The trial High Court Judge erred when he held that the hotel at Konongo, Ashanti Region and residential house at Kasoa, Central Region, which were appellant’s personal properties were jointly acquired by the parties.*
4. *The judgment is against the weight of evidence adduced at the trial.*
5. *The award of GH¢150,000.00 in the nature of alimony in favour of the petitioner/respondent was harsh and excessive considering the economic position of the respondent/appellant.*

No additional grounds of appeal were filed as adverted to in the notice of appeal*.* We shall now consider the submissions made by counsel for the parties under each of the grounds of appeal.

# GROUND 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*.*

**Submission of counsel for appellant**

According to counsel, article 18 (1) of the Ghana constitution guarantees the right of individuals to acquire personal properties or acquire properties in association with others. As a consequence, a husband or wife, despite the existence of the union of marriage, has the constitutional right to acquire personal property which is owned to the exclusion of the other spouse. He anchored his submission on **Fynn v Fynn & Anor [2014] 77 GMJ 43 SC**.

According to counsel, the trial judge misallocated the burden of proof. He submitted that when the appellant denied that certain listed properties were not (a) acquired jointly during the sustenance of the marriage but were acquired before the marriage or (b) were acquired by the appellant as his exclusive personal properties, the burden was upon the respondent to prove her averments that the properties were jointly acquired during their marriage. However, the trial judge placed the burden of proving that the properties were not jointly acquired marital properties on the appellant, at a time the respondent had not discharged her primary onus of proving the averments made by her in her pleadings.

To him, the respondent merely mounted the witness to repeat the averments in her pleadings as her evidence in chief, without any effort to substantiate the said averments, by for instance telling the court as to how the properties were acquired. He submitted that once the averments were denied by the appellant, the respondent was required to substantiate them by evidence which on preponderance of probabilities, outweighed that of the appellant. That, according to him, was what was required of the respondent under section 10 (1) and (2), section 11 (1) and(4), section

12 (1) and (2), and section 14 (4) of the **Evidence Act, 1975 (NRCD 323).**He relied on **Nana Akufo-Addo v John Mahama & Ors [2013] 64 GMJ Sc 1,** at pages 104- 105, wherein their Lordships cited the *dictum* of Sophia Adinyira JSC in **Ackah v Pergah Transport Limited & Ors [2011] 31 GMJ 174.** He further cited **Adwubeng v Domfeh [1996-97] SCGLR 660; Hawkins v Powells Tillery Steam Coal Co. Ltd (1911) 1 KB 988; Yorkwa v Duah [1992-93] GBR 280, CA, Poku v** Poku [2001-2002] SCGLR 162; Zabrama v Segbedzi [1991] 2 GLR 221, CA and others.

According to him, a bare assertion, absent probative evidence, was incapable of proving an averment. He referred us to **Samuel Okudzeto Ablakwa v The Attorney General [2012] 50 GMJ 1; Dogo Dagarti v The State [1964] GLR 653** and **Majolagbe v Larbi [1959] GLR 199**.

He concluded that the wholesale admission by the trial court based on the mere say so of the respondent without more, and in the teeth of the denials of the appellant was wrong in law, for which reason the appeal must be upheld.

# Submission of respondent’s counsel

Respondent’s counsel firstly drew our attention to the fact that the focus of the submission of counsel for the appellant was not based on any alleged error on the part of the trial judge in assessing the oral and documentary evidence, but on his handling of the evidential burden of proof. In his view, extraneous matters were smuggled into ground (a), making aspects of the submission incompetent. He prayed us to strike out the offending aspects of the appellant’s counsel’s submission on ground (a).

On the substance of the submission, he posited that counsel for the appellant misconstrued the burden of proof as is applied generally in civil suits and as applied in matrimonial cases where property is alleged to have been acquired in the course of the marriage.

He contended that the burden of proof as applied in matrimonial causes do not take the same line as stipulated in sections 11,12,13 and 14 of the **Evidence Act, 1975 (NRCD 323).**

He submitted that in matrimonial causes, there is an established presumption that all properties acquired during marriage are jointly acquired. He relied on **Mensah v Mensah [2012] 1 SCGLR 391; Arthur v Arthur (No 1) [2013-2014] 1 SCGLR**

# 543; GPHA v Nova Complex Ltd [2007-2008] 2 SCGLR 806; Hannah Dankwah v Nana Gyamfi Mensah-Bonsu (H1/013/2024, dated 8 February 2024) and section 20 of the Evidence Act, 1975 (NRCD 323).

According to him, the trial judge found some of the assets to be jointly acquired and accordingly decreed their equal distribution. In his view, the onus was on the appellant to prove that even though the said properties were acquired in the course of the marriage, they were not intended to be matrimonial properties.

By references to the evidence, he submitted that the trial judge was right in his assessment that certain properties were jointly acquired and fall to be distributed between the parties.

According to him, the appellant in this appeal has failed to produce any evidence pointing to his exclusive ownership of some of the properties as held by the trial judge. He backed the trial judge’s decision on (a) the prenuptial property in which the respondent has no interest (b) property that does not belong to either the appellant or the respondent, and (c) jointly acquired marital property that belongs to the respondent and the appellant.

In his view, the appellant failed to demonstrate any errors in the judgment to warrant its setting aside. He relied on **Agyenim-Boateng v Ofori & Yeboah [2010] SCGLR 861**.

# Comment

We have examined the preliminary legal objection/issue raised by counsel for the respondent to the submission of counsel for the appellant on ground (a) of the appeal. We concede that ground (a) is couched quite vaguely, but the submission thereunder unmistakably relates to whether the trial judge erred in the allocation of the burden of proof or not. Since it is a legitimate legal enquiry as to whether or not the evidential burden of proof was properly allocated, we decline the invitation to strike out parts of the submission of appellant’s counsel on that ground.

# GROUND B: The principle of *“equality is equity”* pursuant to article 22 of the 1992 Republic constitution of Ghana was not (respectfully) judiciously applied by the trial High Court Judge.

**Submission of counsel for the appellant**.

By references to the provisions of article 22 of the constitution as elucidated in

# Mensah v Mensah [2012] 46 GMJ 48; Quartson v Quartson [2013] GMJ 56 SC;

**Boafo v Ababio [2012] 56 GMJ 165 CA; Fynn v Fynn [2014] 77 GMJ 43 SC;**

**Arthur v Arthur [2013] 67 GMJ 110 SC; Oduro v Okyere [2013] 67 GMJ 103 CA and Tabury v Yeboaba [2013] 59 GMJ 115 CA**, he stated the law to be that marital properties that fall to be distributed between the spouses upon dissolution of the marriage ought to be one that was jointly acquired by the couple. According to him, the constitution guarantees the right to the acquisition of property by married persons either jointly or individually, and property acquired individually must be exempted from the jointly acquired marital property that must be distributed between the parties upon dissolution of a marriage.

According to him, the parties agreed to acquire their individual properties, and in fact acquired their separate properties in the course of the marriage. And since the parties did separate businesses and acquired separate properties, the notion of “*jointly acquired properties*” is inapplicable to them, since each is only entitled to the individual properties acquired during the marriage.

According to counsel, the trial judge lost sight of the fact that being a polygamous man, the appellant was already married with children and had acquired some properties before marrying the respondent. He referred to the answers of the respondent under cross examination where she claimed that the appellant told her before their marriage that he did not have a wife, only for her to uncover after their marriage that he indeed has a wife.

He could not understand as to how the hotel at Konongo, or other properties were to be shared in two equal parts between the appellant and the respondent since the appellant has another wife? He could not appreciate the basis for the exclusion of the other wife of the appellant from his properties.

He proceeded to categorise the properties the appellant claimed to have acquired before getting married to the respondent, and those acquired individually by each party in the course of the marriage.

He insisted that the respondent could not rebut the following claims by the appellant:

1. That there was a prenuptial agreement to engage in individual business and acquire individual properties.
2. That the appellant gave the respondent cash of GH¢100,000.00 to do her separate gold business since he had another wife.
3. That the appellant rented a shop for the respondent, bought her a car and built a house in her hometown for her, as well as another house for her at Kade in the Eastern Region.

# Submission of counsel for the respondent

The first comment of the respondent’s counsel was on the propriety of this ground of appeal, which even though alleges error of law; presumably in relation to article 22 of the constitution, does not provide particulars of the error. Based on Rule 8 (4),

C.I. 19 and on the authority of **Martey v Abrampah [2013] 57 GMJ 133** and **The Republic v Conduah [2013] 67 GMJ 1**, he prayed us to strike out this ground as being incompetent.

Barring that, he failed to see the soundness of the argument that the principle of *“equality is equity*” was not applied by the trial judge. That was because, counsel for the appellant failed to explain the principle and demonstrate how the trial judge misapplied it or failed to apply it, in the face of his decision that some of the properties were acquired before the marriage, some not for the parties and some acquired in the course of the marriage.

According to him, the trial judge recognised the fact that the appellant had a wife before marrying the respondent and took that into account before making the order for distribution of the properties. In his view, the other wife should have joined the suit if she had any interest in the properties. Alternatively, the appellant should have joined the other wife as a necessary party, if she had any interest in the subject properties. He submitted that the failure of the other wife to join the suit or appellant’s failure to join her implied that she had no interest in the disputed properties.

He saw no misapplication of the “*equality is equity”* principle, as submitted by counsel for the appellant.

# GROUND C: The trial High Court Judge erred when he held that the hotel at Konongo, Ashanti Region and residential house at Kasoa, Central Region, which were appellant’s personal properties were jointly acquired by the parties

Counsel for the respondent drew our attention to the fact that counsel for the appellant failed or omitted to submit on ground (c) of the appeal. He considered that to be an abandonment of ground (c) of the appeal.

# GROUND D: The judgment is against the weight of evidence adduced at the trial.

**Submission of counsel for the appellant.**

It was the submission of counsel for the appellant that the evaluation of the court below was not thoroughly, reasonably and meticulously done, especially regarding the allocation of the burden of proof. In his view, a different conclusion would have been arrived at by the trial court had the appropriate principles been applied and proper evaluation of the evidence conducted. In his view, all the factors for disturbing the findings of a trial court or a first appellate court as expatiated in **Koglex Ltd v Field (N0. 2) [200] SCGLR 175,** apply to this case. He referred us to a number of other authorities including **Welbeck v Welbeck [2015] 91 GMJ 152 SC; Gregory v Tandoh IV & Hanson [2010] SCGLR 971; Agyeiwa v P & T Corporation [2007-2008] SCGLR 985; Duodu Sayima v TDC [2017] 104 GMJ 1, SC and Anatu Dagarti v Mustapha Bandah [2018] 121 GMJ 194, CA.**

In addition to the defects he found with the trial judge’s analysis and conclusions, he attacked the judgment for giving no weight to the evidence of DW1 on the ownership of a property at Topreman, which was to the effect that their father allegedly gifted it to them, and on the properties the appellant had acquired before he got married to the respondent.

# GROUND E: The award of GH¢150,000.00 in the nature of alimony in favour of the petitioner/respondent was harsh and excessive considering the economic position of the respondent/appellant*.*

**Submission of counsel for the appellant**

He referred to the fact that: (a) the appellant gave the respondent GH¢100,000.00 to start her own business (b) rented stores for the respondent (c) build a house for the respondent in her hometown (d) built a house for respondent in Kade (e) bought a car for the respondent (f) the appellant is still married to his first wife, and (g) the appellant is taking care of the children of the marriage, and submitted that the alimony of GH¢150,000.00 is on the higher side. He prayed the court to review it downwards.

# Submission of counsel for the respondent on grounds (d) and (e).

According to counsel, the appellant who per the omnibus ground of appeal alleges that the judgment is against the weight of evidence had the burden of demonstrating through the submission of his counsel, the lapses in the judgment, but same was not done as expected. According to him, since the claim that the appellant was married before marrying the respondent and the fact that he gave the respondent GH¢100,000.00 to do business as part of the prenuptial agreement to acquire separate properties were denied by the respondent, the appellant had the burden of proving the said claims but failed to do so.

He contended that the trial judge took into account, all the evidence adequately and fairly. On the rejection of the evidence of DW1, he said that the trial court had sufficient ground to do so based on the witness’ interest in the subject property. He contended that if the siblings of the appellant had interest in the said property, they would have joined the suit to defend their interests.

He found the award of GH¢150,000.00 as alimony fair, on account of the services provided by the respondent to the appellant, the substantial means of the appellant and amply supported by section 20 of the **Matrimonial Causes Act, 1971 (Act 367)**.

**APPRAOCH**

It is recalled that whereas the respondent claimed that all the properties listed by her in paragraph 14 of the petition were jointly acquired marital properties, the trial court found otherwise to a large extent and held that part of the properties were:

1. acquired by the appellant before getting married to the respondent.
2. did not belong to either the respondent or the appellant either jointly or individually, while
3. part was acquired jointly by the parties in the course of the marriage.

The respondent did not cross appeal (prayer for variation) under Rule 15 of C.I. 19. That meant, she concedes that her evidence failed to prove her claims that all the properties listed in paragraph 14 of her petition were jointly acquired.

After perusing the record of appeal and the submission of counsel for the parties, we found the main issue for the resolution of the grounds of appeal of appeal to be as to whether or not the properties declared by the trial judge to be jointly acquired were indeed marital properties of the parties, or individually acquired properties of the appellant.

Before we determine that issue, we shall briefly:

1. outline the nature of this appeal and our task as the penultimate appellate court.
2. construct of the onus of proof in this case (standard/burden of proof).
3. the legal standards for determination of the nature of property in a marriage,
4. whether or not the properties so decreed by the trial court were indeed jointly acquired properties, and,
5. whether the properties found by the trial judge to be jointly acquired, ought to be distributed equally on a 50:50 basis.

**APPEAL AS A REHEARING**

A common-knowledge rule of law and procedure to all appeal practitioners is that an appeal amounts to a rehearing. This is more so where the appellant relies on the omnibus ground of appeal, as done by the appellant herein. Rule 8 (1) of the **Court of Appeal Rules (1996), C.I. 19** provides:

“*Any appeal to the Court shall be by way of re-hearing and shall be brought by a notice referred to in these Rules as "the notice of appeal*".

The apex court per Sophia Akuffo JSC (as she then was) in **Tuakwa v Bosom2001- 2002 SCGLR 61,** held (at p 61):

*“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. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence…’’*

On his part, Acquah JSC (as he then was), speaking for the apex court in **Koglex Ltd (No.2) v Field [2000] SCGLR 175, SC**,), stated the principles upon which a second appellate court may set aside concurrent findings of a first appellate court. These principles are of equal force and application to a trial court’s findings by a first appellate court. The principles were stated thus:

*“i. Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory….*

* 1. *Improper application of a principle of evidence… or, where the trial court has failed to draw an irresistible conclusion from the evidence….*
  2. *Where the findings are based on a wrong proposition of law; where the finding is so based on an erroneous proposition of law, that if that proposition is corrected, the finding disappears; and*
  3. *Where the finding is inconsistent with crucial documentary evidence on record…*’’

**BURDEN AND STANDARD OF PROOF**

The primary burden of proof, which is the duty of producing evidence in support of averments relevant to the court’s decision, is upon the party who made the averment. Such averments are made in the statement of claim/petition, the statement of defence, reply or the counterclaim. The primary burden of proof is usually on the plaintiff or petitioner who mounted the action and usually made the primary assertions. Where a defendant has a counterclaim, the same primary burden of proof, and standard of proof are placed on him as it is with the plaintiff, see **Birimpong v Bawuah [1994-95] GBR 837.**

The primary burden of proof is usually on the plaintiff because he made the primary averments when he instituted the action. However, where the plaintiff adduces sufficient evidence in discharge of the primary burden, the burden shifts under section 14 of Act 323 onto the defendant, who under section 10 (2) of Act 323, is required to adduce sufficient evidence in rebuttal, in order to avoid a ruling against him on the particular issue, see, **Faibi v State Hotels Corporation [1968] GLR**

**471**. The burden of proof is not static and is determined by the nature of the pleadings. For instance, where a plaintiff’s claims are based on *res ipsa loquitur* and the underlying facts are not denied by the defendant, the defendant will carry the burden of proving why the clear direction of the facts should not be affirmed by the court. Similarly, where the underlying facts of a plaintiff’s claims are admitted by a defendant who rather sets up a defence of *res judicata* or limitations, the defendant assumes the primary burden of proving the facts constituting the defence.

The obligation on the party making the averment is in two parts. The first part is the production of evidence in proof of the averment, as required by sections 11(1) and 14 of the **Evidence Act, 1975 (N.R.C.D 323).**

That burden may be discharged by production of evidence by the plaintiff himself and or his witness(es).

In the alternative, the burden of producing evidence may be discharged if the averment made by the plaintiff or defendant-counterclaimant, is admitted by the opponent. In **West African Enterprise Ltd v Western Hardwood Enterprise Ltd [1995-96] 1 GLR .CA**, it was held (in holding 3),

‘*’*...*no principle of law required a party to prove an admitted fact.’’*

Lastly, the burden of proof may be discharged by evidence from the mouth of an opponent or his witness. In **Nyamekye v Tawiah & Anor [1979] GLR 265, C.A (Full Bench),** it was held:

‘*’A party could prove his case by admissions from the mouth of his opponent or his adversary’s witness and in holding otherwise the house offended both principle and authority.’’*

# See also: Tsrifo v Duah VIII [1959] GLR 63; Ameoda v Pordier [1967] GLR 479

and **Eugene Guddah & Ors v Goldfields (Ghana) Ltd [2006] 8 M.L.R.G 13, C.A**

The second part of the duty of proof is to ensure that the evidence adduced meets the law’s standard of proof. The evidence must be sufficiently persuasive to the court as required by section10 (1), Act 323. The test applied by the court in determining whether the evidence adduced was sufficiently persuasive, is “*proof by preponderance of probabilities’’,* as required by section 12 of Act 323, see- **Majolagbe v Larbi [1959] 2 GLR 190; Owusu v Tabiri & Anor [1987-88] 1GLR 287; Fosua & Adu-Poku v Adu-Poku Mensah [2009] SCGLR 310** and **Agbeko v Standard Electric Co [1978] 1 GLR 432.**

# Evidential construct in the present case

The pleadings in a case are like a skeleton in a body. The evidence is the flesh. The pleading which makes the allegation, like a skeleton, is insufficient to constitute a body. The flesh alone cannot also stand. As a result, a party who makes an averment (skeleton) in a pleading must support it with evidence (flesh). Failing that, the averment would be held unproven and stands to be dismissed.

The appellant claimed that he had a prenuptial agreement with the respondent on property ownership. Since the respondent denied the claim, the appellant had the duty to prove it. The respondent averred that she was in a joint business with the appellant. The appellant denied this claim and averred that each of the parties did their business separately. Since this averment was denied, the respondent assumed the primary burden of proof. It was only after she had satisfactorily discharged that burden that the burden would shift onto the appellant to adduce evidence in rebuttal, to avoid a ruling against him on that issue.

The respondent averred that the properties listed in paragraph 14 of her statement of claim were jointly acquired. This was denied by the appellant in his statement of defence. The respondent retained the primary onus of proof, before the appellant assumed the duty to rebut the averment to avoid a ruling against him on that issue.

It is noted that the trial judge found some of the claims of the respondent not to be supported by the evidence. That was why in upholding part of the claims of the respondent, he found some of the properties to be appellant’s prenuptial properties while others were held not to belong at all to the appellant or the parties. Our enquiry will centre around the properties held by the trial court to be jointly acquired.

When it is determined that the respondent was able to discharge the primary burden of proof, the court will determine whether the appellant was able to rebut the claims as established by the respondent on preponderance of probabilities.

**ACQUISITION OF JOINT MARITAL PROPERTY**

# Jointly Acquired Property versus Solely Acquired Property

Article 18 (1) of the constitution guarantees the property rights of “*all persons*.” This must of necessity include all citizens and residents of Ghana, whether married or not. The provision was in its kingly reign for a period until it was destabilised. The first attempted *coup d’etat* against article 18 (1) of the 1992 constitution of Ghana, and thereby against the universally established principle of the right to own property singularly as a human being; a right which is at the very core of the pursuit of happiness, and for which individuals toil day and night, was plotted and executed by the Ghana Supreme Court in **Mensah v Mensah [1998-99] SCGLR 350**. In that case, the court seemed to question the possibility of a right of a spouse to acquire individual property during marriage. By clear implication, the mere fact of marriage cancelled a spouse’s article 18 (1) right, which guarantees that: “*Every person has the right to own property either alone or in association with others.*”

In that case, the venerable Bamford-Addo JSC, held (at page 355):

“…*the principle that property* ***jointly acquired*** *during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commence has no application in marital relations between husband and wife who jointly acquired property during marriage.*’’

Two comments on the above judgment relevant to the present case will be made.

Firstly, Mensah v Mensah (*supra*) did not abolish a spouse’s right to acquire individual property upon marriage, since article 18 (1) bestows the right to individual property to “*every person*”, including spouses. Any notion that a spouse lost his/her right to acquire individual property upon marriage would be *per incuriam*. Spousal right to property under article 22 and the right to individual property are both co- equal constitutional norms. One can only defeat the other by explicit constitutional amendment or an explicit interpretation by the apex court, specifically declaring that one norm was unconstitutional or was outweighed by the other, by the use of the interpretative technic of weighing and balancing, in an actual case of conflict between the two norms.

Secondly, this court in the case of **Emmanuel Obeng v Kate Nyamekye (Civil Appeal No :HI/51/2021,20 July 2023)** observed:

*“ It is observed from the dictum of Bamford-Addo JSC, that she referred to ‘jointly acquired’ property. She laid down the principle of equal sharing of ‘jointly acquired’ marital property. She however never intimated that every property created during marriage is ‘jointly acquired.*’’

The euphoria that every property acquired during marriage is jointly acquired marital property went down a bit, when in **Boafo v Boafo [2005-2006] SCGLR 705**, the apex court affirmed the principle for equitable distribution of ‘*joint property’* but cautioned that equal distribution should be pursued only where the *circumstances of a particular case permits*.

Despite affirming the ‘*equality is equity’* principle propounded in **Mensah v Mensah** (supra) by Bamford-Addo JSC, the court recognized the need to apportion the shares according to the equities in each particular case. The proportions are to be decided on a case-by-case basis, upon the peculiar facts of each case. That means, equal distribution would be sanctioned in a particular case only if it would be equitable so to do. The legal theory of that case was propounded by Date-Bah JSC thus:

“*The spirit of Bamford-Addo JSC’s judgment in Mensah v Mensah appears to be that the principle of the equitable sharing of* ***joint property*** *would entail applying the equitable principle, unless one spouse can prove* ***separate proprietorship*** *or* ***agreement*** *or a* ***different proportion of ownership****. This interpretation of Mensah v Mensah as laying down the principle of equitable sharing of* ***joint property****, accords with my perception of the contemporary social mores*…’’ (emphasis ours).

The apex court in **Boafo v Boafo** (*supra*):

1. Limited the “*equality is equity*” principle of Mensah v Mensah (*supra*) to “*jointly acquired property*.”
2. The court recognized the fact that a spouse who has contributed substantially more than the other spouse must get more than half share of the property. As a consequence, “*equitable distribution*” may not amount to “*equal distribution*” in all instances. Where a spouse has substantially contributed more than the other in the acquisition of the property, equal distribution would result in inequity and injustice, and undermine the very administration of justice. The court is not numb to simple legal and social arithmetic when it comes to the acquisition and distribution of marital property.
3. The court affirmed article 18 (1) by recognizing the right of a spouse to ‘*sole proprietorship*’ of property, distinct from the jointly acquired property of the spouses. That meant that property acquired distinctly as individual property in the course of a marriage would be set aside from the jointly acquired property in the distribution of property upon dissolution of a marriage.

In **Arthur v Arthur [2013-2014] SCGLR 543, at 565**, the unstable precedential pendulum at the apex court on marital rights swung backwards. The scholarly Date- Bah JSC, who had in **Boafo v Boafo** espoused spousal rights in joint marital property alongside the right to sole proprietorship, reverted to **Mensah v Mensah**, and seem to have stretched the *dictum* of Bamford-Addo JSC in **Mensah v Mensah** further by articulating that every property acquired during marriage is a ‘*jointly acquired*’ property. He held:

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

**Boafo v Boafo** (*supra*) in effect amounted to a successful judicial *coup d’etat* against the right to sole proprietorship of spouses as guaranteed under article 18 (10.

In **Emmanuel Obeng v Kate Nyamekye,** we commented:

**“***By this judicial decree, all properties acquired during marriage becomes jointly acquired property. The distinction between ‘jointly acquired’ property and sole proprietorship of property, appear to have been obliterated. It is doubtful however, whether Date-Bah JSC, intended to abolish sole proprietorship rights of spouses by the above dictum. That was because:*

1. *Bamford-Addo JSC in Mensah v Mensah restricted the equitable and equal distribution principles to ‘joint property.’*
2. *In relying on Bamford-Addo JSC, Date-Bah JSC had also restricted himself to ‘joint property’ in Boafo v Boafo, and expressly recognized the right of a spouse to solely own property, and hence the need to take evidence in each case to reflect the nature of contributions.*

*The constitutional right of spouses to an equitable share of joint property, is a fundamental value, but is not more or less important than other fundamental values enshrined in the constitution. Therefore, if the constitution wanted to use the property rights of spouses under article 22 (3) of the constitution, to abolish the property rights of all citizens, in particular, spouses, as enshrined in article 18 (1), a clause will have been inserted in article 22 (3) to that effect*.”

The ‘*overthrow*’ of article 18 (1) did not last for long, for in **Fynn V. Fynn & Anor (2014) 77 GM.J 43 SC**, sole proprietorship of spouses was explicitly affirmed. It was decided by the court per Wood CJ:

*“Decided cased envisage situations where within the union, parties may still acquire property in their individual capacities as indeed is their guaranteed fundamental right as clearly enshrined under article 18 of the 1992 Constitution, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in this instant case. No court in such clear cases would invalidate a sale transaction on the sole legal ground that the consent and concurrence of the other spouse was not obtained. We would however subject these views we have expressed to this sound caution. Since, the peace, tranquility, harmony, stability and indeed the health and general well-being of any marriage union thrives best in the environment of mutual affection, trust and respect for each other as well as transparency; we think a spouse in such a case is under a moral obligation at any given time, (indeed it is most expedient and fair) to apprise the other spouse of the intention to acquire and dispose of self-acquired properties at all material times. This is clearly implicit from this court's view expressed in* ***Quartson V. Quartson (supra)****, namely that:*

*“The Supreme Court's previous decision in* ***Mensah v. Mensah*** *..., 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 case of **Penelope Chishimba Chipasha Mambwe v Mambwe (Appeal 222 of 2015) [2018] ZMSC 317** epitomises the factors that reinforce sole proprietorship in a marital setting, and the need to distribute properties based on the evidence in each case, but not on the basis of an automatically fixed principle of 50:50 distribution. The Zambian Supreme Court spoke of such situations thus:

“*Although indeed many marriages are built on happiness and mutual support, there are still many others where one spouse may be perpetually wasteful, uncooperative, distant and providing absolutely no warm of companionship let alone financial contribution. It is debatable whether such spouses should be taken to have earned the entitlement to 50% share of the property of the family at the dissolution of the marriage*.’’

# A new paradigm: recognition of non-monetary (domestic services) as contribution towards acquisition of marital property

Until quite recently, the reigning principle was that a spouse was entitled to a portion of marital property only if he/she had made financial/substantial contribution to its acquisition. Cases in which that principle was applied include: **Yeboah v Yeboah [1974] 2 GLR 114; Abebrese v Kaah & Ors [1969] 2 All ER 826; Anang v Tagoe [1989-90] 2 GLR 8; Acheampong v Acheampong [1982-83] GLR 1017** and **Reindorf v Reindorf [1974] 2 GLR 38**.

A radical precedential change on spousal contribution to acquisition of joint property, propelled by social change and the recognition of womens’ rights, was affirmed in **Mensah v Mensah [2012] 1 SCGLR 391**. At pages 401-402 of the report, Dotse JSC, who wrote the opinion of the court, described non-monetary contributions as follows:

“*We believe that, common sense and principles of general fundamental human rights require that a person who is married to another, and performs various household chores for the other partner like keeping the home, washing and keeping the laundry clean, cooking and taking care of the partner’s catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved.*

*This is so because, it can safely be argued that the acquisition of the properties were facilitated by the massive assistance that the other spouse derived from the other. In such circumstances, it will not only be inequitable, but also unconstitutional ...to state that because of the principle of substantial contribution, which had been the principle used to determine the distribution of marital property upon dissolution of marriage in the earlier cases decided by the law courts, the spouse would be denied any share in marital property when it is ascertained that he or she did not make any substantial contributions thereof*.’’

The above case: in addition to financial contribution/substantial contribution, formally recognised unpaid domestic services as contribution towards the acquisition of joint marital property. Hitherto, some spouses, mostly women, had difficulty proving substantial contribution, the result of which was most walking away from marriages with empty hands despite their domestic toils.

Pwamang JSC in **Adjei v Adjei [2021] 172 GMJ 1**, explained what Mensah v Mensah and the subsequent cases held on non-monetary contributions thus:

“*It is here that the decisions say that non-pecuniary contributions 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*.’’

He emphasized that the constitution has no provision to the effect that property acquired during marriage is joint property. He expressed the need for the equal protection of both spouses from encroachment on their property rights by the other spouse. He held:

“*It is important to understand that the commendable and progressive presumption that property acquired during marriage is jointly acquired is not stated by the constitutional provisions in article 22 which is abundantly clear*.’’

He explained that the principle of presumptive ownership, being judicially created and not based on the constitution, is a rule of evidence, which does not confer substantive rights on spouses.

The duty of spouses to prove their exclusive or joint acquisition of property post Mensah v Mensah still prevails. The contribution may be (a) monetary (b) materials or services, and (c) domestics services and emotional support.

**DISTRIBUTION OF JOINTLY ACQUIRED PROPERTY**

In the pre-1992 constitution era, property settlements on spouses upon divorce was under section 20 (1) of the **Matrimonial Causes Act, 1971 (Act 367**). It provides:

*“(1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable*.’’

Presently article 22 (3) of the constitution is the key provision for the distribution of jointly acquired marital property. It provides:

*(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article -*

1. *spouses shall have equal access to property jointly acquired during marriage.*
2. *assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.’’*

Property settlement under section 20 (1) of Act 369 is on a different principle from that of article 22 (3) of the constitution. Under Act 369, property may be settled on a spouse whether or not it was jointly acquired. Section 20 (1) of Act 369 may be deployed when the court concludes that there is no joint property to be distributed under article 22 (3), or where the court intends to settle a portion of a spouse’s individually acquired property on the other. However under article 22 (3), spouses have a right to equal access to jointly acquired property during marriage, but on divorce, the property is to be shared equitably.

The dispute has been as to whether “*equitable*” distribution commanded under article 22 (3) amounts to arithmetically “*equal*” distribution. The first **Mensah v Mensah** case (*supra*) postulated that article 22 (3) stipulates an equal distribution of jointly acquired property upon a divorce.

In **Boafo v Boafo** *(supra),* the Supreme Court affirmed the equality is equity principle but made it clear that it could only be applied on a case-by-case basis, and where the equities of the case permitted, such as where the spouses have made equal or substantially equal contribution to the acquisition of the property

In the second **Mensah v Mensah** case (supra), the apex court per Dotse JSC advocated a new approach on determining the nature of the spouses contribution and the ratio for distribution in the following terms:

“*We are therefore of the considered view that the time has come for this court to institutionalise this principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the sustenance of a marriage in* ***appropriate cases****. This is based on the constitutional provisions in article 22 (3) and 33 (5) of the constitution 1992, the principle of equality and the need to follow, apply and improve our previous decisions in Mensah v Mensah and Boafo v Boafo* …’’

The push for the “*50:50 as equity*” principle has been bitterly litigated in Ghana and beyond. The Kenyan, Ugandan and Zambian courts have made striking pronouncements on the principle, which have persuasive effect on us, on account of the similarities between our articles 22 (3) and 33 (5), and their constitutions.

Kiage JA in **PNN v ZWN (Civil Appeal No 128 of 2014; [2017] eKLR** expatiated on the 50:50 principle thus:

“*Does this marital equality recognized in this Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts.*

*That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.*

*The reality remains that when the ship of marriage hits the rock, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get served by simply cutting up a contested object into two equal parts…*

*I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce- hoping brides and, alas, grooms.*

*Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.’’*

*Thus, it is that the Constitution, thankfully, does not say equal rights “including half of the property.*’’

In **UMM v IMM [2014] eKLR**, Tuiyott J of Kenya held:

“*I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non- monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the matrimonial property then, the courts should give it effect.*

*But to hold that article 45 (3) decrees a romantic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property.*

*That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by article 45 (3).*’’

The Kenyan Supreme Court in the landmark case of **JOO v MBO & Ors [2023] KESC 4 (KLR)**, struck down the argument for application of a universal ratio of 50:50 sharing of marital property upon divorce. The court held:

“…*whiles article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married (p.27)…*

*Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45 (3) of the Constitution. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott J (as he then was) has explained why above.*

*Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.*’’

On its part, the Ugandan Supreme Court **in Rwabinumi v Bahimbisomwe (Civil Appeal 10 of 2009) [2013] UGSC 5**, held per Kisaakye, JSC:

“*In my view, the Constitution of Uganda (1995), while recognizing the right to equality of men and women in marriage and at its dissolution, also saved the constitutional right of individuals, be they married or not, to own property either individually or in association with others under article 26(1) of the Constitution of Uganda (1995).*

*This means that, even in the context of marriage, the right to own property individually is preserved by our Constitution as is the right of an individual to own property in association with others, who may include a spouse, children, siblings or even business partners. If indeed the framers of our constitution had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly stated so*…

*So, while I agree that article 31(1) (b) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or the husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of the marriage should in all cases, be shared equally upon divorce. It was therefore erroneous for the Court of Appeal to hold that all individually held property…becomes matrimonial property upon marriage and joint property of the couple and that it should be shared equally…The court’s holding was irrespective of whether the claimant proves that he or she contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage instalments or its development; indirectly through payment of other household bills and other family requirements including child care and maintenance and growing food for feeding the family.’’*

The Zambian Supreme Court in **Mathews Chisimba Nkata v Ester Dolly Mwenda Nkata [SCZ Appeal N 60/2015** also held:

“*If the basis of sharing family property is that both spouses contributed to its purchase or creation, it should follow that where it can be demonstrated that one spouse invested nothing (financially or in kind) in the acquisition of the property, they should technically not be entitled to a share of what was in fact an investment by one spouse on the basis only that they had entered into a marriage. Our view is that property [sharing] should be undertaken on the basis of fairness and conscience, not on an unjustified reference to 50:50 dogma. In our opinion, the sharing of matrimonial property should not reside in a fixed formula in law. It should not be a matter of mathematics as simply splitting a piece of land into two equal portions. Equal rights between husbands and wives do not necessarily translate, in every case, into equal portions of family property.’’*

This court had the opportunity to dilate on the issue in **Emmanuel Obeng v Kate Nyamekye ( Civil Appeal NO:HI/51/2021, 2023),** where we stated*, inter alia*:

**“***From the expositions in the above foreign cases and the recent tilt of our case law as enunciated in Adjei v Adjei, it is evident that the proponents of an inflexible and global marital property distribution ratio of 50:50, stand on loose and slippery grounds. The notion that equality is equity, does not apply to all cases. Equality is equity where all things are equal. Where the contributions are inordinately skewed, equality in distribution would only result in inequity and injustice. Equality blindly applied will stifle innovation, hard word and sound economic management principles, that are the bedrock of a liberal society*…

*Most importantly, our constitution does not demand any 50:50 sharing of marital property. As the Kenyan, Zimbabwe and Ugandan examples show, had our constitution even stipulated a 50:50 distribution, it will have been interpreted under the assumption that each spouse has made a contribution equal or close to the share to receive*.”

**WHETHER OR NOT THE PARTIES DID JOINT BUSINESS AND THE SUBJECT PROPERTIES WERE JOINTLY ACQUIRED**

Our enquiry here will determine:

1. whether or not there was a prenuptial agreement that each party will acquire his/her property as claimed by the appellant,
2. whether the parties did joint or separate business(es), and
3. whether or not the properties were jointly acquired or each party in fact acquired his/her own property.

# Whether or not there was a prenuptial agreement on property

The appellant as the respondent, averred the prenuptial agreement in paragraph 7 of his response. He averred:

“*Respondent avers that when he met the petitioner, he reached understanding with her that each party will do his/her business and acquired (sic) property separately as the respondent was already married*.”

In paragraph 9 of the reply, the respondent as the petitioner, denied any such prenuptial agreement on property.

A prenuptial agreement is a contract made between two people before marrying, by which they establish rights to property and support in the event of divorce or death. Prenuptial agreements which are common in the western world, are used by would- be couples who desire to set down the terms of any future divorce before they get married. As a general rule, pre-nuptial and post-nuptial agreements are not legally binding in Ghana. In appropriate circumstances; that is where the terms are clear and were intended to be binding on the parties, the courts may enforce prenuptial agreements as enforceable contracts.

In the instant case, beside merely repeating the claim on oath, the appellant did nothing more towards proving that there was such a prenuptial agreement. Such a serious agreement should have been documented or if verbally made, communicated to at least one disinterested person as a witness in the event of a dispute. The repetition of the mere claim, in the teeth of respondent’s denial was incapable of proving the claim. We accordingly align with the trial court’s implied conclusion that there was no such prenuptial agreement between the parties on property.

# Whether the parties did joint or separate businesses

Whereas the respondent averred that they did joint businesses and acquired joint properties, the appellant asserted that each party did his/her own separate business and acquired his/her separate properties. We shall now examine the evidence on two businesses mentioned by the respondent.

# Shop business

It was the case of the respondent that the parties did joint businesses from which they acquired joint properties. According to her, the first business they did was store keeping.

The appellant admitted that the two were into the business of shop keeping at the time they met, but asserted the following:

* 1. That he established a shop for the respondent distinct from the one that he operated.
  2. That the respondent collapsed the business he established for her, for which reason he transferred his own store with the goods worth GH¢200,000.00 to the respondent in 2009. After handing his shop to the respondent in 2009, he went into the gold business which he established and carried on exclusively for himself.
  3. That in 2016 when the respondent expressed interest in entering the gold business, he granted her a loan of GH¢100,000.00 but same has remained unpaid.

In her reply, the respondent averred that when they got married, the appellant stocked provisions in a shop near Ajara junction for her to manage, but said the sales were bad so she stopped operating from that shop. The two then abandoned their separate shops and acquired a shop in the Kade market into which they moved. She claimed that the goods left in the shop was not valued at GH¢200,000.00.

The respondent called Cosmos Amewugah Ametorwoshie (PW3) who testified on the operation of their shop in the Kade market. PW3 admitted to working in the shop for only 3-4 months. According to him the respondent is still running the shop.

The respondent by the evidence admit that the appellant opened a shop for her at Ajara junction. From all indications, she was running this shop as her exclusive *bona fide* business. That was because, she did not indicate running it with the appellant or accounting to him. She claimed to have left that shop because it was not profitable.

When it comes to the shop in the Kade market, the respondent again did not deny the appellant’s claim that he brought the goods in his individual shop into that shop for the respondent to run. Her only complaint was that the goods were not to the value of Gh¢200,000.00 as claimed by the appellant. Strangely, she did not state the value of the goods brought into the new shop by the appellant. It is usual for goods being brought into a new shop to be counted and valued, for the sake of accounting for profit and loss. Therefore, if the goods were not worth GH¢200,000.00 as the appellant claimed, the respondent was obliged to tell the court what the value was. Her failure to rebut appellant’s figure left us with no option than believing that the goods added to the Kade market shop for her to run was GH¢200,000.00. Goods of that amount in 2009 were of substantial value .

It is noted that the respondent has been running that shop to date. Her claim that she has been running that shop since 2009 with the appellant was not supported by the evidence. The respondent filed her petition on 5 July 2019. In paragraph 12 of the petition, she states:

“*That the respondent has for ten (10) years financially abandoned the matrimonial home and the upkeep of the children, including his children and niece*.”

This affirm that the appellant has not been party to the running of the shop since 2009 when he added the stock from his own shop and embarked on the gold business. In paragraphs10 and 18 of her evidence in chief (at pages 92 and 93 of the record), the respondent claimed that the appellant failed to maintain the children for close to ten years and she had to take up that responsibility. The respondent claimed that she kept the house from proceeds from the shop and other family sources. If the appellant was considered part owner of the shop and same was being run as a joint business of the parties herein, expenditure on the children from income from the shop would have been from both parties, and the respondent’s claim that the appellant abandoned the family financially for ten years would have been a pointless allegation.

The one and only conclusion that the evidence permitted was that the Kade market shop was procured for the respondent, who has run it from then till now solely as her business without accounting to the appellant.

# Gold business

The respondent claimed that she advised the appellant to join the gold business in 2009 by teaming up with Mr. Ampofo and Gyebi Foster. She claimed that the appellant occasionally took money from the shop to engage in the gold business. She gave no example of any amount the appellant took from the shop for the gold business in spite of the denial of the appellant, thereby casting doubt on the claim. As aforesaid, the appellant claimed that he gave a loan of GH¢100,000.00 to the respondent to trade in gold by herself. The respondent did not specifically deny that the appellant gave her an amount of GH¢100,000.00 to engage in her own gold trade. Aside denying that she was separately trading in gold, her response to the claim was hazy and confusing. In paragraph 12 of the reply, she averred:

“*That I deny paragraph 5 and say further that myself and the respondent were doing the gold business together and I was using the money to buy gold from a friend dealer for the respondent and that any outstanding money is part of the loss on the business*.”

She repeated the claim in paragraph 36 of the evidence in chief. If the alleged gold business incurred a loss, then it could not have made profits from which assets could be created.

Under cross examination, she denied that she made a profit of Gh¢80,000.00 from the gold business which she kept for herself. According to her, a gold dealer failed to pay an amount of GH¢50,000.00 for which reason she sent him to the Asamankese court, to the knowledge of the appellant.

If the respondent and the appellant were doing joint gold business, then why did the respondent alone send the debtor to the Asamankese court? Why did the respondent not join the appellant to herself as plaintiffs or complainants? Clearly, the respondent was acting alone as a plaintiff or complainant in the action to recover the sum from the defendant in the gold deal. The sole action of the respondent clearly shows that she was acting on her own, which further proves that she was doing the gold trade as her exclusive business.

The respondent in paragraph 12 of her evidence in chief (page 93 of the record) identified herself as “*a petty trader and* ***a former gold dealer***” but identified the respondent in paragraph 4 of the petition as “*formerly a storekeeper with the wife is currently a gold dealer and buys and sells gold in the Ashanti and Eastern Regions of Ghana.*” If the respondent by her own testimony is a former gold dealer when she knows that the appellant is still in the gold business, then the two were dealing in gold separately as claimed by the appellant, and not jointly as claimed by the respondent.

In paragraph 17 of his evidence in chief, PW3 told the court that the respondent was sold gold by his friends called Twum and Godfred which she sent to the appellant in Konongo. Under cross examination (page 162 of the record) he said the friend Twum sold gold to the respondent which she sold to the appellant. Said he:

“*He sells gold to the petitioner who in turn sells same to the respondent. When the respondent relocated to Konongo the petitioner used to send gold to him to buy*…”

The evidence of the respondent’s own witness betrayed her cause. PW1 was emphatic that the respondent sold the gold to the appellant. That meant the respondent was doing her gold business exclusively from the appellant. She was buying the gold from other dealers and selling same to the appellant.

# Whether the parties acquired joint properties

The trial court decided that the following properties were jointly acquired by the parties.

1. Dabi Asem Hotel at Akrantebesa, Konongo.
2. House located at Dr. Wood, Ekooso, Konongo.
3. House situated at Topreman near Akyem-Kade.
4. Storey building located at Tipper junction, Bawjiase Road, Kasoa.
5. One excavator machine.
6. Uncompleted house at situated at (sic) Akyem-Achiase.
7. Six (plots) of land at Kweikuma, Kasoa.
8. One (1) plot of land at Tipper Junction, Bawjiase Road, Kasoa.

The question to resolve in this appeal as earlier stated is as to whether the evidence on record supported those conclusions. We shall consider the evidence in respect of each property, one after the other. It has to be noted that since the parties engaged in separate businesses and accrued profits for themselves, the presumption that properties acquired during the marriage was joint property was effectively rebutted by the appellant. We are therefore to determine if there was evidence that the respondent made monetary or non-monetary contribution to the acquisition of the named properties.

# Dabi Asem hotel at Akrantebesa, Konongo

The appellant claimed that he exclusively developed the hotel for his post mining work benefit. According to him, the respondent made no contribution towards its development and was not even aware until its inauguration.

Kwame Asiedu (DW2) testified that he developed the two houses purchased by the appellant into the hotel. He claimed that he saw the respondent for the first time when the hotel was to be inaugurated.

The respondent on the contrary claimed that the hotel was joint property that was built with gold money. Since the parties did the gold business separately, and the respondent could not prove that she invested part of the proceeds of her gold business in the acquisition and development of the hotel, her claim of joint acquisition of the hotel was not convincing. That explains why she seemed to know next to nothing about its development until its inauguration. Her claim of buying utensils for the kitchen and decorations for the inauguration, even if true, could not be sufficient contribution, when she was doing her business separate from the appellant.

# House located at Dr. Wood, Ekooso, Konongo.

Against the claim of the respondent that this property was joint property, the appellant contended that he acquired that house for his wife called Rukaya Abdil. The respondent failed to discharge her primary onus of proving the averment in the form of when and how the house was jointly acquired by the couple. Most importantly, she could not disprove the claim of the appellant that he has a wife called Rukaya Abdil for whom the house was acquired. The respondent conceded that the appellant was married before getting married to her. There was no evidence that the appellant had given any of his properties to that wife save this particular house. The claim of the appellant was therefore more plausible than the mere averment of the respondent.

# House situated at Topreman near Akyem-Kade

The respondent claimed this house to be joint property. The appellant however contented that the house belonged to his late father called Opanin Kwaku Brako who gifted same to his children including himself (the appellant). The appellant called one of his brothers, Daniel Osafo to testify as DW1. The trial judge placed no weight on the evidence of DW1 because of his vested interest in the property as a beneficiary

and alleged lack of credibility.

We do not find any basis for the trial court’s conclusion. In the first place, the respondent who made the averment provided no clue as to when and how the property was acquired. She merely went to the witness box to repeat her averment. That could not amount to proof of the averment. In **Faibi v State Hotels Corporation [1968] GLR 471**, HC Ollenu J (as he then was) held (holding 1):

“*Onus in law lay upon the party who would lose if no evidence was led in the case, and where some evidence had been led it lay on the party who would lose if no further evidence was led*…”

In respect of DW1, we note the warning of the Supreme Court in **Sakyi v Basare [1987-88] 1 GLR 313** against relying solely on the evidence of a relative with vested interest in the subject property. We equally take note of the advice of this court in **Atadi v Ladzekpo [1981] 218** that a witness ought not to be assessed solely on the basis of his relationship with the party who called him.

There is indeed no law against the testimony of a relative, with the issue relating only to the weight to be attached to such evidence. Accordingly, the evidence of DW1, no matter how slightly it weighed, tilted the balance in favour of the appellant and against the respondent on the ownership of the Topreman house.

# Storey building located at Tipper junction, Bawjiase Road, Kasoa/ Six (plots) of land at Kweikuma, Kasoa/One (1) plot of land at Tipper Junction, Bawjiase Road, Kasoa

As in respect of the other properties, the respondent’s claim that the above properties were jointly acquired remained a bare assertion. As aforesaid, the appellant who carried on his exclusive gold business had the right to acquire properties as a sole proprietor. According to the appellant, he built the storey building at Tipper junction, Bawjiase road, Kasoa for his five children who are not the children of the respondent. According to him, the one plot of land mentioned by the respondent is attached to the building. He denied knowledge of the six plots of land listed by the respondent.

We regret to state that the mere averment and its repetition by the respondent in the evidence in chief was not sufficient. She failed to tell the court when and how the aforementioned properties were acquired. We found the rebuttal of the appellant more plausible, on account that he had the right as a sole proprietor to acquire the properties for the purpose he stated.

# One excavator machine

The respondent claimed that they acquired three excavators during the course of their marriage. Having made the assertion, the duty was on the respondent to provide proof of the claim. No effort was made by her towards proof of the assertion.

The appellant in order to establish that two excavators were rather hired and not purchased, tendered exhibit 2, which proves that two excavators were rented to Dabiasem Enterprise, by A. A. Minerals Ltd.

The trial judge took the claim of the respondent as the gospel truth and decided that if two excavators had been accounted for as being hired, then the couple owned the one excavator that the appellant could not account for.

The decision of the trial court is flawed for several reasons. The respondent who made the assertion had the duty of proving it, when same was challenged. Since she claimed to have been present when the three excavators were purchased, she could have applied to the company that sold them for details on the sale. Secondly, since exhibit 2 evinced hire of two excavators, the claim of a purchase by the respondent should have been discounted. Thirdly, since exhibit 2 proved that only two excavators were rented, the claim by the respondent that three excavators were purchased or rented should have been rejected.

**CONCLUSION**

The evidence led us to the following conclusions:

1. Even though the appellant began the shop business with the respondent, he left that business in 2009, after they moved to the shop in the Kade market, and from that period to date, the respondent has run the shop as her exclusive business without accounting to the appellant.
2. The appellant gave the respondent a capital of GH¢100,000.00 in 2016 to engage in the gold trade on her own. The fact: (i) that the respondent was given a capital of GH¢100,000 to engage in her exclusive gold business (ii) that the respondent sold her gold to the appellant, and (iii) could take her debtor in the gold business to court without recourse to the appellant, supports the claim by the appellant that each party traded in gold exclusively.
3. As a consequence of the above, we hold that the parties engaged in their individual businesses and earned their separate income.
4. Since the parties in the polygamous setting engaged in separate businesses and kept the proceeds from the businesses to themselves, 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.
5. Beyond the mere assertions, the respondent failed to prove that the properties held by the trial court to be joint properties were indeed jointly acquired by the parties in the course of the marriage. The evidence proved them to be the self-acquired properties of the appellant.
6. Since the parties engaged in their separate businesses and acquired their independent wealth, there was no jointly acquired properties to be distributed under articles 22 (2) and 33 (5) of the constitution. The respondent is however entitled to property settlement under section 20 (1) of Act 367. The appellant claimed under cross examination without any strong rebuttal that:
   1. he renovated the respondent’s family house so that she gets a place to live in when she visits her hometown.
   2. he gifted the Ajara House in which he also established a store to respondent.
   3. he built a house (uncompleted) at Achiase for her.
   4. That was in addition to a vehicle, the capital of GH¢100,000.00 to buy gold and a store in the Kade market into which goods worth GH¢200,000.00 were transferred in 2009.

In view of the above and the fact that the appellant has another wife with a right to a similar settlement in the event of a divorce, we consider the Ajara House and the Achiase house to be sufficient property settlement on the respondent.

1. On account of the commitments of the appellant to his existing wife and other children, we found the financial settlement of GH¢150,000.00 to be on the higher side. We hereby review it downwards to GH¢100,000.00.
2. We affirm the trial court’s decision that the appellant shall be responsible for the educational and health expenses of the children whiles the respondent takes care of their feeding, clothing and accommodation expenses.
3. On account of the above, we found the judgment of the trial court to be largely against the weight of evidence. Subject to item (h), the appeal is upheld, and the judgment of the High Court dated 9 May 2022, is hereby set aside.

**(SGD).**

**ERIC BAAH**

**(JUSTICE OF APPEAL)**

**(SGD).**

**I agree GBIEL SIMON SUURBAAREH**

**(JUSTICE OF APPEAL)**

**(SGD).**

**I also agree ALEX OWUSU-OFORI**

**(JUSTICE OF APPEAL)**