

SUPREME COURT OF NIGERIA

23RD JULY, 1993. SC.283/1990

**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE,
A. B. WALI, O. OLATAWURA, I. L. KUTIGI, JJSC**

ALHAJI USMAN HADA APPELLANT

AND

ALHAJI ABDU MALUMFASHI RESPONDENT

APPEALS - Concurrent findings of the Area Court and Upper Area Court - concurrently set aside by the High Court and Court of Appeal - whether proper

EVIDENCE - Inadmissible evidence - whether objected or not objected to - duty of the judge thereto

EVIDENCE - Islamic law - evidence of a near relative - conditions of its admissibility

EVIDENCE - Sharia Law - admission - conditions for its enforce ability - whether alleged admission is unambiguous

ISLAMIC LAW - Real property - where defendant has been in undisturbed possession for more than 10 years - whether plaintiff can succeed in a claim of ownership of the land.

LAND LAW - Islamic Law - Land dispute - claim by plaintiff based on allegation that defendant held the land on-trust - whether established.

FACTS

The plaintiff/Respondent claimed the farm land in dispute as his late father's land from the Defendant/Appellant before the Area Court. The Defendant who has been in possession for about 37 years denied the claim and said he bought the land in dispute from their village head. The plaintiff alleged that the land was held in trust by the Defendant and sought to establish same through his elder brother's evidence. The trial court found in favour of the Defendant holding that his having been in possession of the land for more than 10 years without disturbance defeats the plaintiffs claim

under Islamic Law. The plaintiffs appeal to the Upper Area Court which retried the case, was unsuccessful.

On further appeal to the High Court, it found that the land was held in trust by the Defendant and gave judgment in the plaintiffs favour. Defendant's appeal to the Court of Appeal was dismissed. Being dissatisfied the Defendant has further appealed to the Supreme Court, which had to determine amongst other issues whether there was proof of the trust alleged by the plaintiff under Islamic Law.

HELD (unanimously allowing the appeal)

1. Under Sharia Law, it is trite that a free admission made by a mature and sane person against his interest in favour of another is binding and enforceable against the maker. (p.111 L1)
2. In the instant case, it is difficult to draw a conclusion from the printed record that there was any clear and unambiguous admission whereby the Appellant admitted the ownership of the disputed farmland to the Respondent's father. (p.111 L10)
3. For the principle of "Igrar" or admission to apply (under Sharia Law), such an admission must be devoid of any ambiguity or equivocation, being amenable to one and same interpretation at all times. (p.112 L4)
4. The issue of trust over the disputed farmland though raised by the Respondent before the two Area Courts cannot be said to have been proved. This is because mere statement of the Respondent alleging the existence of any trust is not per se, evidence of such a trust, and it cannot be treated as evidence under procedural and substantive Moslem Law. (p.112 L32)
5. Apart from the evidence of the Respondent's brother (Alhaji Lawal), none of his witnesses gave evidence in proof of the alleged trust. (p. 114 L28)
6. Under Islamic Law, evidence of a near relative is admissible in favour of another if the witness will not derive some benefits from such evidence or if by giving such evidence the witness will not remove some defects or loss from himself. (p.114 L32)

7. On the Islamic principles, the evidence of the Respondent's elder brother, Alhaji Lawal, is not admissible since that witness is a beneficiary to the farmland in dispute. And the Court of Appeal's finding to the contrary is wrong. (p.115 L33)
8. It is the duty of the judge to exclude or reject inadmissible evidence even if it is not objected to. (p.116 L35)
9. The principle of "Hauzi" or prescription in Islamic Law States that whoever is in peaceful possession of a thing (real property) for years becomes its owner. (P117 L22)
10. Since the Respondent stood by 38 years seeing the Appellant in possession and use of the disputed land as his (Appellant's) own, the trial Area Court and Upper Area Court applied the correct law in dismissing the plaintiffs/Respondent's claim after reviewing the evidence before them. (P118 L14)
11. The concurrent findings of the Area Court and Upper Area Court were justified by the evidence under Islamic Law, therefore, both the High Court and Court of Appeal were wrong in interfering with those findings. (P118 L36)

REPRESENTATION

J. B. Daudu (with him, B. Mohammed), for the Appellant

Dabo Barde (with him, O. Rapu), for the Respondent

CASES REFERRED TO

1. Abdullahi Mogaji Mafolaku v. Ita Alamu (1990) 1 LR 60 at 73
2. Sadau Baba v. Sariuin Noma Aruwa (1986) 5 NWLR (pt. 44) 774
3. Chiga v. Umani (1986) 3 NWLR (pt. 29) 460 at 467.
4. Abe v. Akaajeme (1989) 4 NWLR (pt. 113) 95 at 112
5. Alhaji Baba Sule v. Gajere Hamidu (1988) 4 NWLR (pt. 90) 516
6. Haruna Dan Doko v. Gana Jimeta (1990) NWLR 82
7. Ekwunife v. Wane Ltd. (1989) 5 NWLR (pt. 122) 122

LEAD JUDGMENT BY WALI JSC

Alhaji Abdu Malumfashi complained against Alhaji Usman Hada before Area Court II Malumfashi claiming his late father's farm in possession of the defendant.

The defendant denied the claim and said he bought the piece of land in dispute (which is no longer a farm) from Magajin Gari Aliyu, the village head of Malumfashi since 37 years ago.

To prove that he bought the farmland from Magajin Gari Aliyu, the defendant called Maiunguwa Siyasa, Alhaji Mu'aw Malumfashi Magajin Gari, Maiunguwa Danasumi and Alhaji Bako Malumfashi as his witnesses to the purchase transaction.

At the end of the defendant's case, the court also afforded the plaintiff opportunity of calling his own witnesses and he called the following:

- (1) Alhaji Bawa,
- (2) Alhaji Shehu,
- (3) Alhaji Garba Yammana.

Before the parties closed their respective cases, the plaintiff put in evidence, a letter written by Alhaji Malumfashi, the plaintiff's senior brother who was living and working in Katsina (as a Forest Supervisor) Sarkin Dawwan Katsina.

After reviewing the evidence produced by the competing parties, the learned trial Area court Judge came to the conclusion as follows:

".....having regard to the statement of the plaintiff and the witnesses heard so far, I rely upon this nafsi (authoritative text) and gave this disputed farmland to the defendant. This is because of the plaintiff's carelessness which ignored this farmland being cultivated by the defendant for 37 years, and also the plaintiff and his relatives are living to see this farmland being cultivated by the defendant. They are all living in Malumfashi, and they have no any relationship between the defendant and lastly, these are my reasons of taking this decision and quoted from nafsi (authority as follows:

(The authority was quoted in Arabic which was translated into English in the record as follows):

'When a person (not a relation) holds a property for (10) ten years and during that period no one has claimed the same property or farm as his. It follows that the farm or the property belongs to the holder and not the claimant regardless of whatever reasons he may proffer. See Mayyara Commentary on Ahkamul el Hukkam.

Whosoever hold a building or land or property of like nature, the

root of which is recognised by sharia its effect is as if it was obtained vide purchase if the holder has possessed the property for 10 years or about.

Again if a person is in possession of property which he exercises a right over as he wishes and the owner who put the property in his care or trust and is aware of the fact that the Holder is using or employing the
5 *property as his very own such that the owner can be said to have forgotten about the property and thereafter comes back to claim the property. In that case, his knowledge of the holder's use of the property and the fact that he did not travel, then such trust cannot be established, consequently, any action brought on the above facts, in spite of the fact that 10 years have*
10 *elapsed will not succeed, regardless of the fact that the claimant brings his witnesses."*

The plaintiff was not satisfied with the judgment of the trial court and he appealed to the Upper Area Court, Malumfashi.

The Upper Area Court not only re-heard the case but retried it,
15 hearing both the original and additional witnesses called by both sides. When re-stating his complaint before the Upper Area Court, the plaintiff elaborated upon his original complaint as follows:

"While (he) Magaji was trusted by our father, therefore, when our father died all his asset which comprised his farmlands, etc., all were given to
20 *Magaji to take care of. Whereas when our senior brother Alhaji Lawal S/Dawa finished his school in 1958, then he got us admitted into the school after I finished my school, I then joined Nigerian Army, and in 1969, I met with the dead Magajin M/Fashi at Funtua, and I asked him 'is our farmland with him still?' because I wanted it in case I retire, we could come and farm*
25 *it, then he said, he borrowed to his in-law the farmland to farm before we come back and collect it. It was in 1979, I returned home M/Fashi from army service, I met that Magaji died and left everything as it was, I said nothing. Then it was on 28/4/87 Usman Hada surveyed and cleared the plots to start building shops. Consequently, we gathered at the plots (the*
30 *owner of the plots) we were about 20 in number, and we complained against him to the L.G.C. on the basis that he was trying to build up our plots, and cover the road we use usually.*

After that, the Chairman directed us together with his secretary, his assistant and A. Bello Saulawa to inspect the plot. After the inspection, I
35 *told the respondent that is very unfair for him to cover the usual road up to the crossing road. He suddenly interrupted that, if I am so proud and feeling, as high I should get back my farmland from him by force. When I heard that, I told him that I will go and inquire if my father sold away the farmland to him. That's why on 1/5/87 I filed a suit against him so that to*

present any document which shows my father sold the farmland to him."
The Learned Upper Area Court judge after re-trying the case and reviewing the evidence adduced, made the following findings:

"Court convinced that, since their father Jamoja was alive, Galadima Adamu turned the farmland to abattoir, being operated under authority, 5 and afterward, a new abattoir was established. Within the place, northern portion was given to them, and the rest Magajin Gari M/Fashi gave them to respondent. Subsequently, N.A. Katsina, sent surveyors to demarcate some plots, which as a result, 50 were demarcated, among them 8 plots were given to respondent, and the rest were given to people on which they built 10 houses, about 25 years ago. However, the appellant is disputing about those plots with the respondent and others that he sold to people. Court therefore observed that, since he and his brothers have seen this farmland being possessed but did not say anything, right from the time he has got the farmland 37 years ago, at which they supposed to talk about, but failed to 15 do so, if the appellant couldn't do so just because he did respect Magaji Aliyu so Magaji Aliyu died 10 years after, but they didn't talk about their farmland, till now, when they are not in good term with each other:'
After the findings, the learned Judge then concluded:

"Court however, realised that, the appellant neglected his claim for he refused to struggle for himself and others, on time as the Sharia defined, that it should not exceed 10 years".

He then referred to and quoted in support of his findings and conclusion 25 authority from Adawi Vol. II (Commentary on Risala) page 340 which was translated into English in the record as follows:

"if a person sees one portion given out as alms out of his belongings or properties or sold his properties or given as a complement, but he failed to 30 say anything so to stop that, up to the certain time, he has no any right, or anything to do to acquire those properties."

He then dismissed the plaintiffs appeal and affirmed the judgment of the trial court.

The plaintiff again appealed to the High Court of Justice in its appellate jurisdiction against the Upper Area Court judgment.

The learned trial presiding judge - Usman Mohammed, after listening to the plaintiff and the respondent who appeared in person, he reviewed

the case and concluded:

"The evidence adduced by the appellant was positive that the farmland in dispute belonged to his father; it was never sold to anybody and that the appellant was a minor when his father died in 1952 and the land in dispute along with other properties were left in the hand of one Magajin Gari in trust for the appellant and other heirs. No evidence was adduced by the respondent to establish his claim that he bought the farmland rather evidence was adduced to the contrary which was never challenged by anybody. The issue of prescription was raised suo motu by the trial Judge. Even if it was an issue, in the circumstances of this case it does not apply because the land was given to Magajin to hold it in trust for the appellant and if the Magajin Gari breached the trust that will not change the fact that the land belongs to the appellant. The learned Upper Area Court judge himself fell in the same grave error as the trial judge. Instead of looking at the issue of prescription critically to find whether it applies or not he went into a lot of irrelevancies by rehearing the case de novo that is hearing fresh evidence from the same witnesses who had earlier testified and referred to many verses from the Hadith etc. which do not and should not apply in the circumstances of this case. In all from the evidence adduced at the trial court and later in the Upper Area Court, it was clear that the land in dispute belonged to the appellant's father and it was left to the Magajin Gari to be held in trust for the appellant and his other brothers. There was no evidence that the appellant by himself had mandated anybody to sell the land to the respondent as the latter claimed. The doctrine of prescription was wrongly applied by the lower court as it does not apply in this case. The appeal therefore has merit and it must be allowed and it is so allowed."

The defendant was aggrieved by the High Court's judgment and he appealed to the Court of Appeal, Kaduna Division.

In the Court of Appeal, parties were represented by their respective counsel and in compliance with Order 6 rule 2 of the Court of Appeal Rules, 1981 (as amended), learned counsel filed and exchanged briefs of arguments.

The Court of Appeal heard oral arguments in elaboration to the briefs filed and in a considered judgment of the court delivered by Aikawa, J.C.A. (with which Mohammed, J.C.A. (as he then was) and Ogundere, J.C.A. agreed) he affirmed the decision of the High Court and dismissed the appeal.

The defendant has now further appealed to this Court.

As required by the Rules of this Court, learned counsel filed and exchanged briefs.

Henceforth both the plaintiff and the defendant will be referred to as respondent and appellant respectively.

- "1. *Whether it was correct for the Court of Appeal to have held that the appellant had in the court of first instance admitted or acknowledged respondent's father's title to the disputed farmland such as to render academic and unnecessary the need for the respondent to prove his father's title or possession or loss of it?* 5
2. *Going by the legally admissible evidence on the printed records was it right for the Court of Appeal, to have affirmed the High Court's finding that there was a trust transaction between the respondent's father and the Magajin Garin Malumfashi.* 10
3. *Assuming that there was a trust transaction (which is not conceded) between the respondent's father and the Magajin Garin could such trust have affected the appellant who was not a party to the alleged trust arrangement?* 15
4. *What is the legal effect under Sharia of the appellant's undisturbed possession of the disputed land for 37 years and were the High Court and the Court of Appeal correct in holding, for diverse reasons that the Islamic Law principle of Hauzi did not apply to the proceedings?* 20
5. *Whether the Court of Appeal was correct in affirming the decision of the High Court Katsina which set aside the concurrent findings of the two lower courts where the appellant's title was affirmed on account of his long possession?* 25
6. *What is the effect of the disclosure of the fact that what used to be a farmland has been acquired by the Native Authority, partitioned into plots and distributed to persons other than the appellant in the presence of and to the knowledge of the respondent and his brothers?"* 30

Learned counsel for the respondent also formulated in his brief the following issues for consideration by this court:

- "1. *Whether the appellant admitted or acknowledged the Respondent's claim at the court of first instance that the farmland in Dispute Belonged to His Father as Held by The Court of Appeal.*
(Appellant's Issue 1 pages 8 & 9 of his Brief)
(Appellant's Ground 1 and 2 of Appeal)

2. Whether There was Enough Evidence To Support The Findings of The High Court and The Court of Appeal That Magajin Gari Mohammed Ali Held The Farmland in Trust for The Respondent and his Brother.
 (Appellant's Issues 2 and 3 pages 8-9 and] 3 of his brief)
 (Appellant's Grounds 3 and 4 of Appeal)
3. What is the Legal Effect of The Sale of Trust Farmland and The Doctrine of Long Possession Under Islamic (HAUZI) Law.
 (Appellant's Issues 4 page 9 and 17 of his brief)
 (Appellant's grounds 3 and 4 of Appeal)
4. Whether The Court of Appeal was Right in Affirming The Decision of the High Court Katsina which set Aside Concurrent Findings of The Two Lower Courts
 (Appellant's Issue 5 page 9 and 20 of his brief)
 (Appellant's ground 1 and 2 of Appeal)"

Issue 1 of the appellant covers Issue 1 of the respondent, issues 2 and 3 cover issue 2; issue 4 covers issue 3 while issue 5 covers issue 4 respectively. So in deciding this appeal I shall take the arguments of the appellant on the issues as presented in his brief.

Issue 1: Under this Issue it was the submission of learned counsel for the appellant that on the evidence before the courts as contained in the printed record, there was no admission by the appellant that the farm (now the land) in dispute originally belonged to the respondent's father, as concluded by the Court of Appeal. In support he referred to page 1 lines 5 to 10 and page 3 lines 33 to 40 of the printed record. He contended that none of the three courts below, other than the Court of Appeal reached such a conclusion. He cited and relied on Chapter 239 of Ruxton - Translation of Mukhlasai; Babba Mohmud - Supremacy of Islamic Law 30 p.105 and Saude v.Abdullahi(1989)4 NWLR (Pt. 116) 387 at 420.

In reply learned counsel contended that the appellant actually admitted or acknowledged the ownership of the farmland by the respondent's father. He submitted that such an admission or acknowledgement could be deduced from the replies to the respondent's claims by the appellant both before the trial Area Court and the Upper Area Court and the evidence given by the witnesses before those courts. He then referred to pages 1 lines 5-10, 19 lines 1-20 in support.

It is trite law in Shariah that a free admission made by a mature and

sane person against his interest in favour of another is binding and enforceable against the maker. See Page 39-40 Vol. 1 Fathul-Aliyyal Malik wherein admission is given the following definition and effect:

"Admission is a binding declaration by its maker in favour of another. It must be clear and devoid of ambiguity." 5

Also in Bidayatul Mujtahid Valli page 352 it is stated that:

"Where an admission (its wording and context) is clear, it is binding on the court to act upon it" (the words in bracket supplied for clarity).

Looking at the context of the excerpts of the printed record referred to by both learned counsel for and against admission, it is difficult to draw a conclusion therefrom that the admission, if any, is clear and unambiguous. The respondent's complaint before the trial Area Court reads thus: 10

"I A Abdu complaining against Alh. Usman Hada because he bought a farmland from my father which is located at S/Tasha, whereas my father died 30 years ago today; and I never know Alhaji Usman bought this farmland from my father, and if my father sold him this farm he should bring a letter to certify it, or witnesses. That is why I sued him so that court will return me back my farmland." 15

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In answer to the complaint, the appellant replied thus;

"I heard what he said, but what brought this is about the complain made by Alh. Garba, we met Alh. Abdu and he started nagging at me, therefore, I told him that I bought this farm from his father 30 years ago today from the authority, that is from Magajin Garin M/Fashi Moh. Ali. and he is the master of the farmland owner." 25

From the two excerpts supra, it cannot be said with reasonable certainty that the appellant admitted the ownership of the disputed farmland to the respondent's father. The two statements read together are susceptible to two deductions: 30

- (a) that the disputed land was owned by the respondent's father originally but on the latter's death, its ownership reverted to Magajin Garin Malumfashi Alhaji Aliyu, described by the respondent as the master of the farmland and owner; 35

or that:

- (b) the farmland was in possession of the respondent's father by the author

ity of Magajin Gari Ali and the owner of it and on the death of the respondent's father he resumed possession.

For the principle of "Iqrar" or admission to apply, such an admission must be clear, devoid of any ambiguity or equivocation. It must be amenable to one and same interpretation at all times. See FATHUL -ALIYIL-MALIK UIL 1 Pp.39-40; Bidayatol Mujtahid Vol. II P. 352; Almughni - L1 Ibn Quddamah Vol. 5 P.149 and Supremacy of Islamic Law P. 105. Grounds 1 and 2 therefore succeed.

On issue No.2, dealing with "Trust Transaction". It was the submission of learned counsel for the appellant that it was not one of the issues raised by the respondent in his complaint both before the Area Court and the Upper Area Court. He contended that it was raised by the High Court suo motu and referred to page 30 lines 25 to 45 and page 3 lines 1 to 8 of the record. He submitted that even if the issue of trust was probably raised, it was not proved by admissible evidence and that both the High Court and the Court of Appeal were wrong to hold otherwise. Learned counsel referred to the decisions in CA/K/8/S/84 - Abdullahi Mogaji Majolaku v. Ita Alamu reported in (1990) Islamic Law Report 60 at 73 and Sadau Baba v. Sarikin Noma Aruwa (1986) 5 NWLR (Pt.44) 774 at 786 and urged the court to hold that there was no such trust between the deceased's respondent's father and the deceased Magajin Gari Aliyu.

In reply learned counsel for the respondent submitted that there was abundant admissible evidence both at the trial court and the Upper Area Court to support the finding of the High court that the farmland in dispute was held in trust for the respondent and his brothers by Magajin Gari Ali. He referred to page 7 lines 18 to 35, page 13 lines 16 to 39 and pages 88 to 89 of the record as evidence in proof of such a trust and cited the following decided cases in support:

Chiga v. Umaru (1986) 3 NWLR (Pt. 29) 460 at 467 and Abe v. Akaajime (1989) 4 NWLR (Pt. 113) 95 at 112

I do not entirely agree with the submission of learned counsel for the appellant that the issue of trust over the disputed farmland was not raised by the respondent in the two Area Courts that heard his complaint.

In the Malumfashi Area Court No. II although the respondent's complaint was that he was claiming from the appellant, Alhaji Usman Hada his father's farmland which the latter was claiming to have bought from Magajin Malumfashi, he however, at a later stage of the proceedings before Area Court II Malumfashi and in a reply to a question by the Court, whether he had any further explanation to make the respondent said:

"I have an explanation to make, because in 1952, our father died, therefore all his belongings, out properties, and farmlands were given to Magajin Gari Ali. After my brother Alhaji Lawal finished his school, then he collected all the properies but the farmlands were left with Magajin Gari Ali. However, in the early wake up we met defendant doing his work in the farmland, among the farmland which I don't know how he possessed them, 5 last year he told me that he bought the farmland from my father, but in the court he confessed that, he bought it from Magajin Gari Ali. Therefore, I want this court to prove my claims, since Magajin is not among our family (heirs) to avoid conflicts, I didn't sue him already."

Also in restating his complaint before the Upper Area Court Malumfashi, 10 the respondent said:

"While (he) Magaji was trusted by our father, therefore, when our father died all his asset which comprised his farmlands, etc., all were given to Magaji to take care of. Whereas when our senior brother Alhaji Lawal S/ Dawa finished his school in 1958, then he got us admitted into the school, 15 after I finished my school, I then joined Nigerian Army, and in 1969, I met with the dead Magajin M/Fashi at Funtua, and I asked him 'is our farmland with him still?' Because I wanted it in case I retired, we could come and farm it, then he said, he borrowed to his in-law the farmland to farm before we come back and collect it. 20

But the question then is, and as rightly argued by the learned counsel for the appellant "was such a trust proved by admissible legal evidence in accordance with Islamic Law?

I answer this question in the negative for the following reasons:

The statement by the respondent alleging the existence of any trust in respect of the disputed farmland is not per se, evidence of such a trust. This was part of, if not, the thrust of the respondents complain which he had to prove.

In ABDULLAHI MOGAJI MAFOLAKU v. ITA ALAMU (supra), Maidam J.C.A. stated correctly both, procedural and substantive law thus:

"It is pertinent to state here that under Moslem Law, unlike the English law, parties are not competent witnesses in court in their respective cases, hence their statements in court would not be regarded as evidence. But something akin to statement of claim and defence in the District and High Courts."

See also ASHALUL MADRIK FI IRSHADIS SALIK VOL. III P238 wherein

it is stated:

"It is upon the plaintiff/claimant to prove his case and for the defendant to take oath of denial in absence of proof by the plaintiff/claimant;" and Ruxton on Maliki Law P.281 to page 282. Page 210 also states that:

*"The judge will not enter judgment in favour of any of the litigants until
5 after the claimant has stated his case. The judge will then ask the defendant to respond to it: If he (the Defendant) admits the claim, then there is no problem, but if he denies, the plaintiff shall be called upon to adduce evidence in proof of his claim."*

See also further page 281 to page 282 wherein it is stated:

10 "After the plaintiff has stated his case and the circumstances connected with it, the Kadi (judge) orders the defendant to make an answer to confess or deny. The plaintiff's statement of the case will not necessarily be accepted."

And TUHFATUL HUKKAM (English Translation by Bello M. Daura) P.3,

15 Paras.24-25:

"The plaintiff is required to bring witnesses to testify for him and this rule has a general application. The defendant is required to take an oath in the event of failure of the plaintiff's failure to bring forth witnesses."

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See also Baba v. Aruwa (supra) relied upon by learned counsel for the appellant, particularly at page 786 of the Weekly Law Report where the law is restated thus:

25 "The general principles of Islamic Law relating to claim in civil matters in both 'movable and immovable property is that proof is complete by the evidence of two male unimpeachable witnesses or such one male witness and two or more female unimpeachable witnesses or one male or two female or more witnesses with claimants Oath in either case. See page 34 of IHKAMUL AKHAM short commentary on TUHFATUL HUKKAM."
30 (1986) 5 NWLR (Pt. 44) 774 at 786.

None of the witnesses called by the respondent gave evidence in proof of the alleged trust. The only evidence, other than the respondent's statement which is anyway not evidence, is a letter written by the respondent's brother
35 Alhaji Lawal Malumfashi Sarkin Dawan Katsina, who is also an interested party.

The general principle under Islamic Law is that the evidence of a near relative is admissible in favour of another if:

1. the witness will not derive some benefits from such evidence or

2. by giving such evidence he may not escape some harm or loss.
See BIDAYATUL MUJTAHID VOL. II P. 342 where it is stated concerning the evidence of a brother:

The consensus of Islamic jurists is that the evidence of a brother is acceptable if there is no suspicion or bias in that he will not remove some defects or loss from himself or derive some benefit e.g. where he is solely dependent on the brother."

Also in MALIKI LAW (being a summary translation by Ruxton) page 279 paragraph 1535 states:

"A witness may be objected to if he is suspected of deriving benefit from his evidence. Such a case would be where a witness gives evidence of fornication or willful homicide against a relation from whom he would inherit unless such relation was in indigent circumstances, or where the effect of a witness's evidence would be to augment his (the) debtor's assets."

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In Alhaji Baba Sule v. Gajere Hamidu (1988) 4 NWLR (Pt.90) 516 particularly at 522, Aikawa, J.CA. also delivering the judgment of the Court said:

"... It is pertinent to consider the principles of Sharia governing the evidence of witnesses. They are extensively provided in Ihkamul Ahkam pages 29-30; the English translation thereof read as follows:

'A brother may be summoned to give evidence in a claim instituted by his brother except in a claim where it may appear that the brother may claim some benefit or escape something harmful on his winning the claim.'"

See also page 10 of Tuhfatul - Hukkam (English translation by Bello M. Daura) where the principle is again stated thus in para. 116.

"A man who excels his peers in integrity can give evidence in favour of a brother of his; except where suspicion becomes manifest".

and Tharmaruddani (commenting on Risalat Ibn Abi Zayd) page 616 wherein it states thus:

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It is not permissible to receive the evidence of a witness who will benefit therefrom."

Alhaji Lawal is the elder brother to the respondent and therefore a beneficiary to the estate of Jamo'a and the farmland indispute is claimed to be part of such estate. If the respondent succeeds he will take his appropriate share of the farmland. On the principles stated, his evidence is not admissible. The conclusion by the Court of Appeal that

"I agree with the respondent that the High Court's finding of trust was not based on inadmissible evidence. The evidence was given by the respondent and his brother corroborated it by sending a written evidence and both evidence have not been controverted by the appellant. Also there was nothing from the records to show that it was not true. In the circumstances the High Court was right to act on it and declare that the farmland was held on trust by Magaji Gari Maluafashi.

With regards to the third submission, the respondent after calling his witness, who gave evidence that the farmland belongs to his father; the trial Judge asked him if he had anything more to say. He then gave his evidence which is recorded at page 7 lines 10 to 37 in the record of proceedings of the trial area court. When he appealed to the Upper Area Court, the learned Judge after re-valuating the evidence of his witnesses asked the respondent to explain what prevented him from claiming the farmland for 37 years. His explanation has been recorded from page 13 line 25 to page 19 line 5 of the proceedings of the Upper Area Court. The records showed that his father died when he was a minor and his brother was at school in Katsina. During their infancy the estate of his father i.e. the house and the farmland were under the care of the Magajin Malumfashi. When he grew up his brother sent him to school and thereafter he joined the Nigerian Army and went to fight the Civil War. When he was demobilized he returned to Malumfashi only in 1979 and found Magajin Malumfashi had died but his father's farmland was in possession of the appellant. The respondent's evidence was corroborated by the written statement of his brother which was admitted and reproduced at page 9 lines 20 to 40.

The evidence was not objected to by either court or the appellant and was acted upon by the court. The appellant in his brief submitted that both statements aforementioned, do not constitute valid evidence in Islamic Law. I am of the opinion that both statements are valid evidence in Islamic law on the ground that we have decided in many cases that a brother can give a valid evidence in support of his brother."

is therefore wrong, in the context of this case. It is the duty of the Judge to exclude or reject inadmissible evidence even if it is not objected to.

Grounds 2 and 3 of the Grounds of Appeal succeed.

Issue No.3 (Grounds 3 & 4):

Under this issue, learned counsel for the appellant contended that the Court of Appeal appeared not to put any premium on the reason respon-

dent gave for lack of vigilance in claiming his father's alleged property. He referred to page 18 line 37 and page 1 lines 22 to 28 and submitted that these statements amount to an unequivocal admission of the fact that he was aware of the appellant's undisturbed possession of the disputed land for 37 years but only refused to complain because he wanted to live in peace and harmony. Learned counsel referred to pages 164 to 166 of 5 MAYYARA VOL. II (Commentary on TUHFATUL HUKKAM) as quoted in Baba v. Aruwa (supra) and contended that the principle of Hauzi was correctly applied by both the trial Court and the Upper Area Court in dismissing the respondent's claim.

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In reply, learned counsel for the respondent submitted that the principle of Hauzi or prescription is not applicable to a land held in trust; or where the person acquiring knows the owner; or the person challenging the title is not in the area and seeing the position of the land being altered by the 15 person in possession or doing some other acts suggesting or asserting ownership of the same for over ten years. He also relied on Baba v. Aruwa (supra), the reasonings contained in the judgments of the High Court and the Court of Appeal and Haruna Dan Doko v. Gana Jimeta (1990) NWLR 82 at 83 and Bahja Vol. II Page 256 in support of these submissions. 20

The principle of "Hauzi" or prescription is stated thus in the Hadith: *"Whoever is in peaceful possession of a thing (real property) for 10 years, he becomes its owner."*

The same principle is stated in Tuhfa thus:

"Where a person (not being a relation to the claimant) has been in 25 possession of a real property for ten years, he acquires ownership of it." In Ashalul Madarik Vol. 3 page 236, the author also stated the principle as follows: *"He who sees somebody in possession of his (claimant's) property and claiming and using the same as his own over a long period without any objection from him, the person in possession becomes the owner. If the 30 original owner later brings an action to recover it, neither his complaint nor evidence in support thereof will be listened to."*

But there are exceptions to this principle:

1. Cogent reason for not complaining in time e.g. blood relationship or fear of harm from authority. 35
2. Minorship.
3. The person in possession was put there by the claimant either as a free or paying tenant.
4. The person in possession is put in there as a trustee.

5. The claimant is a partner or co-proprietor to the person in possession.

See also MAYYARAH VOL. II P. 164 and MALIKI LAW (Summary Translation of MUKHTASHA KHALIL By RUXTON) P. 309, Para. 1698 which states thus: *"Ten years peaceful enjoyment of possession without its being*
 5 *called in question bars all action against possessor, unless he be the claimant's relative, partner, or co-proprietor, or unless in the case of a house, the possessor was in permissive occupancy only."*

I have already dealt with the question of trust and found it to be not applicable. There was no evidence in all the lower courts that the claimant
 10 was covered by any of the exceptions stated supra. When asked by both the trial Area Court and the Upper Area Court why he did not complain against the appellant when he saw him in possession of the land in dispute, his reply was that he "wanted to live in peace and harmony". Both the trial Area Court and the Upper Area Court, after reviewing the evidence before
 15 them came to the right conclusion and applied the correct law when they dismissed the plaintiff's claim. The respondent stood by for 38 years seeing the appellant and in possession, using the disputed land and claiming the same as his own.

Throughout the case, there was no evidence showing how the respondent's
 20 father came to own the farm, rather, the evidence showed that he was in permissive possession of the farmland by the authority of late Magaji.

Even before the litigation commenced, the evidence showed that the farmland in dispute was acquired by Malumfashi Local Council and converted into abattoir. When it was abandoned, the farmland was demar-
 25 cated into plots and given to the public. The area in dispute was re-allocated to the appellant during that exercise. The respondent also admitted that they were given some of the plots. The character of the land has completely changed and the major part of it has been built up by the allottees as private residential houses.

30 The respondent as of now, if he has any case, it will be with the Malumfashi Local Government which acquired the land about 22 years ago. This was given in evidence by appellant's witness No.3 before the Malumfashi Area Court. Grounds 4 and 5 succeed.

Issue No. 6 has been covered under Issue No.3. It needs no further
 35 consideration. On issue No.5, dealing with concurrent findings of fact of the Area Court and the Upper Area Court respectively, I agree with the submissions of the learned counsel that, the findings were justified by the evidence under Islamic law. Both the High Court and the Court of Appeal were wrong in interfering with them. See Ekwunife v. Wayne Ltd (1989) 5

NWLR (Pt. (22) 422.

This issue also succeeds.

On the whole, I have come to the conclusion that the appeal has merit and it is allowed.

The judgment of the Court of Appeal affirming that of the High Court is set aside. In place thereof, the judgment of Malumfashi Upper 5 Area Court affirming that of the Malumfashi Area Court No. II is hereby restored. The order of the two Area Courts dismissing the respondent's claim is hereby confirmed. The appellant is awarded N1000.00 costs in this court and N500.00 in the court below against the respondent.

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KARIBI-WHYTE JSC

I have had the privilege of reading the judgment of my learned brother Wali, J.S.C, in this appeal. I agree with his reasoning and conclusion allow- 15 ing the appeal. I have nothing to add. I also hereby allow the appeal. I abide by the costs awarded in the judgment of my learned brother Wali JSC

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BELGORE JSC

I had the opportunity of reading in draft the judgment of my learned brother, Wali, J.S.C. I agree with him and I adopt his reasons and conclusions as mine in setting aside the judgment of the Court of Appeal which 25 upheld the decision of the appellate High Court. I also hereby restore the judgment of Malumfashi Area Court No. II and award N1,000.00 against the respondent as costs in this Court and N500.00 as costs also against him in the Court of Appeal in favour of the appellant.

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OLATAWURA JSC

I had a preview of the judgment of my learned brother Wali, J.S.C. just delivered. I agree with his reasoning and conclusions. I will also allow 35 the appeal. I abide by the order for costs.

KUTIGI JSC

I read before now the lead judgment of my learned brother Wali, J.S.C. just delivered. I agree with his reasoning and conclusions. The appeal is allowed. Accordingly the judgment of the Court of Appeal Kaduna is hereby set aside while the judgment of the trial court, Malufashi Area Court II, dismissing plaintiff/respondent's case is restored. I endorse the order for costs. Appeal allowed.

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