**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA- A.D. 2021**

**CORAM: APPAU, JSC (PRESIDING)**

**PWAMANG, JSC**

**DORDZIE (MRS.), JSC**

**LOVELACE-JOHNSON (MS.), JSC**

**AMADU, JSC**

**CIVIL APPEAL**

**NO. J4/06/2021**

**21ST APRIL, 2021**

**PETER ADJEI ……. PETITIONER/APPELLANT/RESPONDENT**

**VRS**

**MARGARET ADJEI ……. RESPONDENT/RESPONDENT/APPELLANT**

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**JUDGMENT**

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*THE MAJORITY DECISION OF THE COURT WAS DELIVERED BY APPAU JSC*

**APPAU, JSC:-**

This appeal originates from the High Court in a matrimonial cause initiated by the man of the marriage as Petitioner against the wife as Respondent. The petitioner prayed the trial court to dissolve the twelve year old customary marriage between him and the

Respondent. The Petitioner again requested for custody of the two children of the marriage aged eleven (11) and eight (8) years old. The Respondent, in an amended answer to the petition, cross-petitioned and prayed for five (5) reliefs against the Petitioner. The first was that the matrimonial home, which is one of four flats or units of flats constructed by the Petitioner on his self-acquired plot of land at Cantonments, Accra, should be settled on her. In her second relief, she prayed for a lump-sum payment of the sum of four hundred thousand Ghana cedis (GHc400,000.00) to her by the Petitioner by way of alimony and then thirdly, a monthly stipend of two thousand Ghana cedis (GHc2,000.00) as maintenance for herself and the two children. She again prayed to be given two (2) out of a chain of stores (number not stated), on the Spintex Road, Accra and then an order that the Petitioner be made to foot the cost of litigation.

**The Decision of the High Court**

The trial High Court granted the Petitioner's prayer for the dissolution of the marriage but dismissed the second one for custody of the two children. The court granted Respondent custody of the children but allowed Petitioner limited rights of access to them. On Respondent's cross-petition, the trial High Court granted the first three (3) reliefs prayed for by the Respondent. The trial Court made an order that the matrimonial home, which is one out of the four units of flats built by the Petitioner, be settled on the Respondent. The trial Court further ordered Petitioner to pay the sum of five hundred thousand Ghana cedis (GHc500,000.00) to the Respondent as alimony and one thousand five hundred Ghana cedis (GHc1,500.00) instead of the GHc2,000.00 prayed for, as monthly maintenance for the two children who should be in the custody of the Respondent.

The reason the trial court gave for settling one of the four units of flats on the Cantonment plot on the Respondent was that the said flats were acquired by the Petitioner during the

subsistence of the marriage at a time the Respondent was the one; ***"nurturing the family unit by cooking meals, cleaning, doing laundry and all the associated chores that the stay-at-home partner in a marriage is expected to do without remuneration".*** The trial judge again made an award of GHc500,000.00 to the Respondent instead of the GHc400,000.00 she prayed for, the reason being that, Respondent should use the additional GHc100,000.00 to complete the uncompleted matrimonial house which the court had settled on her. The trial court, however, dismissed the claim for two stores along the Spintex road as the Respondent could not lead any evidence to establish the existence of the alleged chain of stores along the Spintex road.

**Appeal to the Court of Appeal**

The Petitioner appealed against the decision of the trial High Court to the Court of Appeal. The appeal was buttressed on six (6) grounds as stated in the amended notice of appeal. These were:

- ***a.*** *The learned trial judge erred in law when, notwithstanding the fact that the matrimonial home was acquired before the marriage and solely funded by the Petitioner, she settled part of it on the Respondent.*
- ***b.*** *The learned trial judge erred in law when she awarded the amount of five hundred thousand Ghana cedis (Gc500,000.00) as lump sum or alimony to the Respondent without considering the means of the parties.*
- ***c.*** *The learned judge erred in law when she held that the Petitioner should pay an amount of one thousand, five hundred Ghana cedis (GHc1,500.00) as maintenance to the Respondent without evaluating the means of the parties.*
- ***d.*** *The learned trial judge erred when she granted custody of the children of the marriage to the Respondent.*

***e.*** *The learned trial judge erred in law when she relied on evidence gathered at the locus inspection which said evidence was not formally admitted for petitioner to cross-examine same thus resulting in the Petitioner suffering substantial miscarriage of justice.*

***f.*** *The judgment of the Court is against the weight of evidence.*

**The Decision of the Court of Appeal**

After a careful evaluation of the evidence on record and guided by the decisions of this Court on factors appellate courts must consider in interfering with findings of facts made by trial courts in cases like **ACHORO v AKANFELA [1996-97] SCGLR 209**; **OBRASIWA II v OUT [1996-97]** and other related cases, the Court of Appeal granted the appeal in part. It granted grounds (a) and (f) of the appeal but dismissed grounds (b), (c), (d) and (e).

The Court of Appeal set aside the order of the trial High Court settling one of the four units of flats on Petitioner's Cantonment property or plot of land on the Respondent. The Court of Appeal held that, from the evidence on record, the Cantonment property could not be said to have been jointly acquired by the couple for it to qualify to be devolved on the *'equality is equity'* principle as enunciated in the cases of **MENSAH v MENSAH [2012] 1 SCGLR 391; QUARTSON v QUARTSON [2012] 2 SCGLR 1077; ARTHUR (No.1) v ARTHUR (No. 1) [2013-2014] SCGLR 543**. The Court arrived at this decision after carefully reviewing the above cases of this Court and that of **FYNN v FYNN & OSEI [2013-2014] 1 SCGLR 727**. It is worth quoting this part of the judgment of the Court of Appeal in the settlement of grounds (a) and (f), which can be found at pages 244 to 245 of the Record of Appeal (**RoA**).

***"The High Court Judge relied on Mensah v Mensah [2012] 1 SCGLR 391 and held that once the property was acquired during the subsistence of the marriage, the respondent by operation of law, had an interest in it. The case of Mensah v Mensah supra is a case***

***where both parties at the beginning of the marriage did not have money. The husband was a staff at the Ministries in Accra while the wife was a petty trader. From the facts of that case, it would have sinned against equity and good conscience for the husband alone to have taken over the properties they acquired during the marriage as the contribution of the wife to the acquisition of the properties was immeasurable even though she could not quantify it in monetary terms. We are thus of the opinion that Mensah v Mensah supra did not lay down a general principle of law that <u>any property acquired during marriage including through inheritance and loans, ought to be shared between the parties, especially in cases like this where the loan has not been repaid.</u>***

***In the case of Quartson v Quartson [2012] 2 SCGLR 1077, the Supreme Court, while affirming the position in Mensah v Mensah, held that in partitioning properties acquired during marriage, the court must consider the equities of the particular case. The Supreme Court in the case of ARTHUR v ARTHUR (No. 1) [2013-2014] SCGLR 543 affirmed the ratio in Mensah v Mensah supra and further held that properties acquired during the subsistence of marriage is presumed to be jointly acquired property. However, the presumption is rebutted under certain instances, particularly where the other spouse acquired the property by gift or through succession. <u>In the same vein, where a party takes a loan to develop his self-acquired plot during the subsistence of the marriage, the property shall not be considered a family property until the loan is repaid.</u>***

***In the case of Fynn v Fynn [2013-2014] 1 SCGLR 727, the Supreme Court distinguished the right of an individual to acquire a property from its earlier decisions rendered in Mensah v Mensah and Quartson v Quartson supra. The Supreme Court held that there are situations where, within the union, parties may acquire property in their individual capacities and that position is envisaged by article 18 of the 1992 Constitution of Ghana."*** {Emphasis ours}

The Court of Appeal then held that the monetary award of **GHc500,000.00** made in favour of the Respondent plus the business or store which Petitioner established for her at a time she was unemployed, should be enough or adequate compensation to her as she could not establish that she and the Petitioner jointly acquired any family property during the subsistence of their twelve year marriage. Further to this, the Court of Appeal sustained the order of the trial High Court for the payment of **GHc1,500.00** per month by the Petitioner to the Respondent, as monthly maintenance for the two children of the marriage.

Though the Court of Appeal said it had granted ground (d) in part, we do not see it as such, thus our indication above that ground (d) was also dismissed. The fact that the Court of appeal affirmed the custody order of the trial High Court made in favour of the Respondent and added that the Petitioner be given limited access during weekends and vacations did not mean that ground (d) had been granted in part. The ground of appeal as prayed under ground (d) was; ***"The learned trial Judge erred when she granted custody of the children of the marriage to the Respondent".*** The Court of Appeal did not reverse this order. It only repeated an order giving limited visitation rights to the Petitioner which, perhaps unknown to the Court of Appeal, had already been given to the Petitioner by the trial High Court in its judgment. The mere addition to the custody order that Petitioner be given limited access to his children on weekends and during vacations did not change the order granting custody of the children to the Respondent. The trial High Court said at page 12 of its judgment, which is at page 164 of the RoA that; ***"Custody of the two children of the marriage is hereby given to the Respondent herein with reasonable rights of access and visitation to the Petitioner".*** What the Court of Appeal also said with regard to this was; ***"Custody of the children is given to the Respondent and the Petitioner is given limited access during weekends and vacations".*** This order, in substance, is not different from that of the trial High Court recalled above.

Since the order granting custody to the Respondent was not reversed, the mere addition of the period within which the Petitioner could visit the children could not be interpreted to mean that ground (d) of Petitioner's notice of appeal had been granted in part. We consider it as a total dismissal but not one granted in part. Though none of the parties addressed this anomaly in their submissions before us, as there was no further appeal with regard to the custody order, we deem it necessary to correct same.

**Reaction of both parties to the Decision of the Court of Appeal**

Interestingly, this judgment of the Court of Appeal, did not find favour with the two parties. Each of them was aggrieved by different parts of the decision so both appealed against it on separate grounds to this Court. It was the Respondent who filed her appeal first and the Petitioner later cross-appealed.

**Respondent's appeal to this Court**

The Respondent, who was the respondent in the Court of appeal, invariably was not happy with the order of the Court of Appeal that reversed the settlement of the matrimonial house on her. Her appeal to this Court, which she filed on 8th February, 2019, was only against that order. According to her, the reversal of the High Court order had denied her, ***"her legal and constitutional right"*** to one of the four flats or units of flats, which were acquired during the subsistence of their marriage. She prayed this Court to declare that part of the order or decision of the Court of Appeal, as null and void and an order by this Court restoring the order of the High Court.

**Petitioner's cross-appeal to this Court**

The Petitioner, on the other hand, who filed his notice of cross-appeal on 21st February, 2019, was also not happy about the Court of Appeal's decision affirming the award of five hundred thousand Ghana cedis (**GHc500,000.00**) as compensation or alimony to the

Respondent made by the trial High Court. His only ground of cross-appeal was that the Court of Appeal erred when it upheld the High Court's award of **GHc500,000.00** to the Respondent as lump sum payment without considering the Petitioner's case. He prayed this Court to reverse that award.

**Issues for determination**

The fundamental issues raised in this appeal and cross-appeal for determination are twofold:

***(i)*** *Did the Court of Appeal err when it reversed the order of the trial High Court in respect of the matrimonial house or the settlement of one of the four units of flats at Cantonments on the Respondent as contended by the Respondent in her appeal? and*

***(ii)*** *Did the Court of Appeal err when it affirmed the decision of the trial High Court in awarding an amount of* ***GHc500,000.00*** *to the Respondent by way of alimony or compensation after the dissolution of the marriage as contended by the Petitioner in his cross-appeal?*

**Evaluation by the Court of the submissions by the parties on issue (i) above**

The Respondent/appellant who appealed on two grounds including the omnibus ground that the judgment of the Court of Appeal was against the weight of evidence adduced at the trial, recalled in her written submissions, this Court's decision in the celebrated case of **DJIN v MUSAH BAAKO [2007-2008] SCGLR 687** where this Court outlined the duties imposed on an appellant who appeals on the omnibus ground. The Court said: ***"Where an appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly***

***applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against***".

However, throughout her submissions, the Respondent, as appellant, did not identify the errors alleged to have been committed by the Court of Appeal in its reasons for reversing the order of the trial High Court with regard to the matrimonial house. The only argument made by the Respondent is that since the four units of flats were constructed during the subsistence of the marriage between the parties, the Respondent, as wife, was entitled to a share under the well-known authorities of this Court in cases like **MENSAH v MENSAH [2012] 1 SCGLR 391,** etc. According to the Respondent, the authorities are legion that irrespective of how property was acquired during the subsistence of a marriage, a wife is automatically entitled to a share of such property by operation of law. She calls this a *'legal or constitutional right'*. Respondent quoted a statement made by this Court in the *Mensah case* supra to support her position ***that the sharing of spousal property should no longer be dependent upon the substantial contribution principle and that property acquired during marriage is presumed to be joint property.***

Respondent argued that, by the above decision and others that followed later, it was her legal and constitutional right to be entitled to a share of the Cantonment property since the four unit flats were acquired during the subsistence of the marriage between her and the Petitioner. It was therefore wrong on the part of the Court of Appeal to defy the previous decisions of this Court to deny her a share as ordered by the trial High Court.

The crucial question we have been called upon to determine on this issue is; whether or not the Court of Appeal has decided contrary to the authoritative decisions of this Court in *Mensah v Mensah* (supra); *Arthur (N0. 1) v Arthur (N0.1)* (supra); *Boafo v. Boafo [2005-2006] SCGLR 705*; *Quartson v Quartson* (supra), *Fynn v Fynn* (supra), etc. on the distribution of spousal property upon divorce. To determine this issue, it is important to

appreciate what the position of the law is, per the judgments of this Court and what the Court of Appeal grounded its decision on.

**The position of the law on jointly acquired marital properties**

It is trite law that no two cases are alike and that every case is fact-sensitive, for that matter, each case must be determined on its peculiarities. However, this apex Court has, by its decisions, laid down general principles that guide the Courts in their application of the laws to peculiar circumstances. With regard to the distribution of *jointly acquired properties* during marriage upon divorce, this Court, in a plethora of decisions, has outlined and refined the principles that should guide the courts in their determinations. The decisions of this Court, dating back to the case of **MENSAH v MENSAH [1998-1999] SCGLR 350**, per Bamford-Addo, JSC, which we shall term the first Mensah case, then to *Boafo v Boafo* (supra); then the second *Mensah v Mensah*, (supra) per Dotse, JSC; *Quartson v Quartson* (supra); *Arthur v Arthur* (supra) and *Fynn v Fynn* (supra), have set out the parameters for determining which properties could be termed as 'jointly-acquired marital properties' and the criteria for the distribution of such properties. All these decisions were influenced by the provisions of the 1992 Constitution under articles 22(2) & (3) on **'Property rights of spouses'**; 33 (5) on '**Protection of rights by Courts'** and the provisions of section 20 of the **Matrimonial Causes Act, 1971 [Act 367].** Articles 22(2) & (3) and 33(5) of the 1992 Constitution particularly, read: -

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

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

***(a) spouses shall have equal access to property jointly acquired during marriage;***

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

The combined effect of the decisions referred to supra is that; any property that is acquired during the subsistence of a marriage, be it customary or under the English or Mohammedan Ordinance, *is presumed to have been jointly acquired by the couple* and upon divorce, should be shared between them on the equality is equity principle. This presumption of joint acquisition is, however, rebuttable upon evidence to the contrary – {See the *Arthur case* supra, holding (3) at page 546}. What this means, in effect is that, it is not every property acquired single-handedly by any of the spouses during the subsistence of a marriage that can be termed as a 'jointly-acquired' property to be distributed at all cost on this equality is equity principle. Rather, it is property that has been shown from the evidence adduced during the trial, to have been jointly acquired, irrespective of whether or not there was direct, pecuniary or substantial contribution from both spouses in the acquisition. The operative term or phrase is; ***"property jointly acquired during the subsistence of the marriage"***. So where a spouse is able to lead evidence in rebuttal or to the contrary, as was the case in *Fynn v Fynn* (supra), the presumption theory of joint acquisition collapses.

In the 1998 *Mensah case* (supra) per Bamford-Addo, JSC, this Court held that; ***"property jointly acquired during marriage would become joint property of the parties and such property should be shared equally on divorce, because the ordinary incidents of commerce had no application in marital relations between husband and wife who had jointly acquired property during marriage".*** Notwithstanding this decision, there was still a little bit of confusion as to which property could be described as jointly acquired marital property when spouses in such litigations, lay exclusive proprietary rights or ownership over some of the properties disputed as joint properties. It was this confusion that prompted this Court in the second *Mensah case* (supra) per Dotse, JSC, to introduce

the ***'presumptive ownership'*** principle, which was affirmed and became rooted in *Arthur v Arthur* (supra) per Date-Bah, JSC. In the Arthur case, the Court held at holding (3) as follows:

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

With the decisions in the *Mensah, Quartson and Arthur cases* (supra), it was no longer essential for a spouse to prove a direct, pecuniary or substantial contribution in any form to the acquisition of marital property to qualify for a share. It was sufficient if the property was acquired during the subsistence of the marriage. However, where such evidence exists, it is necessary that a spouse alleging such a contribution must render or offer it to quantify his/her share or portion in the property so acquired on the equity principle. The rationale behind this position was that the duties performed by the wife in the home like cooking for the family, cleaning and nurturing the children of the marriage, etc. which go a long way to create an enabling atmosphere for the other spouse to work in peace towards the acquisition of the properties concerned, was enough contribution that should merit the wife a share in the said properties.

It must be emphasized, however, that it is not every wife to a marriage who diligently performs this marital role that the courts, since the days of **RIMMER v RIMMER [1952] 1 QB 63 @ p 73**, per Denning LJ, have talked so much about. It is therefore necessary that such a contribution or non-contribution must be demonstrated in the evidence adduced at the trial. It is for this reason that the authorities regard this general principle of 'joint-acquisition' as a presumption that could be rebutted by contrary evidence. Thus, in the *Fynn case* (supra), this Court distinguished the right of an individual to acquire property exclusively during the subsistence of a marriage, from its earlier decisions in the *Mensah and Quartson cases* (supra). This Court held that there are situations where, within the marital union, parties may acquire property in their individual capacities as envisaged under article 18 of the 1992 Constitution, which provides under clause (1) as follows: ***"Every person has the right to own property either alone or in association with others".***

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

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

Unlike the *Mensah, Boafo, Quartson* and *Arthur cases* cited supra, where there was ample evidence from both sides in each of the cases to demonstrate how the disputed properties were acquired and the alleged role played by each of the spouses to their acquisition, the Respondent in this case did not lead any evidence to show how the four units of flats on the Cantonment plot were built. Meanwhile, the Respondent admitted that the building plot on which they were built belonged exclusively to the Petitioner since he acquired same long before he met and married her. It even appeared from the evidence on record that the Respondent did not know the work her own husband was doing at the time they met and got married. In one instant, the Respondent said when she first met the Petitioner in 2002, both of them were unemployed. At a later stage, she said the Petitioner told her he was a businessman and that he was in estate development. So seriously speaking, the Respondent did not give any indication as to the work the Petitioner was doing and his earnings and how he allegedly acquired the properties she was claiming a share in. The only contention of the Respondent was that so long as the Petitioner constructed the flats during the subsistence of their twelve year marriage, she was entitled to a share of same notwithstanding the fact that Petitioner acquired the Plot of land on which they were constructed before their marriage.

Significantly, no reference whatsoever was made by the Respondent about the acquisition of the four units of flats, which includes the uncompleted one being used as a matrimonial home. However, the trial court, relying on the general presumptive principle that property acquired during the subsistence of a marriage is presumed to be joint marital property, without giving any serious thought to the case presented by the Petitioner, concluded that so long as the four units of flats constructed on Petitioner's Cantonment plot were began during the subsistence of the marriage between them, the

said property was jointly acquired marital property for which the Respondent was entitled to a share. That was the basis for which the trial High court held that she was entitled to the uncompleted flat being used as a matrimonial home.

In his testimony, the Petitioner contended, without any challenge whatsoever from the Respondent that, he single-handedly took a loan from the Bank to put up the four units of flats; three of which he was renting to tenants to liquidate the loan and to maintain his family since he was on pension. Again, the loan had still not been fully liquidated, with a balance of GHc300,000.00 yet to be paid. With this testimony, what the Petitioner was implying was that he had not yet fully acquired the four units of flats at the time of the dissolution of their marriage, since the loan that he single-handedly took to build them had not been fully repaid.

With this unchallenged testimony coming from the Petitioner, the Court of Appeal, relying on the decision of this Court in the *Arthur case* (supra) on the existence of other exceptions from the general presumptive joint ownership principle, like properties acquired by gift or through succession, held that; ***where a party or spouse takes an individual loan to develop his self-acquired plot during the subsistence of a marriage, the property so acquired shall not be considered a family property jointly acquired until the loan has been fully paid whilst the marriage subsists***. It is this decision of the Court of Appeal that the Respondent has impeached before us. Strangely enough, the Respondent has not shown us, in any way, where the Court of Appeal went wrong.

We are of the view that the Court of Appeal's holding that until the loan that the Petitioner took to acquire the said properties is fully liquidated, the properties so acquired could not be termed jointly acquired family properties, is sound reasoning and falls within the exceptions envisaged by this Court in the *Arthur case* (supra). By this decision, the Court of Appeal has not taken a contrary position to that of this Court in the

cases referred to supra that; assets or property acquired during the subsistence of a marriage are presumed to be jointly acquired marital properties that shall be distributed equitably between the spouses upon divorce. The petitioner was emphatic in his evidence that; ***"the house was acquired by a bank loan. I have not finished paying the loan. Right now, the balance is about GHc300,000.00, so how can I give her the house? What help did she offer me?"***

The above testimony of the Petitioner was not contested by the Respondent. It was only in the written statement of case of the Respondent that she tried to belatedly deny that fact. The Court of Appeal's position could be interpreted to mean that, with the loan that was contracted to put up the houses still outstanding as at the time of the divorce, the property stands the risk of being lost upon failure to liquidate the full loan, so same could not be said to have been jointly acquired during the subsistence of the twelve-year marriage to qualify for distribution under the equality is equity principle. It could only qualify to be termed jointly acquired marital property after the loan that was contracted single-handedly by the Petitioner for its construction, had been fully liquidated whilst the marriage was subsisting. In that situation, it could be said that the Petitioner's ability to liquidate the loan was influenced by the role the Respondent played as a good wife in cooking meals, cleaning and doing laundry and all associated chores for the Petitioner during the period.

On the contrary, however, the evidence on record, as accepted by both the trial court and the Court of Appeal is that the Petitioner is still owing the bank in respect of the loan taken to build the flats and is still paying the loan from rents collected from three of the flats which have been rented out for that purpose. There is no evidence on record showing how much revenue the Petitioner is earning from the rent payments, the proportion of the revenue from the rents the Petitioner is using to maintain his big family of about eighteen (18) children, including Respondent's two children after the divorce

whilst servicing the loan and when the entire loan would be liquidated. It was therefore wrong for the trial High Court to conclude that if the Petitioner gives one of the flats to the Respondent and uses one as his residence, rents from the remaining two flats could liquidate the balance of the loan yet to be paid.

We wish to emphasize that there is a reason behind the abandonment of the substantial contribution principle, which was hitherto used to determine the nature of property acquired during the subsistence of a marriage where it was established that only one spouse, particularly the male spouse, single-handedly did physically acquire the properties. It was buttressed on the understanding that the role of the wife in keeping the home by cooking for the family and preparing and performing other chores that enables the man to have a peace of mind to acquire the properties, is a form of contribution. From the peculiar facts of this case, this Court agrees with the Court of Appeal that the Respondent has not been able to establish that at the time of the dissolution of their marriage in 2014, the parties had jointly acquired any property to be distributed between them.

**Evaluation by the Court of the submission of the parties on issue (ii) above**

On the second issue with regard to the cross-appeal against the award of **GHc500,000.00** as compensation to the Respondent, which decision was based on a concurrent finding of the Court of Appeal with the trial High Court, this Court is of the view that, that decision can only be interfered with by this Court on the legal principles governing appeals against concurrent findings of fact by the two lower courts (i.e. the trial court and the first appellate court) as laid down in a plethora of cases. Some of these cases that readily come to mind are: **ACHORO v AKANFELA [1996-97] SCGLR 209; OBRASIWA II v OTU [1996-97] SCGLR 618; OBENG v ASSEMBLIES OF GOD CHURCH, GHANA**

**[2010] SCGLR 300; @ 322-323; GREGORY v TANDOH IV & HANSON [2010] SCGLR 971 @ 986-987** and **Fynn v Fynn** (supra).

The principle is that a second appellate court like this apex Court would overturn such findings and conclusions only in exceptional cases, particularly where it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts. It must be established, for example, that the two lower courts had clearly erred in the face of crucial documentary evidence, or that a principle of evidence had not been properly applied, or that the finding was based on an erroneous proposition of law that if the proposition were corrected, the finding would disappear.

Apart from contending that both the trial High Court and the Court of Appeal did not offer any basis for the award, the Petitioner, who is the appellant with regard to this issue, did not canvass any arguments to challenge the award in any way in his submissions, but left its determination entirely to the discretion of this Court. This was what the Petitioner said on the last page of his written submission filed on 11/08/2020: ***"My Lords, the appellant prayed for GHc400,000 as alimony. The High Court granted her GHc500,000.. The Court of Appeal affirmed this figure. Both courts, in our humble view however, did not offer a basis for the award. We, however, leave the matter entirely to Your Lordships".***

We do not find anything wrong with this award as it is in compliance with section 20(1) of the Matrimonial Causes Act, 1971 [Act 367], which provides:

***"On any decree for dissolution of marriage, the Court may, if it thinks fit-***

*(a) Order a spouse (hereinafter in this section referred to as the contributing spouse) to secure the other spouse (hereinafter in this section referred to as the dependant spouse), to the satisfaction of the Court –*

*(i) Such gross sum of money; or*

*(ii) Such annual sum of money for any term not exceeding the life of the dependant spouse, as having regard to the means of the dependant spouse, the ability of the contributing spouse and to all the circumstances of the case, the Court thinks reasonable".*

We shall therefore refrain from disturbing same but affirm it, the Petitioner having failed to demonstrate to us where the two lower courts went wrong.

In effect, we find merit in the decision of the Court of Appeal dated 30th January, 2019 and affirm it in its entirety. We accordingly dismiss the appeal and cross-appeal filed by the Respondent and Petitioner respectively. We decline to make any award as to costs. Parties are to bear their own costs of litigation.

**Y. APPAU**

**(JUSTICE OF THE SUPREME COURT)**

**PWAMANG, JSC:-**

My Lords, I read both opinions in their draft state and having scrutinised the record in this particular case and considered the submissions of the Counsel, I am inclined to support the opinion of my esteemed brother Appau, JSC. I had moments of pause when I read the opinion of my honourable sister Dordzie, JSC but then I easily parted company with her for the reason that in this case the trial judge clearly misconstrued the

jurisprudence of the Supreme Court on the distribution of marital property on dissolution of marriage. It is imperative to understand that the commendable and progressive presumption that property acquired during a marriage is jointly acquired is not stated by the constitutional provisions in Article 22 which is abundantly clear. It is as follows;

**(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.**

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

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

**(a) spouses shall have equal access to property jointly acquired during marriage;**

***(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.(emphasis supplied).***

Article 22(2)(b) is the provision that governs cases of property distribution on divorce and it does not say **"assets which are acquired during a marriage shall be distributed equitably between the spouses upon dissolution of the marriage"**. It is explicit in referring to properties JOINTLY acquired so the impression should never be created that it is the 1992 Constitution that says that property acquired during a marriage is joint property. If the framers of the Constitution had wanted to cover all property acquired in the course of a marriage they would have said so expressly. It is a judicially created presumption and as such it is a rule of evidence only and does not confer substantive rights as the trial judge sought to imply. Being an evidential presumption, it is rebuttable by the spouse whose ostensible property is in question or any person challenging the

presumption by adducing evidence to prove that the other spouse contributed nothing in the acquisition of the property. See **Fynn v Fynn & Osei [2013-2014] 1 SCGLR 727**. When sufficient evidence in rebuttal is introduced by the spouse who is the ostensible owner of the property, or a party challenging the presumption, the evidential burden shifts onto the other spouse to also introduce any evidence of her contribution to the acquisition of the property.

**Section 14 of NRCD 323 provides as follows:**

**Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting**

It is here that the decisions say that non-pecuniary contribution in the form of emotional support, unpaid domestic services such as cooking, washing and caring for children of the marriage are admissible as proof of contribution.

In **Quartson v Quartson [2012]2 SCGLR 1077** at page 1090 the Supreme Court speaking through Ansah, JSC said as follows;

*"The Supreme Court's previous decision in the 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 decision as we see it should be applied on a case by case basis, with the view to achieving equality in the sharing of marital property. Consequently, the facts of each case would determine the extent to which the decision in Mensah v Mensah applies"*

In this case, as copiously explained by Appau, JSC in the lead majority opinion, the evidence of the Petitioner in rebuttal of the presumption of joint acquisition was not impeached. In that situation the respondent had a duty to introduce evidence of her

contribution for the consideration of the court and not hang onto the mantra of the property was acquired during the marriage. Meanwhile, the evidence of the petitioner is that the respondent was torturing him emotionally in the marriage and that is the reason he filed for the divorce. In these circumstances, the presumption of joint acquisition was rebutted in this case. The highest policy of the law is to be fair to all parties who come before the court. Our thoughts ought not to focus only on protecting female spouses where the ostensible owner is the male spouse, which is more frequent, but the principles we evolve should equally aspire to protect female spouse when she is the ostensible property owner and a male spouse wants to take advantage of her. That explains why the Constitution uses the gender neutral term, spouse.

It is for the above additional reasons that I support Appau, JSC in affirming the judgment of the Court of Appeal and dismissing this appeal.

**G. PWAMANG**

**(JUSTICE OF THE SUPREME COURT)**

**I.O TANKO AMADU**

**(JUSTICE OF THE SUPREME COURT)**

***DISSENTING OPINION OF THE COURT WAS DELIVERED BY DORDZIE (MRS.) JSC***

**DORDZIE (MRS.), JSC:-**

I have read the majority decision of this court written by my respected brother Appau JSC. It is my opinion however that the appeal ought to succeed. I perfectly agree with the statement of the law on property settlement which the courts have painstakingly developed all over the years. My concern has to do with the inferences the Court of Appeal drew and upon which it overturned the decision of the trial court on property settlement. Those inferences in my opinion are flawed, in that they are not supported by the evidence on record. The inferences drawn by the Court of Appeal are: 1) The properties in question were acquired by bank loan therefore cannot be classified as property jointly acquired in the marriage until the loan is paid. The respondent did not provide any answer to the averment by the petitioner in his amended reply and answer to the cross petition that he obtained a bank loan to acquire the properties. However in her evidence in cross examination she disputed it. In my view the Court of Appeal ought to have addressed the credibility or otherwise of these facts in order to do substantial justice; especially where it relied on this assertion to interfere with the trial court's decision, but the court failed to do so.

2) In considering the equities in sharing the properties the Court of Appeal dwelled much on its finding that the petitioner set up the respondent in business. That the petitioner set the respondent up in business was vehemently contested by the respondent and from the evidence on record the petitioner failed to produce convincing evidence to prove this assertion yet the Court of Appeal came to the conclusion that it was the petitioner who set up the respondent in business thereby justifying its interference with the trial court's exercise of discretion in sharing the properties.

My reasoning for holding the view that the appeal should succeed is fully set out in my judgment below

**Facts:**

The parties herein formally married under the customary law and had lived together and had two children. Differences set into the relationship which they could not settle. In 2014 the petitioner who is the respondent in this appeal (The parties will be referred to as petitioner and respondent) took out a divorce petition praying for the dissolution of the marriage. He also asked for custody of the two children of the marriage with reasonable access to the respondent.

The respondent did not contest the dissolution of the marriage but cross petitioned for the following:

1. The Respondent prays that one of the four flats which serves as their matrimonial home be settled on the Respondent.
2. The Respondent is asking for a lump sum of GH₵400,000 (Four hundred thousand Ghana Cedis only) by way of alimony.
3. The Petitioner should provide a monthly maintenance of GH₵ 2,000 for the family.
4. The Petitioner be made to foot the cost of the litigation.
5. The Respondent prays that two (2) out of the chain of stores on the Spintex Road being one each on the ground and first floors be settled on the Respondent.

The trial High Court granted the divorce and gave custody of the two children to the respondent with reasonable access to the petitioner. The court further granted reliefs 1 to 3 of the cross petition, awarded Ghc500,000 as lump sum financial settlement on the respondent; Ghc 1,500 as monthly maintenance of the children.

The petitioner not satisfied with this decision appealed to the Court of Appeal.

The Court of Appeal allowed the appeal in part by affirming the award of Ghc5000,000 as alimony to the respondent. The court also affirmed the grant of custody of the children to the respondent and gave the petitioner limited access. The court however set aside the award of one of the four houses which served as the matrimonial home to the respondent.

The respondent is in this court praying that this court declares as null and void the decision of the Court of Appeal setting aside the property settlement on her; and restore the award of the matrimonial home to her by the High Court.

The grounds of appeal before us are as follows:

a) That the judgment is against the weight of evidence adduced
b) The learned Appeal Judges erred in Law in overturning the award of one of the 4 houses within the complex at Cantonments to the Respondent

The petitioner also cross appealed against the award of Ghc 500, 000 as lump sum payment to the respondent affirmed by the Court of Appeal and prayed this court to reverse the said award.

**Submissions for and against the appeal**

It is the submission of the appellant's counsel that the position of the law on property settlement on spouses is that a spouse does not have to prove substantial financial contribution to the acquisition of property acquired during the subsistence of the marriage in order to be entitled to a share in the property. Where one partner takes care of household chores such as washing, cooking raising children and supervising the home so that the other partner has the free hand to engage in economic activities that partner qualifies to have a share in properties acquired during the marriage. The award of one of the houses out of 4 to the respondent is just and in accordance with the provisions of Article 22(3) (a) & (b) of the 1992 Constitution. He made reference to the following cases in support of his submission: Quartson v Quartson; Mensah v Mensah [2012] 1 SCGLR 391.

On the cross petition it is submitted on behalf of the appellant that Alimony as defined by Black's Law Dictionary is "a court ordered allowance that one spouse pays to the other

spouse for maintenance and support while they separated; while they are involved in a matrimonial law suit or after they are divorced." Section 20 of the Matrimonial causes Act gives the right to the respondent to be given alimony. This must be considered separately from her entitlement to property settlement.

In reply, petitioner's counsel argued that the properties acquired during the subsistence of the marriage were not jointly acquired as such the respondent cannot be entitled to a share in the properties. Arguing the cross petition, it is submitted that both lower courts did not offer any basis for award of Ghc500,000 to the respondent the said award ought to be reversed by this court.

I will consider the two grounds of appeal together. In doing so I intend to consider the following issues as issues this court has to consider in determining the grounds of appeal.

**Issues**

i) Whether the trial court erred in settling the matrimonial house on the respondent and whether the Court of Appeal was justified in setting aside the trial court's decision

ii) Whether the alimony order was in line with the requirements of the Matrimonial Causes Act

The first ground of appeal which is that the judgment of the court of appeal is against the weight of evidence requires that this court re-evaluates the evidence on record and draws its own conclusions from the inferences made.

A recap of the evidence at the trial is therefore necessary for its effective re-evaluation.

**Evidence of Petitioner**

According to the petitioner they married under the customary law in 2002. At the time of the marriage he was a businessman but the respondent was unemployed. At the time he was giving evidence, that was 2014, the respondent had a shop at Labadi. He the petitioner set her up to start the business years back by giving her GH¢5,000.

He gave her another GH¢5,000 as a loan when she was bereaved. He acquired the land at Cantonments before he married the Appellant. He took a loan from the bank to build the houses in Cantonment he had an outstanding debt of GH¢300,000 to pay. The appellant did not contribute anything to the acquisition of the house she is asking for therefore she is not entitled to it.

**Evidence of Respondent**

The respondent's testimony is that she met the husband in 2001 and they had been in a relationship until the formal customary marriage at the time she was pregnant with their first child. She was living in a two bedroom apartment at Labadi, near the trade fair site when they met. The Petitioner joined her in the said apartment. She became pregnant in 2002 that was when they got married formally. The petitioner took her to a piece of land in Cantonments which he promised to build on for her. The land was big so she encouraged him to build multiple unit of houses on it.

The respondent denied that she was unemployed when she married the Petitioner. According to her, she was working as a supplier of goods to stores. The Petitioner promised to build her a store and asked her to stop working and be a housewife. Between 2001 and June 2009, they lived in her rented apartment. She admitted in cross examination that though the petitioner joined her in her apartment, he had a house elsewhere and did not live with her all the time in Labadi. She further admitted that when the lease on her rented apartment expired the petitioner paid the rent monthly. The husband that is the petitioner built four (4) houses on the plot of land in Cantonment.

None of them was completed as at June 2009 but they moved into one. He completed 3 of the houses and rented them out. As at the time she was giving evidence, that was 2015, the one they lived in was still uncompleted, no windows, no light, no tiles. When it was suggested to her that the husband took a loan to construct the Cantonments houses she replied that is not true. She further said as a house wife she performed her duties as such. Until the husband initiated the divorce petition and moved out of their bedroom she did the domestic chores as a wife, she cooked, cleaned and warmed his bed.

According to Respondent when they moved to Cantonments the Petitioner completed a chain of stores he was building on the Spintex Road but did not give her any. He said the stores were too far from their house, he promised to give her a store from a new set he would build so she remained a housewife.

Since the petitioner refused to give her a shop she looked for one she could rent. She found one that was costing GH¢5000. She had only GH¢3,000, she borrowed GH¢2,000 from her friend Auntie Rose Perry to enable her rent the shop. Her husband told her because the construction work was going on she should wait, he would give her money to pay back the loan of GH¢2,000 but to date he had failed to do so. In the course of running the shop she asked him for help financially and he gave her GH¢5,000 to pay back a loan she took to buy shoes for sale. She made 'susu' contributions and based on that she was given GH¢5,000 loan from the bank to back up her business.

According to the respondent because of their differences, the Petitioner completed the boys quarters of the house they live in and moved in but he left her and the children of the marriage in the uncompleted main house.

In cross examination the Respondent maintained that she supplemented the housekeeping money the petitioner provided and she paid the hospital bills of the children. It is therefore not true that the petitioner was solely responsible for the upkeep

of the household. She forfeited a car the husband wanted to buy for her and encouraged the husband to invest that money in the construction work that was on going in respect of the houses.

She further stated that the husband owns several properties about 20 but she is not interested in any. What she is asking for is where they are living which the husband had promised to build for her. It is still not completed. The other 3 had been completed and he had been collecting the rents for the past 6 years.

**Findings made by the trial court on the issue of property settlement.**

From my analysis of the evidence of both parties, there is no dispute that the land on which the Cantonments houses were built was acquired by the Petitioner before he married the respondent. In his pleadings the petitioner averred he had acquired the properties in issue before marrying the respondent, but in the course of his evidence he admitted it was the land he acquired before the marriage. The buildings were constructed during the subsistence of the marriage. There is therefore no controversy that the houses were built during the subsistence of the marriage and the trial court rightly found so. Therefore in settling the matrimonial home on the respondent this is how the court put its reasoning:

**"There was no controversy in regards to the fact that the construction of the matrimonial home together with the 3 additional buildings on that compound, were done during the subsistence of this marriage. The contribution of the Respondent herein to her household and the recognition that our superior courts have given to such contributions even when undocumented, cannot be discounted or ignored by the court. In distributing marital property it is paramount that the court does so in all fairness and equity to ensure that Justice is done. The Petitioner's proposition to deny the entirety of the Respondent's counterclaim will in effect deprive the Respondent and**

**her children of accommodation and financial support, whilst ignoring the fact that more than ten years of the Respondent's life have been invested into nurturing the family unit, cooking meals, cleaning, doing laundry and all the associated chores that the stay-at-home partner in a marriage is expected to do without remuneration. Certainly the time and effort it takes to run a home has some value. The children of the marriage and their mother should not be rendered homeless because the Respondent has no receipts to show how she contributed towards the effective running of her household, or how much time she spent supervising construction workers. This court therefore deems it fit that the Respondent herein be awarded one house amongst the 4 located at Cantonments, more specifically the matrimonial home of the parties. The Court's financial award made at the end of this judgment will enable the Respondent to complete and furnish same and make it habitable. The court's preference for the award of the matrimonial home of the parties to the Respondent is based on the fact that the other units within the complex have already been leased out to tenants and as is customary in our jurisdiction, the landlord may have collected rent in advance of years. That situation will make it impossible for the Respondent to reside in same or to lease it out for valuation consideration. This court therefore makes an award of one of the 4 houses within the complex at Cantonments to the Respondent herein, leaving the remaining 3 in the possession of the Petitioner. The revenue generated from leasing the two of those properties to tenants, assuming that the Petitioner decides to occupy one himself, should sufficiently help the Petitioner herein to service the GH₵300,000 alleged to be the balance on the loans he may have contracted to build the houses. The Respondent may use this property as the primary dwelling place for herself and the two minor children of the marriage or rent it out to tenants to earn revenue. The transfer order related to this award is to be completed and deposited with the court within 180 days of this order."**

The above decision in my view is in line with the constitutional provision of ***article 22(3) of the Constitution*** and the statutory provision of section 20 of the ***Matrimonial Causes Act, 1971 Act 367***. It is also in line with the current case law as laid down in Mensah v Mensah and Quartson v Quartson

**Constitutional Provision on property rights of spouses**

***Article 22 of the 1992 Constitution guarantees rights of spouses to properties I may describe as spousal properties, the article reads:***

***"(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.***

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

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

***(a) spouses shall have equal access to property jointly acquired during marriage;***

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

**Legislation on property rights of spouses**

The legislation that regulates the property rights of spouses is section 20 of the Matrimonial Causes Act, 1971 Act 367 which provides as follows:

***"20. Property settlement***

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

***(2) Payments and conveyances under this section may be ordered to be made in gross or by instalments."***

**Case Law**

It is well known that for almost 30 years since the 1992 Constitution of this nation came in to effect Parliament had failed to comply with Article 22 (2) of the Constitution which requires it to as soon as practicable after the coming into effect of the constitution enact laws to regulate the property rights of spouses. The court being an institution aimed at doing substantial justice to the citizenry of this nation had taken steps to develop equitable principles of determining property rights of spouses, bearing in mind the changes in social values and practices that modernization has introduces societies to globally.

It is in this vein that this court in the case of Quartson v Quartson [2012]2 SCGLR 1077 strongly criticized the position the Court of Appeal took when it held in its decision in the said case that, in Ghana no legislation had been enacted to commercialize domestic services rendered by wives therefore the issue of taking into consideration services rendered by a woman in the home as substantial contribution to property acquired during the subsistence of marriage is at large. The Supreme Court overturned the Court of Appeal decision in this case and particularly showed its dissatisfaction to the position the of Court of Appeal when the Supreme Court reproduced at page 1088 of the report the offending portion of the Court of Appeal decision and stated its reaction to same. The

Court of Appeal held that ***"….In the instance case, the appellant [wife] from the record did not contribute financially towards the acquisition of the property. The contribution she relied upon is the services she rendered as a wife during the construction of the house. The question I ask is this: does it amount to a substantial contribution? In other words, what price or commercial value do we ascribe to domestic services rendered by wives in Ghana, like cooking for workmen and supervising workers constructing a house solely funded by a husband? In Ghana this issue, particularly upon dissolution of marriage is still at large in the sense that no legislation has been enacted to commercialize domestic services rendered by wives …… In the absence of such legislation in Ghana. We are of the considered opinion that domestic services rendered, however important they may be, for now, cannot amount to a contribution by a spouse in a property acquired through the financial resources of the other spouse. We are of the view that if the courts are left on its own to quantify such domestic services without legislative guidance, the result will be judicial chaos in matrimonial suits"***

This court's reaction to the above quoted decision of the Court Appeal in the Quartson v Quartson case is found at page 1089 of the record, it reads ***"In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament. We do not think that this court is usurping the role of Parliament, especially in cases where the inaction of Parliament results in the denial of justice and delays in the realization of constitutional rights…….. happily this court has taken a progressive step and put the matter to rest in its recent decision of Mensah v Mensah [2012] 1 SCGLR 391."***

The Mensah v Mensah case cited supra was decided by this court in February 2012, the Quartson v Quartson was decided in October the same year, this court in the Quartson v Quartson case followed the principle laid down in the Mensah v Mensah case with the caution that the principle should be applied on the circumstances of each case. At page 1090 of the report the court expressed this view this way ***"The Supreme Court's previous decision in the 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 decision as we see it should be applied on a case by case basis, with the view to achieving equality in the sharing of marital property. Consequently, the facts of each case would determine the extent to which the decision in Mensah v Mensah applies"***

The Supreme Court in the Mensah v Mensah case took a purposive approach in interpreting article 22(3) of the 1992 Constitution and came out with a principle which is now the locus classicus on the issue of property settlement on spouses upon divorce. It is clear from the decision of this court in the Mensah v Mensah case (supra) that to qualify as a joint owner, and to be entitled to a share in property acquired during the subsistence of marriage does not depend solely on substantial monetary contribution. Domestic services offered by a wife in the marriage qualify her to have a share in property acquired during the subsistence of the marriage. Making reference to Article 22 (3) of the 1992 Constitution the court at page 401 of the report (Mensah v Mensah supra) posed this rhetoric question ***"Why did the framers of the Constitution envisage a situation where spouses shall have equal access to property jointly acquired during marriage and also the principle of equitable distribution of assets acquired during marriage upon the dissolution of the marriage?"*** The court went on to analyse the situation as follows: ***"We believe that, common sense and principles of general 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 generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of 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 marriage when the marriage is dissolved. This is so because, it can be safely 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. It was inequities found in the older judicial decisions that we believe informed the Consultative Assembly to include article 22 in the constitution of the Fourth Republic."***

To emphasize that the Supreme Court in this decision is making a departure from the substantial financial contribution principle, in accordance with the provisions of the 1992 Constitution, coupled with the obligation on the court to safeguard the fundamental human right of spouses in property settlement, the court further held at page 412 as follows: **" *Thus, even if this court had held that the wife had not made any substantial contribution to the acquisition of the matrimonial properties, it would still have come to the same conclusion that the wife is entitled to an equal share in the properties so acquired during the subsistence of the marriage. This is because this court recognizes the valuable contributions made by her in the marriage like the performance of household chores referred to (supra), and the maintenance of a congenial environment for the***

***husband to operate and acquire properties. Be sides, the constitutional provisions in article 23(3) of the 1992 Constitution, must be construed to achieve the desired results which the framers of the constitution intended."***

Thus the current position of the law as stated above is once a property is acquired during the subsistence of a marriage it becomes a marital property that entitles the other spouse to it whether the said spouse made any contribution towards acquiring it or not.

In February 2013 about a year after the decisions in Mensah v Mensah and Quartson v Quartson, this court, in the case of ***Arthur v Arthur (No 1) [2013-2014] 1 SCGLR 543*** re-affirmed this principle as the current position of the law in property settlement on a spouse in the event of divorce. The court made it unequivocally clear what must be regarded as marital property. At page 560 of the report this court per Dr. Date-Bah JSC held ***"We are bound to follow this holding of the Supreme Court in Mensah v Mensah. Marital property is thus to be understood as property acquired by the spouses during marriage, irrespective of whether the other spouse has made a contribution to its acquisition. We would re-affirm this concept of marital property."*** The court went on to say at page 565 that ***"It should also 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."***

It is strange that counsel for the petitioner considered all these cases in his submission but concluded that the respondent did not contribute to the property in question the property is not a joint property and therefore she is not entitled to a share in same. The respondent had been a house wife for 12 years, she carried out domestic chores and cared for the children of the marriage, that is a contribution the cases considered above recognize and should be considered in the settlement of marital properties. This

argument on behalf of the petitioner in my view flies in the face of the current position of the law as stated in the cases I have made reference to above.

I have earlier quoted extensively the reasoning of the trial High Court judge and the conclusions she drew in settling one of the four houses acquired during the subsistence of the marriage. The trial court's decision is in line with the current law on distribution of marital properties as laid down in Mensah v Mensah (supra). It is my view that in coming to the conclusions the trial court came to, it carefully considered the circumstances of this particular case and did not apply the principle in a blanket manner. It is also my view that she exercised her discretion fairly in the distribution; particularly she took into consideration the right of the respondent and the children of the marriage to be provided with shelter when she stated that the children and their mother should not be rendered homeless simply because the respondent has no documentary proof to her contribution to the acquisition of the property.

**Findings made by the Court of Appeal**

It is clear from the totality of the evidence of the parties on the record that there was no contention as to who funded the construction of the four separate buildings in Cantonments one of which was settled on the respondent by the trial court. The parties agreed that it was the petitioner who funded the construction of the houses. There was therefore no issue joined between the parties on this and the trial judge needed not make any determination on a non-issue. It is therefore not in place for the Court of Appeal to state in its judgment, page 241 of the record that the trial court failed to make a determination as to the person who provided money for the construction of the houses at Cantonments and the source of the funding thereby opening the door for it to make its own finding of fact.

The Court of Appeal further faulted the trial court for failing to make findings of fact on a material issue, which is that the respondent was unemployed during the marriage yet she alleged she set up a business. . It is trite that every appeal is a re-hearing, particularly where grounds of appeal include the ground that the judgment is against the weight of evidence as in the case of the grounds the Court of Appeal considered in this case. The Court of Appeal had the obligation to re-evaluate the evidence on record and based on inferences drawn from the evidence, and weighing the preponderance of probabilities come to its own conclusions on issues joined between the parties. In the judgment on appeal before us the Court of Appeal in its bid to discharge this obligation made findings of fact which unfortunately are not supported by the evidence on record. Some of the findings the Court of Appeal made are not based on proven facts before the court. In order to demonstrate this I will quote extensively portions of the judgment on appeal where the first appellate court made those findings.

**"From the evidence on record, at the time of the marriage, the respondent was unemployed. However, at the time of the pendency of the suit before the court below, the Respondent had set up a shop around Kpogas in Labadi. The Petitioner in his evidence testified that he provided a capital of GH₵ 10,000.00 to the Respondent to operate the shop. The Respondent did not admit that it was the Petitioner who provided the capital for her business. It was material to determine how at the time of the marriage, the Respondent, being unemployed was able to set up a business but the trial High Court Judge failed to make a finding of fact to that issue. The following questions and answers came up during the cross-examination of the Petitioner by the Respondent's lawyer.**

**"Q: You have told the court that you set her up in business?**

**A: Yes, that is so.**

**Q: What kind of business is that?**

**A: I gave her GH₵5,000 and then another GH₵5000 and she set up a shop herself around Kpogas in Labadi. As for the business, I know nothing about it, she does it herself.**

**Q: I am suggesting to you that, your wife took a loan from her friend to start the business.**

**A: I gave her GH₵ 10,000.00, if she took a loan I am not aware of it".**

**The Petitioner claimed that he gave the Respondent an amount of GH₵ 10,000.00 to set up her shop at Labadi but the Respondent said she took a loan from a friend. When the Respondent was under cross-examination, she admitted that she did not take a loan from a friend to set up her business but she took an amount of GH₵2,000.00 to secure the shop. The following questions and answers came up when the Respondent was under cross-examination.**

**"Q: Your evidence that you obtained a loan from your friend to set up your store at Trade Fair is untrue.**

**A: I didn't say I set up the store with a loan. When I was to start the business, I did not have enough money. Rose is a family friend, she agreed to help us to secure the shop and she gave me GH₵ 2,000 which he has not repaid to date.**

**From the above evidence, we find as a fact that it was the Petitioner who set up the Respondent's business by providing am amount of GH₵10,000. We further find that Rose provided an amount of GH₵ 2,000.00 to enable the parties secure the shop at Lababdi which sum the Petitioner was supposed to repay. This fact corroborates the assertion that it was the Petitioner who set up the Respondent's business.**

**We also find from the evidence that, the Petitioner, who is an estate developer; took a loan to put up four buildings on his plot at Cantonments. We find that he rented three of them out and was living in the other which was uncompleted, with the Respondent and the children of the household. We further find as a fact that the Petitioner, during the pendency of the suit, still owed an amount of GH₵300,000.00 to his creditors, being the amount outstanding on the loan."** (See page 261 to 263 of the record of appeal)

The question of whether the respondent was working at the time she married the petitioner and whether the petitioner set her up in business were matters that were in controversy and could be resolved by the preponderance of probabilities. It is the petitioner who asserted that he set the respondent up in business, therefore he bears the burden of producing evidence in proof of his assertion.

***11(1) of the Evidence Act, 1975 NRCD 323*** defines the burden of producing evidence as follows:

***"For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party."***

The petitioner in my view failed to discharge this burden.

The petitioner barely asserted without any proof that at the time he married the respondent, she was not working. The respondent denied this and said in her evidence that she was trading, she was supplying stores with goods therefore she had her own apartment at Labadi where she was living with her son before she met the petitioner in 2001. When the petitioner married her they cohabited in the said apartment and the petitioner asked her to stop working and be a house wife. She obeyed and became a house

wife. The petitioner took over payment of rent for the apartment, they lived there until 2009 (that is 8 years) when they moved to live in the uncompleted house in Cantonment.

In his pleadings, (reply and answer to amended cross-petition) paragraph 5, the petitioner averred that "It was rather the petitioner, having regard to his financial status; who set the respondent up in business after the marriage. Petitioner therefore denies that he asked the respondent to stop work as alleged or at all." His evidence in chief in proof of this averment is found on page 72 of the record of appeal and goes this way: Q: "Can you tell the court, at the time of your marriage, what work were you doing?

A: I was a business man.

Q: And can you tell the court, at the time of the marriage, what work was the Respondent doing?

A: She was unemployed

Q: Can you tell the court what work the respondent currently does?

A: She has a store around Kpogas near Labadi.

Q: This store at Kpogas, how did she get it?

A: I gave her GH₵5,000 to start the business.

Q: When was this?

A: About 5 years ago.

At page 73 of the record of appeal his evidence in chief on the issue continues:

"Q: we will now look at the answer filed by the respondent. In paragraph 3 of the answer, she says that at the time of the marriage both of you were unemployed.

A: If I was not working how was I able to give her GHC 5,000. In addition to the GHC5,000 I also gave her another GHC5000 as a loan after she was bereaved.

In cross examination (page 76 of the record of appeal) a question was put to the petitioner as to the type of business she set up for the respondent; his answer was: "I gave her GHC5000 and then another GHC5000 and she set up a shop herself around Kpogas in Labadi" From his answer as stated above he gave the respondent GHC 5000 five years prior to the time he was giving evidence. He gave evidence on 13th November 2014 it means he gave the money somewhere in 2009. The subsequent GHC5000 he gave to the respondent according to the petitioner was a loan after she was bereaved. That he set up the respondent in business with GHC 10,000 does not flow from his own evidence.

The respondent clearly narrated how she set up the shop at Labadi. The Court of Appeal's finding on the issue of the petitioner setting up the respondent in business or not ought to be based on weighing the evidence of both parties on the issue and determining which of the situations was more probable.

This being a civil case, ***section 11(4) of the Evidence Act, 1975 NRCD 323*** requires the petitioner to lead sufficient evidence to establish the truth of his assertion. Section 11(4) provides: ***"In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence."***

***Section 12(2) of the Evidence Act*** defines preponderance of the probabilities as follows: ***"Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence***.

The Court of Appeal did not follow this requirement of the law in weighing the evidence placed before the court when it came to its conclusion that "they found as a fact that the petitioner set up the respondent in business."

Details of the respondent's evidence in chief on when and how she set up the shop is found on page 101 of the record of appeal. She said the husband promised to give her a shop out of some shops he was building but that never materialized so in 2011 she decided to find a shop for herself. To quote her "In 2011 I decided to go and find a shop myself, because my husband refused to give me a store. I found a store that would cost Ghc 5000, but I already had GHc 300, so a friend of mine Auntie Rose Perry gave me GHc2000. Since I had no money I asked my husband for money, he told me that because of the construction he had no money and that I should wait he would sort me out. To date my husband has still not reimbursed the GHc2000. …. When I started the business I was selling cosmetics, shoes dresses etc. and at that point I asked him to help me and he gave me GHC5000 to defray the cost of money I had borrowed to buy shoes to sell….. After that I was working so in 2013, I went to the bank for a loan based on my susu contributions. I was given a loan of GhC5000."

The respondent remained consistent with her story as to how she set up the store she runs at Labadi. It is really absurd that in the face of the evidence of the respondent on how she established the shop she runs, the Court of Appeal would prefer the bare assertion of the petitioner without proof that he set up the respondent in business with Ghc10, 000. He claimed in setting her up in business he gave the first GHc 5000 in 2009. From the respondent's evidence it was his persistent refusal to assist her that eventually in 2011 she got a shop with the assistance of a friend whose full name and profession she disclosed in her evidence. The second GHc 5000 petitioner claimed he gave her, according to his own evidence was a loan he gave her after she was bereaved. The respondent

admitted that at a point in running the shop she asked him for assistance and he gave her GHc 5000. Even if the petitioner gave a Ghc5,000 to the respondent in 2009, the probable situation is that it could not have been towards setting up the respondent in trading in the face of the respondent's evidence that it was the petitioner's persistence refusal to assist her that she set out to look for a shop in 2011. The second GHc 5000 the petitioner alleged he gave to the respondent, he himself clarified, he gave it as a loan after the respondent was bereaved. The reason for the giving of the second GHc 5000 as given by the petitioner himself does not point to setting up the respondent in business. The respondent magnanimously admitted that in the cause of running her business she asked her husband for assistance when she needed money to pay for shoes she took to sell and he gave her GHc 5000.

From the totality of the evidence on record on the issue of whether it was the petitioner who set up the respondent in business or not. It is clear that the petitioner failed to provide convincing evidence in proof of his assertion. The respondent on the other hand has produced creditable evidence establishing how she came by the business she is running and the assistance she received from the petitioner in the course of running the business. It ought to be noted that there is no evidence on the record as to how much the respondent earned from this business. What the evidence shows is that the respondent depended on the financial support the petitioner gave her throughout the marriage.

The findings of the Court of Appeal that it was the petitioner who set the respond up in business by providing a capital of GHc 10000 weighed heavily on the first appellate court's consideration of the equities of the circumstances of this case. At page 245 of the record of appeal the court's reasoning went as follows: "We have carefully considered all the above quoted Supreme Court cases and the facts of the instant case, and we are of the considered opinion that the petitioner took a loan to build his plot as an estate developer.

At the same time, he set up the respondent who was unemployed to do business. It will be unconscionable to hold that the respondent should take the business which the petitioner set up for her and further take one quarter of the buildings built out of loans which have still not been paid off. We are of the opinion that considering the equities, the monetary award in addition to the business which she has exclusive rights over should be adequate to compensate her." This conclusion in my view is flawed, in that it is not supported by the evidence on record.

On the property settled on the respondent by the trial court, the petitioner in his pleadings maintained he acquired the property before marrying the respondent but in his evidence he eventually admitted that it was the land he acquired before the marriage, the 4 houses were constructed during the subsistence of the marriage. At page 243 of the record of appeal the Court of Appeal made findings that the petitioner took a loan to build the 4 houses in cantonment, he still owes an amount of GHc300, 000 to his creditors as the outstanding amount on the loan. The court went on to say at page 245 that though in the case of Arthur v Arthur (supra) the Supreme Court affirmed the ratio in Mensah v Mensah and held that properties acquired during subsistence of marriage is presumed to be jointly acquired property, the presumption is rebuttable under certain instances such as properties acquired by gift or through succession. The Court of Appeal then made a pronouncement that "in the same vein where a party takes a loan to develop his self-acquired plot during the subsistence of the marriage, the property shall not be considered a family property until the loan is paid." The respondent denied in her evidence in cross examination that the petitioner took a loan to build the houses. It is required of the first appellate court therefore to be cautious in accepting the assertion that, the petitioner took a loan and he was still owing a debt of GHc300,000. The court had no proven evidence before it that the property in question was acquired by bank loan and the loan had not

been paid. The court's pronouncement is based on an assumption, therefore it can not stand.

It is trite that findings of fact are based strictly on the evidence placed before the court. S. A. Brobbey JSC in his book ***Practice and Procedure in the Trial Courts and Tribunal of Ghana (second Edition) page 180 paragraph 383 wrote***: ***"With the exception of matters in respect of which judicial notice may be taken and points of law, every judgment and every finding of fact should be based strictly on the evidence put before the court"***

In the face of the respondent's denial in her evidence in cross examination that her husband took a loan to develop the land and her further evidence that the petitioner had been collecting rents for 3 of the houses for about 6 years as at the time of her evidence which was December 2014. The petitioner ought to produce evidence to prove certain essential facts on the issue, such as where the petitioner took the loan from, how much he took, how much he had paid and whether the outstanding balance was really Ghc 300,000 after he had collected rents for 6 years. The petitioner however failed to offer any evidence proving these matters. The finding the Court of Appeal made that the petitioner took a loan to build the houses and he had GHc300, 000 outstanding as debt to be paid on the loan is not based on any evidence on record, it was an assumption made by the Court of Appeal based on the bare assertions made by the petitioner without proof, and without taking in to consideration other evidence on record by the other party denying that he took a loan and that he had collected rents on the three houses for 6 years.

**Interference with the findings of the trial court.**

The Court of Appeal faulted the trial court on two grounds to justify its decision to interfere with the trial court's finding and to set aside the decision of the trial court which settled the matrimonial home on the respondent. Firstly the first appellate court alleged

the trial court failed to make determination as to the person who provided money for the construction of the Cantonment houses and the source of the funding. In my earlier analysis of the evidence placed before the court by both parties, I have demonstrated that there was no controversy between the parties as regards who financed the construction of the houses at Cantonments, the onus lies on the petitioner to provide evidence on the source of the money, which evidence he failed to produce. Irrespective of that situation the trial court gave consideration to all relevant matters concerning the acquisition of the houses and the living condition of the parties. To help her make a fair and equitable decision on the property settlement she visited the locus in quo i.e. the subject matter houses in Cantonments.

Though I may sound repetitive I will quote the evaluation of the learned trial judge of the evidence placed before her that led to the conclusions she came to:

"In regards to the landed or immovable property of the parties, the Respondent indicated to the Court that the Petitioner owned a chain of stores on the Spintex Road, stores in East Legon as well as 20 properties. Details of these properties were not disclosed to the Court. The said stores on the Spintex Road were shown to the court via Exhibit MA1. The Respondent denied personal ownership of same, and alleged that the stores belong to a company called Medical Equipment and Services Limited. No further evidence was adduced in respect of this property. However, in regards to the matrimonial home of the parties, the Court verified its existence and location during its visit to the locus in quo on the 15th of July 2015. The Petitioner's position on this property was that the land on which the matrimonial home was built was acquired before he met the Respondent. During the inspection of the said property it was recorded that 3 out of the 4 houses on the said land had so far been completed and at least 2 out of those 3 houses had been leased out to tenants for income generation purposes. The 4th unit that served as the matrimonial home of the parties even though inhabited by the couple, had not yet been finished completely

at the time of the locus visit. During the Petitioner's evidence in chief on the 13th of November 2014, this is what ensued when counsel for Petitioner sought his responses to the Respondent's counterclaims?

Q: The respondent has also cross petitioned and is asking the court to give her the home where both of you live right now, GH¢400,000 as alimony and GH¢ 2000 as maintenance monthly?

A: The house was acquired by a bank loan, I have not finished paying the loan, right now the balance is about GH¢300,000. So how can I give her the house? What help did she offer me? She has been married before, did her husband give her a house?

Q: The Cantonments house you said you took a loan to acquire it, what was the respondent's contribution to same?

A: She did not contribute to it. When I met her I had already bought the land, I just went for a loan to build the house.

Q: So should the court grant her the things she is asking for?

From the petitioner's evidence he had already acquired the land on which the matrimonial home was built when he married the Respondent. The Respondent corroborated this evidence and added that the petitioner took her to the bare land before construction commenced and promised to build a house for her on the said land. The Respondent further stated that she advised the Petitioner to build multiple units on the land. Both parties agreed that the houses were built during the subsistence of the marriage. On the 23rd of April 2015 this is what the Respondent said during cross-examination by Counsel for the Petitioner in regards to the couple's current living arrangement:

Q: Where you are living now, what has happened?

A: Where we live now, he has finished the boys quarters and moved in with AC and furniture and he has left me and the children in the uncompleted main house.

There was no controversy in regards to the fact that the construction of the matrimonial home together with the 3 additional buildings on the compound were done during the subsistence of this marriage. The contribution of the Respondent herein to her household and the recognition that our superior courts have given to such contributions even when undocumented, cannot be discounted or ignored by the court. In distributing marital property it is paramount that the court does so in all fairness and equity to ensure that justice is done. The Petitioner's proposition to deny the entirety of the Respondent's counterclaim will in effect deprive the Respondent and her children of accommodation and financial support, whilst ignoring the fact that more than ten years of the Respondent's life have been invested into nurturing the family unit, cooking meals, cleaning, doing laundry and all associated chores that the stay-at-home partner in a marriage is expected to do without remuneration. Certainly, the time and effort it takes to run a home has some value. The children of the marriage and their mother should not be rendered homeless because Respondent has no receipts to show how she contributed towards the effective running of her household, or how much time she spent supervising construction workers. This court therefore deems it fit that the Respondent herein be awarded one house amongst the 4 located at Cantonments, more specifically the matrimonial home of the parties. The Court's financial award made at the end of this judgment will enable the Respondent to complete and furnish same and make it habitable. The court's preference for the award of the matrimonial home of the parties to the Respondent is based on the fact that the other units within the complex have already been leased out to tenants and as is customary in our jurisdiction, the landlord may have collected rent in advance for a number of years. That situation will make it impossible for the Respondent to reside in same or to lease it out for valuation consideration. This court

therefore makes an award of one of the 4 houses within the complex at Cantonments to the Respondent herein, leaving the remaining 3 in the possession of the Petitioner. The revenue generated from leasing two of the property to tenants, assuming that the Petitioner decides to occupy one himself, should sufficiently help the Petitioner herein service the GH¢ 300,000 alleged to be the balance on the loans he may have contracted to build the houses. The Respondent may use this property as the primary dwelling place for herself and the two children of the marriage or rent it out to tenants to earn revenue. The transfer order related to this award is to be completed and deposited with the court within 180 days of this order. "

It is important to note that though there was no proof of the alleged loan taking and the balance of GHc300, 000 due on same, the judge gave consideration to that allegation by the petitioner when she said "The revenue generated from leasing two of those properties to tenants, assuming that the petitioner decides to occupy one himself, should sufficiently help the petitioner herein to service the Ghc300, 000 alleged to be the balance on the loans he may have contracted to build the house" (emphasis mine) The choice of words here, "alleged" and "loans he may have contracted" points to the trial judge's acknowledgement that no proof had been provided to support the allegations; however she took the possibility of that situation into consideration in the exercise of her discretion in the distribution of the properties between the parties.

The second accusation the first appellate court leveled against the trial court is that the trial judge failed to make a finding of fact on a material issue, which is that it was the petitioner who set up the respondent in business. The findings the Court of Appeal made on this issue that it was the petitioner who set up the respondent in business with GHc10,000 I have demonstrated earlier that it is not supported by the evidence on record. The trial court however in considering the means of the parties did not lose sight of the fact that the respondent got some earnings from the business she was running and that

the earnings from that business had not been the respondent's main sustenance, she depended largely on the petitioner's financial support.

It is a well-established principle, not only in our jurisdiction but the wider Common Law jurisdiction that it is the trial court that has the exclusive right to make primary findings of fact; this is because it is the trial court that observes the demeanor of witnesses and therefore in a position to determine the truthfulness of their testimonies. Hence the appellate court is expected to exercise great caution in interfering with the findings of fact by the trial court. The appellate court interferes only when certain specific flaws occur in the findings of the trial court and those specific circumstance had been identified in many decisions of the Supreme Court. In the case of ***Agrenim-Boateng v Ofori & Yeboah [2010] SCGLR 861 at 863*** this court relying on Fofie v Zanyo [1992]2GLR 475 held per Aryeetey JSC that ***"It is the trial court that has exclusive right to make primary findings of fact which would constitute building blocks for the construction of the judgment of the court where such findings of fact are supported by evidence on the record and are based on the credibility of witnesses. It is also the trial tribunal which must have the opportunity and advantage of seeing and observing the demeanor of the witnesses and become satisfied of the truthfulness of their testimonies touching on any particular matter in issue. ……The appellate court can only interfere with the findings of the trial court where the trial court: (a) has taken into account matters which were irrelevant in law; (b) has excluded matters which were critically necessary for consideration; (c) has come to conclusion which no court properly instructing itself would have reached and (d) the court's findings were not proper inferences drawn from the facts."***

Thus though the appellate court is entitled to draw its own inferences on the primary facts found at the trial it is not allowed to knock out the building blocks that constructed

the judgment of the trial court unless specific conditions as specified in the quote above prevails.

Lewison LJ in a more resent English case of ***Fage UK Ltd v Chobani UK Ltd. [2014] FSR 29 at 114*** sounded the warning and set out very interesting principles that the appellate court must consider when it comes to interfering with findings of fact made by the trial court. Not only that but the evaluation of those facts and the inferences to be drawn from them. I consider these principles useful for guidance in our jurisdiction l will therefore quote them in detail. The learned jurist expressed his view as follows:

***"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. …The reasons for this approach are many. They include***

***i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.***

***ii. The trial is not a dress rehearsal. It is the first and last night of the show.***

***iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.***

***iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.***

***v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).***

*vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

The point I am driving home here is that the judgment on appeal is full of the phrase "we find as a fact" meanwhile the findings so made are not supported by the evidence on the record. I therefore consider it an error on the part of the first appellate court to overturn the decision of the trial court to settle one of the houses particularly the one providing shelter for the respondent and the children of the marriage on the respondent.

I hold the view that the conclusions the trial court came to in settling the matrimonial property on the respondent is fully supported by the evidence on the record. The learned trial judge carefully weighed the equities of the circumstances. The evidence on the record demonstrates that the respondent was not making much from the business the Court of Appeal made so much capital of. The petitioner himself provided evidence on how much the wife depended on him financially. The property distribution is in line with the applicable law as well; in exercising her discretion in the distribution she acted fairly according to the circumstances of this case. The Court of Appeal therefore had no justifiable reason to interfere with that decision.

For the above stated reasons I would allow the appeal, set aside the judgment of the Court of Appeal on the property settlement and restore the judgment of the High Court which settled one of the four houses acquired during the subsistence of the marriage on the respondent.

**Cross Appeal**

The only ground for the cross appeal is that the Court of Appeal erred when it upheld the High Court's award of GHc5000,000 to the respondent as lump sum payment without considering the petitioner's case.

The submission made in support of this ground is that the respondent prayed for Ghc 400, 000 lump sum payment. The trial court granted her Ghc 500,000 without stating the basis for the grant. The court of Appeal affirmed the grant without offering any basis either.

The trial court granted Ghc100,000 to the respondent to use to complete the uncompleted matrimonial home she occupies with the children. The court went ahead to analyze the evidence on the affluent life style of the family which the petitioner supported. The trial court further said that it took the stand as taken in the case of Quartson v Quartson (supra) that the respondent must have some money to live on whilst she reorganizes her life and went on to grant the Ghc400,000 the respondent prayed for as lump sum payment. It is therefore not the case that the trial court offered no basis for the grant. This court in my view has no justifiable ground to interfere with the discretion exercised by the trial court in the award. I would therefore dismiss the cross petition.

**A. M. A. DORDZIE (MRS.)**

**(JUSTICE OF THE SUPREME COURT)**

**LOVELACE-JOHNSON (MS.), JSC:-**

I have read the judgment of my esteemed sister Agnes Dordzie (JSC) and I am in complete agreement with it, that, the judgment of the Court of Appeal be set aside and that of the High Court restored because it is borne out by the evidence on record and supported by the consistent position taken by this Court to do substantial justice regarding the property rights of a married woman upon divorce in respect of property acquired in the course of the marriage. This position is in line with Constitutional provisions.

It is my opinion that a very clear case has to be made for departing from this consistent position. In my opinion no such case has been made in this case and so the trial Court's exercise of discretion, having been done duly, should not be disturbed. The appeal by the Appellant succeeds while the cross- appeal by the

Respondent fails. The Judgment of the Court of Appeal is set aside and that of the High Court restored.

**A. LOVELACE-JOHNSON (MS.)**

**(JUSTICE OF THE SUPREME COURT)**

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