**EMMANUEL OBENG**

**(SUING PER HIS LAWFUL ATTORNEY FELIX DONKOR)**

*(PETITIONER)*

**vs.**

**KATE NYAMEKYE**

**(OTHERWISE KNOWN AS MARY FRIMPONG RUBIERA(RE)**

*(RESPONDENT)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/51/2021 DATE: 20TH JULY 2023

**COUNSEL**

D. OSEI-ANTWI ESQ., FOR PETITIONER/RESPONDENT.

EBENEZER AHIATOR ESQ., FOR RESPONDENT/APPELLANT.

**CORAM**

SUURBAAREH, J.A (PRESIDING)

BAAH,J.A

AMALEBOBA, JA

**JUDGMENT**

**BAAH, J.A:**

**INTRODUCTION**

The respondent/appellant by this appeal challenges the decision of the trial Circuit Court, Kumasi, dated 25 November 2019, by which it was held that the following properties:

1. Two buildings on Plot Nos 40 and 41, Anwomaso, Kumasi.
2. A school built on Plot Nos 297-304, Ampabamen, Kumasi.
3. A house at Ampabamen No.1, Kumasi, and
4. An uncompleted storey building adjacent to the three-bedroom house at Ashongman,

are not joint marital properties, as a result of which none could be settled on the respondent/appellant. The court settled a three- bedroom self-contained house in Ashongman on the respondent/appellant. Whiles the respondent/appellant contends that the three-bedroom house and the uncompleted storey building are properties on the same piece of land, which is owned by the parties, petitioner/cross-appellant asserts that the two properties were developed on two separate lands. He contends that whiles the three-bedroom self-contained house is built on land jointly acquired by the parties, the other land is separate and acquired solely from his resources.

The issues raised for our determination are:

1. Whether or not a spouse, in the course of the marriage, can acquire individual property, separate and distinct from the jointly acquired marital properties.
2. Whether or not all properties acquired in the course of a marriage, notwithstanding the respective contribution or lack thereof by a spouse, becomes jointly acquired marital property.
3. Whether or not a jointly acquired marital property must be shared ‘equally’ or ‘equitably’, upon dissolution of the marriage.

For the purpose of this appeal, the petitioner/cross-appellant shall be referred to as petitioner, and the respondent/appellant, respondent.

We shall first sum up (a) the case of each side (b) the decision of the High Court, (c) the grounds of appeal and (d) the submissions of counsel for the parties before our core mandate of reviewing the decision against the evidence.

**CASE OF PETITIONER**

The petitioner and respondent equally petitioned for divorce. There was no contest on the joint prayer for the dissolution of the marriage, and same has been dissolved by the court. The trial court’s decision dissolving the marriage is not being contested by either side in these appeals. The relevant facts for this appeal accordingly relates to the acquisition of the subject properties which petitioner allege are his personal properties, but respondent contend are jointly acquired marital properties.

The petitioner in his cross appeal prayed the court to settle the three- bedroom Ashongman house on him, since he single-handedly constructed it. It was his case that he individually acquired the land adjacent to the three-bedroom house in Ashongman. He denied that the properties on plot Nos 40 & 41, Anwomaso, Kumasi, were jointly acquired. He claimed to have single-handedly constructed them for his daughter called Emmanuella Gyamfua. He claimed also that the house at Ampabamen, Kumasi, was built for his grandfather, in memory of his immense contribution to his education. He claimed further that the school claimed by the respondent as their jointly acquired property, rather belongs to him and his siblings. All the subject properties, he contended, were therefore not marital property which could have been distributed upon dissolution of the marriage.

**CASE OF RESPONDENT**

The case of the respondent was that the house in Accra is situate in Ashongman, and not Adenta as sometimes asserted by the petitioner. Most importantly, respondent claimed that the three-bedroom house in Ashongman, Accra, was single-handedly built by her, and that is where she resides on her visits from Italy to Ghana.

According to her, the three-bedroom self-contained house with an extension in Ashongman, Accra; a six-bedroom house at Anwomaso, Kumasi; an eight-bedroom house at Ampabamen, Kumasi; a fifteen- bedroom storey building used as a hostel and situated at Anwomaso, Kumasi, and 50% share in a school called Grace Talent Academy, Ampabamen, Kumasi, were acquired jointly during their marriage and are therefore marital property, which ought to be distributed between the parties.

**DECISION OF THE HIGH COURT**

The trial was conducted by the parties by proxy, that is, through lawful attorneys. Petitioner testified through an attorney and two other witnesses. Respondent relied solely on the evidence of her attorney. After the plenary trial, the trial Circuit Court, *coram:* H/H Comfort K Tasiame, delivered its judgment on 25 November 2019. In relation to the issue of the properties which is on appeal, her Honour held:

1. That the three-bedroom house at Ashongman is a jointly acquired property and therefore a marital property. That was because, the document on the land, exhibit B, is in the joint names of the parties, and secondly, the house was regarded as the matrimonial home of the couple, where respondent lives on her visits to Ghana, and where her sister also lives.
2. That the uncompleted storey building being constructed on the land adjoining the three-bedroom house, the site plan of which was tendered as exhibit C, was on a separate land which was acquired solely by the petitioner.
3. That the six-bedroom house at Anwomaso, Kumasi, the eight- bedroom house at Ampabamen, Kumasi, the fifteen-bedroom hostel at Anwomaso, Kumasi, and petitioner’s 50% share in Great Talent School, Ampabamen, Kumasi, were the self-acquired properties of the petitioner. That was because, the respondent who claimed to have jointly acquired the said properties with the petitioner, failed to prove the monetary or non-monetary contributions she made towards the acquisition and development of the properties.

Based on the foregoing, the court ruled against either an equal or equitable distribution of the aforementioned properties, with the exception of the three-bedroom jointly acquired property which, as aforesaid, was settled on the respondent. Both parties were dissatisfied with specific aspects of the judgment. Consequently, when the respondent appealed, the petitioner also cross appealed. The grounds of appeal and cross appeal are hereunder communicated.

**GROUNDS OF APPEAL AND CROSS APPEAL**

**Grounds of appeal**

By her notice of appeal dated 28 January 2020, the grounds of appeal of respondent are the following:

1. That the judgment is against the weight of evidence.
2. That the learned trial judge erred in law when she held that the following properties were not matrimonial properties and therefore same cannot be described as jointly owned by the parties:
   1. House built on Plot Nos. 40 & 41 situate at Anwomaso, Kumasi.
   2. House built on Plot No. 147 situate at Ampabamen, Kumasi.
   3. Great Talent School built on Plot Nos. 297,299, 300, 301 &

302 and same located within the Atwima Kwanwoma District of the Ashanti Region.

The respondent prayed this court to reverse the judgment of the trial court and declare that the afore-mentioned properties were the jointly acquired properties of the former couple, which ought to have been distributed equally or equitably, upon dissolution of the marriage.

**Ground of cross appeal**

The sole ground of appeal in the notice of cross appeal dated 28 May 2020 , is the following:

1. That the trial judge erred when she granted the respondent the three (3) bedroom property with No. N. 14599, Old Ashongman, Accra.

Petitioner prayed this court to reverse the said decision and declare the said property as a jointly acquired property, liable to be distributed between the parties.

**APPEAL AS A REHEARING**

It is a well-trodden rule of law and procedure that an appeal amounts to a rehearing, especially where the appellant, such as the respondent herein, relies on the omnibus ground of appeal. Rule 8 (1) of the **Court of Appeal Rules (1996), C.I. 19,** accordingly 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*".

In **Tuakwa v Bosom2001-2002 SCGLR 61,** the court per Sophia Akuffo JSC (as she then was), 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…’’*

In **Koglex Ltd (No.2) v Field [2000] SCGLR 175, SC**, Acquah JSC (as he then was),the Supreme Court 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 for consideration of a trial court’s findings by a first appellate court. Speaking through Acquah JSC (as he then was), it was stated:

*“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…*’’

From the totality of the evidence on record and the legal questions arising therefrom, we considered the two main issues for our enquiry as to:

1. Whether or not the properties in dispute were jointly acquired marital property, and
2. Whether the property or properties found to be jointly acquired, ought to be distributed equally on a 50:50 basis.

We begin our enquiry with the ownership status of the disputed properties.

**BURDEN AND STANDARD OF PROOF**

It is a trite rule of evidence that he who asserts assumes the burden of proof. The respondent who claimed to have jointly acquired the properties with the petitioner, was obligated to prove that claim by the evidential standards set by the law.

The trial judge was firm in her conclusion that the respondent failed to discharge her evidential burden. We are obliged in these appeals to review that decision to ascertain its compliance with the tide of evidence. We shall for that purpose briefly outline the evidential standards set by the law.

In every civil suit, the primary burden of proof which comprises the duty of producing evidence in support of averments relevant to the court’s decision, is upon the party who made an averment.

The obligation on the party making the averment is in two parts.

The first part of that obligation 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 task may be fulfilled by the abduction of evidence by the plaintiff himself and or his witnesses, as was done by the parties in this case.

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.’’*

The burden of proof may also be discharged by evidence from the mouth of an opponent or his witness. It was to that end held in **Nyame v Tawiah & Anor [1979] GLR 265, C.A (Full Bench)**:

‘*’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 obligation is to ensure that the evidence adduced meets the standard of proof set by the law. The evidence must be sufficiently credible in order to persuade the court of fact under section10 (1), Act 323, that the fact alleged exists. The standard applied by the court of fact in determining whether the evidence adduced was persuasive, is ‘*’proof by a preponderance of probabilities’’,* as stipulated under section 12 of Act 323, and elucidated in **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.**

The primary burden of proof is usually on the plaintiff who usually makes the primary averments in the action instituted by him. Where the plaintiff adduces evidence sufficient to discharge the primary burden, the *onus* shifts under section 14 of Act 323 onto the defendant, who under section 10 (2) of Act 323, is obliged to adduce sufficient evidence in rebuttal so as to avoid a ruling against him on the particular issue, as elucidated in **Faibi v State Hotels Corporation [1968] GLR 471**.

A defendant who counterclaims, as was akin to the circumstances of the cross petitioner in the instant case, assumes the same primary burden and standard of proof as the plaintiff, see: **Birimpong v Bawuah [1994-95] GBR 837.**

**ACQUISITION OF THE SUBJECT PROPERTIES**

**Submission of counsel for petitioner**

Counsel for the petitioner backed the trial court’s decision on the acquisition of the properties, with a few exceptions. His view on the three-bedroom house at Ashongman was that being a jointly acquired property, each party was entitled to an equal share. He found no error in the judgment decreeing the property on site plan exhibit C and the other assorted landed properties, to be the self-acquired properties of the petitioner.

**Submission of counsel for respondent**

Counsel for the respondent on the other hand contended, that his client was able to prove by her evidence that with the exception of the property in Ashongman which she solely developed, she contributed to the acquisition of all the other properties the petitioner lays exclusive ownership to. The contribution of the respondent, he claimed, came in the form of monies expended on the building, and by causing her brother (who held her power of attorney), to undertake the tiling or terrazzo works in the/these house(s).

There was also no doubt, he submitted, that the said properties were acquired during the pendency of the marriage. He submitted on that account that the petitioner could not have advanced the properties on Plot Nos 40 & 41 to his daughter Emmanuella Osei-Gyamfua, without the consent of the respondent. He called for an equal share of the said properties under the authority of **Mensah v Mensah [2012] 1 SCGLR 391**.

In respect of the property on Plot No 149, Ampabamen, Kumasi, the contribution of the respondent, he submitted, was the purchasing of building materials and the terrazzo works she caused her brother to undertake in the house. He posited that even if that house was constructed on family land as petitioner asserts, the parties herein would have life interest in them.

He contended that Plot Nos 298-304 on which the school has been established is a jointly acquired marital property. According to him, the parties had earlier carried out poultry farming on that same land.

He called in his aid, the *nemo dat quod non habet* rule, and submitted that since the land belonged to the then couple, the petitioner could not have single-handedly, granted it to the school, or registered its title in the name of the school.

He prayed for a reversal of the unfavourable decision of the trial judge, and an order made for the equitable distribution of that property as a jointly acquired property under article 22 (3) of the Constitution.

On the properties at Ashongman, counsel for the respondent contended that the two properties, that is, the tree-bedroom house and the uncompleted story building, are on the same piece of land acquired jointly by the parties. He disagreed with the trial judge’s conclusion that the land on which the storey building is being constructed, and covered by a site plan, exhibit C, was acquired exclusively by the respondent and could not be distributed as a jointly acquired property. He prayed us to hold that the three-bedroom house and the uncompleted storey building are on a single piece of land with a common wall and gate, which ought to be settled on the respondent.

**WHETHER OR NOT THE PROPERTIES WERE JOINTLY ACQUIRED**

**Jointly Acquired Property, versus Solely Acquired Property**

From the trend of the cases, it would appear that the apex court, beginning with the case of **Mensah v Mensah [1998-99] SCGLR 350**, began to doubt or question the possibility of the right of a spouse to acquire individual property during marriage. 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.*’’

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.*’

In **Boafo v Boafo [2005-2006] SCGLR 705**, the apex court affirmed the principle for equitable distribution of ‘joint property’, and canvassed equal distribution where the circumstances of a particular case permits. The court affirmed the ‘*equality is equity’* principle enunciated in Mensah v Mensah by Bamford-Addo JSC, but recognized the need to fix the proportions per the equities in each 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 court recognized the likelihood of a spouse getting more than a half share of the property, based on his or her skewed contribution. That meant that equitable distribution may be sanctioned by the court only where circumstances commands it. Put differently, equitable distribution may not result in equal distribution in all marital circumstances. The court again limited the distribution to ‘*joint property’*. The court recognized the right of a spouse to ‘*sole proprietorship*’ of property, separate from the jointly acquired property. By logic, individually acquired property would be exempt from the distribution upon divorce, or would be distributed in a matter that will not create inequitable circumstances for one spouse.

Date-Bah JSC, opined:

“*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*…’’

In **Arthur v Arthur [2013-2014] SCGLR 543, at 565**, the scholarly Date-Bah JSC, seem to have stretched the *dictum* of Bamford-Addo in Mensah v Mensah a notch further by postulating that, every property acquired during marriage, is a ‘*jointly acquired*’ property. His Lordship 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*.’’

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.
3. 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.

**Property Rights**

Property rights are a guaranteed fundamental right. Article 18

(1) of the Ghana constitution thus provides:

“ *Every person has the right to own property either alone or in association with others*.’’

The provisions in articles 18 (1) and 22 (3), encapsulates current social ethos which have been legislated and raised to fundamental constitutional norms. The right to own property, is the foundation of a liberal society which encourages innovation, hard work and durable economic and social ethics.

To begin with, human beings are differently endowed by nature. God knows why he put different talents and gifts in different people, and why some have higher innovative attributes than others.

There was therefore only one Bob Marley, one Tina Turner and one Michael Jackson. There was only one Osagyefo Dr Kwame Nkrumah, one Professor Kofi Abrefa Busia, one Nelson Mandela, one Jomo Kenyatta and one Julius Nyerere. We have one Bill Gates, one Elon Musk, one Jeff Bezos and one Mark Zuckerberg. The mentioned individuals exemplify humans imbued with incredible natural talents, abilities and capabilities. They have God’s special gifts to create innovative goods and services out of which unimaginable wealth is created. They are entitled to the ownership of what they create out of God’s endowment, as they shower a reasonable portion on those who become their spouses. If God wanted to share the produce of talent and innovation equally, he will have endowered everyone with the same talent, abilities and capabilities.

Our constitution provides the environment for the creation of private wealth, which cannot be derogated on account of marriage.

Article 35 (1) establishes a democratic state, geared towards freedom and justice. It provides, *inter alia*:

*“ Ghana shall be a democratic state dedicated to the realization of freedom and justice…’’*

The state is obligated to take steps in:

*“(b) Affording ample opportunity for* ***individual initiative*** *and* ***creativity in economic activities*** *and fostering an enabling environment for a pronounced role of the private sector in the economy.*

1. *Ensuring that individuals and the private sector bear their fair share of social and national responsibilities including responsibilities to contribute to the overall development of the country.*

*Article 36 (6) and (7) provides:*

*“The State shall afford* ***equality of economic opportunity to all citizens****; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana.*

*(7)* ***The State shall guarantee the ownership of property and the right of inheritance****.’’*

The fundamental policy of the state is to afford ‘*individuals*’, or ‘*spouses*’ as individuals teaming up for economic activity, the environment to unleash their initiative and creativity, and thereafter guarantee the wealth created through their toils, and the right to choose who inherits it.

If the constitution desired to abolish individual property rights of a person upon marriage, it would have said so expressly. The idea that an individual loses his or her constitutionally ordained right to own individual property merely for contracting a marriage, invokes the repugnant notion of ‘*marital communism*’, by which a man or woman through the device of marriage, seizes half or a reasonable portion of a spouse’s property just by sitting on the fence, and even probably undermining the other spouse, and without showing a contribution either in terms of financial or non- financial contribution, such as cooking, washing, taking care of children and visitors etc. That would amount to ‘*marital slavery*’, where the *’slave spouse*’ works to create the wealth for the healthy and zero contributing (in terms of financial and non- monetary) spouse to share the fruits on an equal or almost equal basis.

If such a route to acquisition of property is sanctioned by the courts, marriage will be turned into a perpetual war of attrition, where some spouses will enter just to grab property and then exit to enjoy it.

There is no law in economics or natural science which rewards people for doing nothing when they had the capability to do something but refused. And there can be nothing more antithetical to development than the notion that, half of the wealth that a spouse is creating individually is going to be sliced up, and *pro bono*, presented to his or her spouse on divorce, on the mere account of being a spouse.

It is through individual effort, innovation, creativity and hard work that properties are acquired and capital is born to launch the incredible businesses and products that the world has been enjoying. A spouse does not lose his fundamental right to acquire sole property, just by being married, and the other spouse does not become entitled to property he or she has not contributed to, by merely getting married.

Getting married is not a means of property acquisition recognized in any statute, property law book or journal. A scan through the local law text writers on property, will attest to this.

Article 22 of the constitution specifically mentions “*jointly acquired’’* property*.* This obviously excludes “*individually acquired*’’ property. There are two types of contributions to the acquisition of joint marital property. A spouse’s contribution to the acquisition of marital property is either monetary or non-monetary.

Financial contribution to joint property found expression in the principle of ‘substantial contribution’, which was a major hinderance to property rights of women who could often not prove that they financially contributed, despite immensely contributing non- financially. In the cases of **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**, the courts took account of the substantial contributions of the female spouses especially, to decree a portion of the marital property for them.

The confusion generated by the recent cases is from the notion that, the substantial contribution principle has been slaughtered on the altar of equitable or equal distribution. That notion is to a large extent not accurate, on account firstly that, in the effort to equitably distribute the properties of the spouses, the contribution of each spouse is taken into account. That cannot be an equitable distribution if all the courts do is to under blindfold, slice up the property into two, regardless of the nature of contribution of each spouse, and as to whether their conduct was progressive or retrogressive. Secondly, the cases have emphasized equal sharing only where the circumstances of a particular case warrants it. The above implies that the contributions of the spouses continue to be a key factor in the equitable distribution of jointly acquired property.

The commendable evolution is the apex court’s recognition of non- monetary contributions.

The apex court has decided that beside other contributions, domestic duties is recognized as non-monetary contribution that counts as contribution towards the acquisition of joint property. In **Mensah v Mensah [2012] 1 SCGLR 391**, at pages 401-402, Dotse JSC, in writing the opinion of the court, described the nature of non-monetary contributions in the following terms:

“*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*.’’

What the case did was to go beyond financial or substantial contribution, to recognize non-monetary contributions such as household duties, as sufficient to enable a spouse to claim a joint share in marital property. In **Adjei v Adjei [2021] 172 GMJ 1**, Pwamang JSC explained what Mensah v Mensah and others held on non- monetary contributions, as follows:

“*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*.’’

Mensah v Mensah and the others did not discount the need to enquire into the financial sources or contributions of the spouses towards the acquisition of a joint property. It just demands that both monetary and non-monetary contributions should be taken into account, and the property shared equally where that would be equitable, and unequally, where the equities so require.

The enquiry in the distribution of property upon divorce still takes same sequence, which is the resolution of the following questions:

1. Is the property jointly acquired, or solely acquired?
2. If it is jointly acquired, what is the nature and *quantum* of the monetary or non-monetary contributions of each spouse?
3. If it is individually acquired and therefore exempted under articles 22 (3) and 18 (1) of the constitution, how much of it is to be settled on the other spouse under section 20 of the Matrimonial Causes Act?

In **Adjei v Adjei** (*supra*), the Supreme Court seem to reject the theory of spouses’ automatic right to property, merely because it was acquired during the sustenance of the marriage. The court held that the spouse must lead some evidence to show that the property was jointly acquired.

In his concurring opinion to the lead judgment, Pwamang JSC underscored the fact the constitution makes no provision to the effect that property acquired during marriage is joint property. He expressed the need to protect both spouses equally, 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 held that the principle of presumptive ownership, not based on the constitution, was judicially created, and is therefore a rule of evidence, and does not confer substantive rights on spouses.

The enquiry as to whether a spouse made a monetary or non-monetary contribution must therefore be based on evidence, and must be dealt with on a case-by-case basis. Since no two marital situations are the same, it would be erroneous to apply the facts of Mensah v Mensah as the yardstick in each divorce and distribution case. A few instances will suffice.

1. Firstly, there are situations I shall call ‘*physical impossibility’*, where the other spouse is physically not present as to be able to perform the household duties. A spouse may desert the matrimonial, or may be domiciled in another jurisdiction as was the case with the respondent. In the instant case, the respondent left a few years into the marriage to Italy for greener pastures. For a decade, she made only three brief visits to Ghana. To a substantial extent, she was physically not available to perform the marital duties envisaged by the Supreme Court through Dotse JSC in Mensah v Mensah.
2. There are instances where a spouse may be physically present in the matrimonial home, but is constructively absent, on account of failure to perform any of the envisaged domestic duties, or may be acting to undermine the peace and cohesion in the family. There are spouses whose main talents and attributes are the manufacture of quarrels, disputes, anarchy and strife in the marriage. Instead of a congenial atmosphere, they turn the home into a marital war zone. Some refuse to assist in basic household chores. In **Penelope Chishimba Chipasha Mambwe v Mambwe (Appeal 222 of 2015) [2018] ZMSC 317**, the Zambian Supreme Court spoke of such situations as follows:

“*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*.’’

In the instant case, whiles the petitioner was creating the properties, respondent made no financial contribution. Worse of all, she was frolicking with a man in Italy with whom she had a child out of wedlock. Beside not contributing financially or non- monetarily, she acted to destabilize the home by committing adultery and bringing forth a child out of wedlock. This led to the divorce. Such conduct cannot count in favour of a spouse as non- monetary contribution.

1. There are several homes where even though the other spouse is willing or at least has not declined to do so, no need arises for the performance of the envisaged domestic duties. For example, if an affluent man or woman who is a divorcee or whose spouse is deceased marries a splashy lady or gentleman into a home staffed with cooks, cleaners, drivers and other domestic staff who undertake all the envisaged domestic duties of the other spouse, the issue of domestic duties cannot arise as to count as a non- monetary contribution in the event of divorce. In such a circumstance, a right to joint property may fail, but the spouse is entitled to a fair and reasonable settlement under section 20 of the Matrimonial Causes Act, so that his or her standard of living after divorce, will not drastically fall below the marriage level.
2. Since a marriage is a contract, the parties have the right to enter into a prenuptial agreement by which their right to create their individual property would be outlined. Where such a premarital agreement is made on property rights, neither the provisions of article 22 (3) of the constitution, section 20 of the Matrimonial Causes Act, section 38 (3) and (4) of the Land Act or any of the Supreme Court cases including Mensah v Mensah and Adjei v Adjei becomes applicable.

It is for the above reasons and more, that a spouse’s claim to non- monetary contribution to marital property must be vetted.

With the foregoing legal analysis, we now proceed to determine whether the subject properties were jointly acquired by the parties herein as spouses. There was little or no contest as to the fact that the petitioner was the one who foresaw the construction of all the properties under dispute in these appeal. His contribution to the acquisition and development of the properties was not in doubt. Respondent never claimed that the petitioner made no contribution towards the acquisition and development of the properties. The issue was as to whether the respondent made any contribution, whether financial or non-financial, to the acquisition and development of the properties.

The respondent contends that she made financial and other non- monetary contributions towards the acquisition and or the development of the properties as to earn them the badge of ‘ *jointly acquired properties*.’

Since the petitioner denied respondent’s claim of contribution, the primary *onus* was on her to prove the assertion through the evidence of the attorney who testified on her behalf. It was only after the respondent had adduced evidence of sufficient probative value, would the burden be shifted onto the petitioner to rebut same.

The question in this enquiry again is as to whether the respondent was able to prove that she contributed financially, or made non- monetary contributions towards the acquisition or development of the disputed properties?

The materials for our enquiry are the pleadings and evidence proffered by respondent. In her answer to the petition, the

respondent gave no inkling as to the contribution she allegedly made towards the acquisition of the properties. The only exception was in paragraph 21 of her answer, by which she claimed that she single- handedly constructed the three-bedroom house in Ashongman. In the cross petition, she prayed for a distribution of the properties,

again without pleading, or providing particulars of her financial or non-monetary contributions.

The nearest the respondent came to fulfilling her duty was in respect of paragraphs 4, 19,25, 40, 41 and 42, by which she made bare assertions that she contributed to the acquisition and development of the properties. In particular reference to paragraph 19, she made a bare claim of having contributed to the construction of the

properties. She also claimed that her brother did the tiling/terrazzo in most of the houses. She insisted that the Ashongman house was her individually acquired property. Respondent’s attorney merely mounted the witness box to repeat the bare assertions made in the pleadings. Under cross examination, he asserted that he did the

terrazzo in the house at Ampabamen, after the petitioner had

purchased the materials for him. He denied the claim by petitioner that he was paid for the terrazzo or tiles work.

The trial judge found as a fact that petitioner’s attorney paid respondent’s attorney for the terrazzo or tile work. She rejected the claim that respondent’s brother did the work for free and as representing respondent’s contribution towards the development of the properties.

On the balance, we found the trial judge’s conclusion to be based firmly on the evidence. As respondent’s attorney admitted, all the materials for the terrazzo or tiles work were provided by the

petitioner. If petitioner could single-handedly provide all the

materials, we cannot see how he could not pay for the labour of the respondent’s attorney. If respondent who appears to be comfortable in Italy and is gainfully employed there was indeed contributing to the construction of a house, it will have gone beyond the ordinary labour services of her brother. This view is bolstered by her own claim that she contributed monetarily to the acquisition and

development of the properties.

It appears that respondent’s attorney is one of the tiles or terrazzo experts in the locality. His hiring therefore appears to be based on his skills and proximity than his affiliation with the respondent. It looks more likely than not that respondent’s attorney who has expertise in that vocation was paid for the work he did. We found no basis to

alter that finding of the trial judge, since she was the one who observed the witnesses during their testimony.

As the trial judge found as a fact, respondent’s claim of contribution to the acquisition of the subject properties remained a bare assertion at the close of the case.

In **Majolagbe v Larbi [1959] GLR 190**, Ollenu J (as he then was) held:

“*Proof, in law , is the establishment of fact by proper legal means, in other words, the establishment of an averment by admissible evidence. Where a party makes an averment, and his averment is denied, he is unlikely to be held by the Court to have sufficiently proved that averment by his merely going into the witness-box, and repeating the averment on oath, if he does not adduce that corroborative evidence which (if his averment be true) is certain to exist.*’’

Financial contribution may be in terms of money, other financial instrument or something of monies’ worth. Since respondent is domiciled in Italy, money sent by her will have been by SWIFT or any of the numerous money transfer systems. If that were so, she was required to produce at the trial, receipts for the transfers made. If she sent money through someone, that person(s) could have been called as a witness. If money was sent through her brother who acted as her attorney, he would have said so and provided particulars thereof when he testified. At the close of evidence, respondent had provided zero proof of the claim of financial contribution to the acquisition and development of the properties.

We in the circumstances affirm the trial judge’s decision that the subject properties, save the three-bedroom house in Ashongman, Accra, are the individually acquired properties of the petitioner. None could therefore be settled on the respondent. The appeal of respondent is dismissed for lack of merit.

We further uphold the trial judge’s decision that the three-bedroom Ashongman house is a joint property of the parties. That property was acquired by the couple in their joint names. Besides the presumption of joint ownership, none of the parties could prove exclusive development of that property. The next issue to resolve is as to whether the trial judge was right in settling the three-bedroom house on the respondent.

**FORMULA FOR DISTRIBUTION OF JOINTLY ACQUIRED PROPERTY**

Until the advent of the 1992 constitution, property settlements on spouses upon divorce was effected 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*.’’

Property rights of spouses are now further enshrined article 22

(3) of the constitution. 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.’’*

What is of moment is that property settlement under section 20 (1) of Act 369 is of different dimension from that of article 22 (3) of the constitution. Under Act 369, property may be settled on a spouse whether it was jointly or individually acquired. On the hand spouses have equal access to jointly acquired property during marriage, but on divorce, the said property is to be shared equitably.

The mode of distributing jointly acquired properties has generated some confusion in the courts of late. It began with **Mensah v Mensah** (No 1, supra) in which it was first proffered that article 22 (3) stipulates equal distribution of the entirety of jointly acquired property property upon a divorce.

In **Boafo v Boafo [2005-2006] SCGLR 705**, the trial court found that the marital properties were jointly acquired, even though the degree of financial contribution by the wife was not easily ascertainable. The unequal distribution of the assets was reversed by this court which decreed equal distribution based on the facts. That decision was affirmed by the court Supreme Court. In his decision, Date-Bah JSC pushed the equality is equity principle but made it clear that it could only be applied on a case-by-case bases, 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 [2012] 1 SCGLR 391**, Dotse JSC took further, the debate in terms of the nature of spouses’ contribution, and the ratio for distribution. He held (391):

“*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 controversy over the 50:50 as equity principle, has besides Ghana, been bitterly litigated in the superior courtrooms in several jurisdictions. Kenya, Uganda and Zambia are significant examples. We considered a few notable cases from these jurisdiction for two reasons. Firstly, the provisions under which those cases were litigated have striking resemblances to the provisions we have in Ghana. Secondly, sound interpretations on *in pari materia* legal texts should have persuasive effect on our courts, especially if the social, cultural and economic context of those jurisdictions are similar to that of Ghana, as we found in the instances of the jurisdictions cited.

We begin with Kenya, where the issue at hand has received substantial elucidation. Article 45 (3) of the 2010 Kenyan Constitution on which the disputes have largely hinged, is in *pari materia* with article 22 (3) of the Ghana Constitution. It provides:

“*Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the time of dissolution of the marriage*.’’

The interpretation thereof would therefore be of persuasive effect.

In **PNN v ZWN (Civil Appeal No 128 of 2014; [2017] eKLR**, Kiage JA 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, on whether the Kenyan Constitution decrees a 50:50 share, 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 an 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 ad 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).*’’

After a synthetization of the above cases and others both within and beyond its jurisdiction, the Kenyan Supreme Court in the landmark case of **JOO v MBO & Ors [2023] KESC 4 (KLR)**, smacked down the argument of a universal ratio of 50:50 sharing of marital property upon divorce. The court decided that the 50:50 principle applies only when the applicant spouse proves either a monetary or non-monetary contribution to the acquisition of the marital property that is substantial or equal or near equal to the contribution of the other spouse. The court variously 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.*’’

Another theatre for dispute on the 50:50 argument has been the Ugandan Supreme Court. Yet again, article 31(1) of the Uganda Constitution on which the dispute rests, is *in pari materia* to article 22 (3) of the Ghana Constitution. Interpretation by the Ugandan courts of article 31(1), therefore has persuasive value in this jurisdiction. It provides:

“*Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in the marriage, during marriage and at its dissolution*.’’

In the case of **Rwabinumi v Bahimbisomwe (Civil Appeal 10 of 2009) [2013] UGSC 5**, the Supreme Court of Uganda 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.’’*

It goes without saying from the above, that if joint property comes into existence through the contribution of the spouses, whether monetary or non-monetary, then a spouse who had made no such contribution cannot assert joint a nature of property held by the other. That cogency was affirmed by the Zambia Supreme Court in **Mathews Chisimba Nkata v Ester Dolly Mwenda Nkata [SCZ Appeal N 60/2015**, where it was held that sharing of property should be according to fairness and conscience, and not a universally fixed formula that applied in same way to every case. The court 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.’’*

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.

It will put off young and ambitious young men and women from marrying, for fear that whatever they create will be shared equally with a spouse who may contribute next to nothing.

Such a rule may encourage some individuals out of bad faith and selfish interests, to induce others into marriage, only to deliberately torpedo it and walk away with undeserved wealth. The implications of single-handedly creating wealth only for it to be sliced into two for a spouse underserving of it, are sufficient to kill the joy and conviviality that the institution of marriage is expected to bestow.

Customary and Islamic marriages based on customary and Islamic law respectively, abound in Ghana. Customary and Islamic marriages are potentially polygamous, and there are men with multiple wives in that context. Determining the contribution of each wife to the acquisition of joint marital property is a herculean task. One of the wives who decides to leave on divorce would have to establish that she was not a mere spectator in the marriage, but contributed financially or non- monetarily to the acquisition of the properties. Evidence is central, and a predetermined theory or formula for ascertaining joint property and its share will be insufficient.

In our typical traditional homes, relatives of both spouses assist in the creation of wealth. Adult children may forgo their own lives to assist the spouses create their wealth. Some of these relatives or children may be from only spouse’s side. If the marriage flounders and there has to be divorce, a spouse cannot claim a contribution and share of the joint properties without taking into account, the compensation that has to be made from the joint property to the relatives or children who contributed, but who may not be the relatives or children of the departing spouse. An inflexible theory of a 50:50 share in joint marital property may run the vehicle of justice into the abyss of chaos.

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.

Our constitution demands equitable distribution. We hold that an equitable distribution must take account of all the circumstances, to the extent that the jointly acquired property may end up with one spouse. For instance, where a spouse individually owns ten landed properties but has only one jointly acquired property, it would be trivial to slice the single joint property for the affluent spouse to take his half. It may be equitable in such a circumstance, when article 22 (3) of the constitution and section 20 (1) of Act 369 are applied together, for the court to settle the only joint property on the deprived spouse.

In the instant case, since the contribution of each spouse to the acquisition of the three-bedroom Ashongman house was not clear, the best result was to slice it into two, to be shared on a 50:50 basis. The scenario will then be that, since what the respondent got was from her own toil, she has received nothing from the petitioner who appears to be of substantial means. The petitioner has such means as to build a house for his daughter, and begin a storey building on a second adjoining plot for her. He has built a house to honour his long dead grandfather for his role in his education. He jointly owns a school with his siblings. On a plot acquired by himself and adjacent to the three- bedroom settled on respondent by the trial court, he has begun the construction of a storey building. With his apparent means, he can build any house he desires, anywhere and anytime. It will be against common sense and the norms of equity for the petitioner to be settled with half of the humble three-bedroom house, only for the respondent to buy him out, or huddle with him in that limited space, in a poisoned and hostile environment.

In the circumstances, we apply section 20 (1) of Act 369, and settle petitioner’s share of the three-bedroom house on the respondent. That will ensure that her status and lifestyle during the marriage is not drastically reduced upon the divorce.

On the score of the above, we found no merit in the appeal of the petitioner. The decision of the trial judge settling the three-bedroom house on respondent is affirmed, albeit, on the varied reasons. The meritless cross appeal is dismissed. Since both sides were granted their claims for divorce and got part of the reliefs sought at the court below, we affirm the decision to waive costs to either side.

(SGD.)

ERIC BAAH

(JUSTICE OF APPEAL)

I agree. (SGD.)

GBIEL SIMON SUURBAAREH

(JUSTICE OF APPEAL)

I also agree. (SGD.)

HAFISATA AMALEBOBA

(JUSTICE OF APPEAL)