

SUPREME COURT OF NIGERIA

26TH FEBRUARY, 1993. SC. 128/1990

**CORAM:- A. G. KARIBI-WHYTE, S. KAWU, S.M.A. BELGORE,
P. NNAEMEKA-AGU, O. OLATAWURA, U. OMO, I.L. KUTIGI, JJSC.**

ALHAJI AHMADU BABALE APPELLANT

AND

AMINA AMINU ABDULKADIR RESPONDENT

COURTS

- Duty of Court - whether to make case for a party - or resolve dispute between parties.

ISLAMIC LAW

- Of inheritance - wrongfully held to apply by Upper Area Court - wrongfully affirmed by two appellate courts - when remittal is necessary.

JUDGMENT

- Of trial court - not supported by evidence - effect thereof

JURISDICTION

- Erroneous refusal to assume jurisdiction - though jurisdiction exists - proper order to be made.

FACTS

The Plaintiff as Respondent claimed from the Defendant/Appellant in the Upper Area Court Zaria, a return of her father's farmland which were left in the care of Defendant's father. The Defendant alleged that the farmland belongs to his father who inherited same from his own father. None of the parties suggested that they were co-inheritors of the land in dispute under Islamic law. After reviewing the evidence adduced by the parties the trial court wanted the Plaintiff to take oath towards establishing her sole claim to the land. The Plaintiff refused maintaining that the Farmlands belong to her father alone. The Court ordered that the farmlands be snared between the parties since Plaintiff refused the oath. The Plaintiff/App-

70 BABALE V. ABDULKADIR (1993) 3 KLR 69; (1993) 3 NWLR

pellant being dissatisfied appealed to the High Court which refused to entertain the appeal on grounds of lack of jurisdiction.

Despite submissions by Counsel on both sides to the contrary, the High Court held that the case was a matter of inheritance under Islamic Law within the exclusive jurisdiction of the Sharia Court of Appeal. The appeal was unanimously dismissed and the ruling of the High court was affirmed. Appellant appealed to the Court of Appeal, Kaduna Division. The appeal was also dismissed.

This is a further appeal to the Supreme Court by the Appellant

HELD (unanimously allowing the appeal and remitting the case to the High Court to be heard on merit)

1. The Plaintiff's/Appellant's claim has no bearing or relevance to a suit of inheritance under Islamic law. (p.74 L. 27)
2. The duty of a trial court is to resolve the dispute between the parties as presented by them, and not to make a case for a party as the Upper Area Court appear to have done in the present case. (p. 74 L. 35).
3. The Upper Area Court was in error to have come to the conclusion that the dispute between the parties related to an issue of joint inheritance under Islamic personal law when the evidence before the court did not support such a conclusion. (P. 75 L. 2)
4. The decision of the High Court affirmed by the Court of Appeal that it has no jurisdiction cannot be allowed to stand and as such this case is remitted to the High Court to be heard on its merit. (p. 75 L. 6)

PER OLATAWURA JSC *"Before a court makes a finding, there must have been evidence led in support of the statement of claim or defence. In this case, it is the claim which will decide the issue of jurisdiction."* (p. 81 L. 14)

REPRESENTATION:

J. Daudu, with Miss Uche Agomoh for the Appellant

Respondent absent and not represented.

CASES REFERRED TO

1. Adebajo v. Brown (1990) 3 NWLR (Pt 141) 661
2. Barclays Bank v. Central Bank (1976) 6 S.C. 175
3. Madukolu v. Nkemdilim (1962) 1 All NLR (Pt 4) 587
4. Attorney-General of Kwara State v. Raimi Olawale (1993) 1 NWLR 645

STATUTES & RULES

1. Constitution of the Federal Republic of Nigeria 1979 ss. 241 (1)(c), 242 (1) (2)
2. High Court Law s. 78

LEAD JUDGMENT BY KAWU JSC

In the Upper Area Court, Zaria, the appellant herein was the defendant in a suit instituted by the respondent in which she stated her claim as follows: -

“I am sueing (sic) Alhaji Amadu because I want him to give me back my father’s farmlands. They are situated at Shika, Jushi, U/ Kaya and also here at Kwarbai.”

The trial Upper Area Court, in an apparent endeavour to determine the exact nature of her claim said; -

“You are co-inheritors with him or he has his own separate one ?”

Answer: *“They have sold their own farmlands, these ones belong to my father only. My father is Abdulkadir Dan Wambai, he left the farmlands in the care of Alhaji Babale (Father of the defendant Alhaji Ahmadu)”*

In his reply to the claim the defendant stated as follows:-

“I do not agree with what she said, because these farmlands she is talking about belongs (sic) to my father (Alhaji Babale) who inherited same from his father (Dallatu Muhammadu). I lived with my father for 51 years, I never heard anybody saying he has a share
5 of the farmlands. He was using these farmlands until after his death, and about 4 years later, Amina went to Yusufu (the ward head of U/Kaya) to whom I left the care of the farmlands to, she said he should come and beg me to cut a portion for her in the name of goodwill, I
10 said we the children of Babale are seven in number, six males with one female until I consult them before I do the appropriate thing. Everybody was still awaiting the reply, then came a summons. That is all I know.”

Both parties gave evidence and called a number of witnesses
15 in support of their respective claims. As the conclusion of the trial, after reviewing the evidence adduced by the parties, the trial Upper Area Court observed as follows:-

“What this Court has observed in this case is that in respect of these farmlands none of the parties has called any witness whose
20 evidence can fully be relied on, all the witnesses are saying that they do not know the history of the farmlands. None of the parties has shown to this Court that the farmlands belong to him or her alone. There are witnesses to confirm that both Dangaladima and Dalhatu owned the farmlands and were collecting (Galla) during their life-
25 time, and that they had a relationship with each other, they were brothers. For this reason, what will happen in this case is they will all be given an Oath to make, everyone swear that the farmlands belong to him/her alone. If all of them should swear, then it will be divided into two for them and if all of them refuse the Oath, it will still
30 be divided for the two of them. If one swear and the other refuses then the whole of the farmlands will go to the person who swore. If it is confirmed that the farmlands are for joint inheritance, then they will all be shared equally including the ones Alhaji Babale sold out
35 and the one he gave out free of charge (They will be counted as part of his share). The farmland at Shika which the plaintiff said that it belongs to Fatu, the court will not make any order in respect of it. Alhaji Ahmadu can sue her or the inheritor since he said it was Babale who gave it to her on loan. The one which they built a house on near

the prison which they said they filled a pit with sand before building, the Court will not make order on it also, if Amina likes she can sue the person who built on it or the inheritor of the house in a separate suit since they said it was a pit and no one can say who is the rightful owner and who to inherit. The farmlands that the Government seized and built school and the ones sold out to people by Alhaji Babale will not be touched because no one knows how much they gave Babale on them. 5

In respect of the farmlands with Dankauye which the plaintiff said he divided into two and showed only one part, since Alhaji Ahmadu said he knows nothing about them only the one shown by Dankauye, if the plaintiff wants she can investigate further and sue the people who are in possession of the farmland. Since the plaintiff is not here in person, the case is adjourned to Friday for taking of the Oath. Case adjourned to 27/2/87. 10 15

The record shows that on the 27/2/87, the plaintiff, Hajiya Amina was present in Court but the defendant was absent. The trial court then asked if the plaintiff was prepared "to swear that the farmlands belong to you alone, you inherited it from your father, Alhaji Ahmadu has no share out of it" She replied that she would not take any oath since all the farmlands belong to her father, and on that note, the trial court decreed as follows:- 20

"It is hereby ordered that all the farmlands in dispute are for joint inheritance between Amina and Alhaji Ahmadu, the ones sold by Alhaji Babale and Alhaji Ahmadu sold out will be counted among their share." 25

Being dissatisfied with the decision of the trial Upper Area Court, the appellant appealed to the High Court of Kaduna State on a number of grounds. 30

When the appeal came up for hearing in the High Court, that Court declined to entertain the appeal. It held that it had no jurisdiction to do so as the matter in dispute between the parties raised an issue under Islamic Law. The Court then ruled as follows:

"We have read the record and it appears to us to be a case of inheritance under Islamic Law and therefore outside the jurisdiction of this court. It is a matter within the exclusive jurisdiction of the Sharia Court of Appeal by virtue of the provisions of section 242(1) (c) of the Constitution." 35

Mr. Daudu, learned counsel for the appellant made a submission to the court to the effect that the dispute between the parties had nothing to do with inheritance. He referred to a portion of the proceedings where the Upper Area Court had held that the parties' fathers were brothers.

5 The High Court was not persuaded by the submissions made on behalf of the defendant. The Court decided that the issue between the parties related to *"inheritance under Islamic Law," which*
 10 *was a matter within the exclusive jurisdiction of the Sharia Court of Appeal "and subject to the written consent of the Honourable Grand Kadi as provided by section 78 of the High Court Law, the appeal shall be transferred to that Court."*

15 Again being dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal, Kaduna Division which Court, in a unanimous decision delivered on 10th July, 1989 dismissed the appellant's appeal and affirmed the ruling of the High Court. This appeal is from that decision.

20 Now I have already set out earlier in this judgment the finding of the Upper Area Court that all the farmlands in dispute "are for just inheritance." *This was the finding that was upheld by both the High*
 25 *Court and the Court of Appeal: But having carefully read the record of the proceedings in the Upper Area Court, I am unable to find any scrap of evidence to support that finding. The plaintiff's claim, as Mr. Daudu correctly submitted, had no bearing or relevance to a suit of inheritance under Islamic Law. Furthermore, the defendant or ap-*
 30 *pellant when asked by the trial Upper Area Court before the conclusion of the hearing if he had anything further to say, said:*

"What I have to say is that there is nowhere we jointly inherit with Amina."

35 The duty of a trial court is to resolve the dispute between the parties as presented by them, As was clearly pointed out by this Court in Adebajo v. Brown (1990)3 NWLR. (Pt. 141) 661, it is not the

business of a trial Court to make out a case for a party as the trial Upper Area Court would appear to have done in this case. In my view the Upper Area Court was in error to have come to the conclusion that the dispute between the parties related to an issue of joint inheritance under Islamic personal Law when the evidence before the Court did not support such a conclusion. On this point alone, the decision of the Court of Appeal affirming that of the High Court cannot be allowed to stand. Consequently the appeal succeeds and it is accordingly allowed. The decisions of both the Court of Appeal and the High Court are hereby set aside, and the appellant's appeal against the judgment of the Upper Area Court, Zaria delivered on 27/2/87 is hereby remitted to the High Court of Kaduna State to be heard on its merit by a differently constituted panel. Costs assessed at N1,000.00 are awarded to the appellant.

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KARIBI WHYTE JSC

I have read the judgment of my learned brother Kawu, JSC in this appeal. I agree entirely with his reasoning and conclusion that this appeal succeeds.

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It is very clear from the claim before the Upper Area Court Zaria, where the action was commenced that it was for the return of farmlands. The Upper Area Court recorded the claim as follows -

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"I am suing Alhaji Ahmadu because I want him to give me back my father's farmlands. They are situated at Shika, Jushi, U/Kaya and also here at Kwarbai."

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I think the ordinary meaning of this claim is that plaintiff now wants the return of the farmlands situated at Shika, Jushi. U/Kaya and at Kwarbai which are now with the defendant. Plaintiff claims to be entitled to these farmlands by virtue of inheritance from her father.

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Plaintiff's answer to the question put by the Court suggesting whether plaintiff and defendant are co-inheritors of the same land that defendant has his own separately; emphasised the nature of the

claim. Plaintiff answered as follows

"They have sold their own farmlands, these ones belong to my father only. My father is Abdulkadir Dan Wambai, he left the farmlands in the care of Alhaji Babale (father of the defendant Alhaji Ahmadu)."

5 *It is clear from these exchanges in the proceedings that plaintiff is only claiming from the defendant return of the farmlands left in the care of his father Alhaji Babale.*

10 *The issue of inheritance was introduced by the Upper Area Court when the following question was posed to the plaintiff, "You are co-inheritor with him or he has his own separate one."*

Plaintiff denied the suggestion.

15 It could be seen from the proceedings in the trial Court that defendant claims the farmlands by inheritance from his father, Alhaji Babale. Plaintiff's allegation was that the farmlands in dispute were left in the care of Alhaji Babale (defendant's father) by plaintiff's father. It is therefore difficult to surmise how the Upper Area Court
20 could arrive at the conclusion that the claim of the plaintiff was based on inheritance.

25 Both the High Court in its appellate jurisdiction and the Court of Appeal relying on the finding of the Upper Area Court, dismissed the appeal and held that the matter in dispute between the parties raised an issue of Islamic law of inheritance, and therefore outside the jurisdiction of the court. It was held that it is a matter within the
30 exclusive jurisdiction of the Sharia Court of Appeal by virtue of the provisions of section 242(1) (c) of the Constitution 1979.

I have already set out the claim of the plaintiff, in this judgment.

35 Although plaintiff has traced her right to the farmlands through inheritance from her father, her claim from the defendant is not founded on inheritance. It is a claim to return to her the farmlands left in the care of his father. This is clearly brought out by the defendant when he said,

“What I have to say is that there is no where we jointly inherit with Amina.”

Thus, as between the plaintiff and defendant, the issue is not one of inheritance. The issue not being one of inheritance and a simple case for the return of the farmlands, the subject matter does not fall within the jurisdiction of the Sharia Court of Appeal. Section 242(1) (2) (c) provides as follows -

“242.-(1) The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the Law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the Court is competent to decide in accordance with the provisions of subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide -

(c) any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Moslem.”

The High Court, Kaduna on appeal, and the Court of Appeal, Kaduna Division would appear to have followed unreflectingly and adopted the finding of the Upper Area Court, that the issue between the parties was one of inheritance. I agree entirely with the submission of Mr. Daudu for the appellants that the evidence relied upon is not in support of such a finding.

In my view the Upper Area Court was in error in such a finding. Since the decision of the Court of Appeal affirming the High Court was based on the erroneous finding, the judgment cannot stand. Accordingly, the decisions of the Court of Appeal, and the High Court are set aside.

It is well settled that the jurisdiction of the Court is determined by the claim of the plaintiff. *Barclays Bank v. Central Bank* (1976) 6 S.C.175. Whenever the subject matter of the claim is within the jurisdiction of the Court, and the Court is properly constituted in its composition and qualification of its members, and there is no extrinsic factor affecting its jurisdiction, the court is competent to exer-

cise jurisdiction- see *Madukolu v. Nkemdilim* (1962) 1 All NLR. (Pt.4) 587; (1962) 2 SCNLR 341.

There is no doubt that in the instant case, the subject matter, namely, return of land being within the jurisdiction of the Court and the question of the constitution and qualification of members of the Upper
5 Area Court not in issue, the Court has jurisdiction. Accordingly, the appeal is hereby remitted to the High Court for hearing and determination on its merits by a differently constituted panel.

Respondent shall pay costs assessed at N1000 to the appellant.

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BELGORE JSC

I have had the privilege of reading in advance the judgment of
15 my learned brother. Kawu, JSC with which I am in full agreement. I also allow this appeal for the reasons ably advanced in the judgment and I adopt them as mine. I make the same order as to costs.

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NNAEMEKA-AGU JSC

The Supreme Court was unable to make the judgment of the Hon. Justice Philip Nnaemeka-Agu. J.S.C. available for publication because the Hon Justice was involved in a motor accident which
25 occurred on February 12, 1993.

We wish the Hon. Justice a very quick recovery.

OLATAWURA JSC

30 This appeal raises issue of jurisdiction. It is whether the Kaduna State High Court or the Sharia Court of Appeal has jurisdiction in respect of the decision given by the Upper Area Court, Zaria.

The claim before the Upper Area Court as gathered from the
35 statement made by the plaintiff is that the land in dispute belongs to Amina Aminu Abdulkadir alone. The record reads thus:

“Amina Aminu says I am suing Alhaji Amadu because I want him to give me back my father’s farmlands. They are situated at Shika,

Jushi, U/Kaya and also here at Kwarbai.”

That simply was the claim before the Upper Area Court.

The defendant, Alhaji Ahmadu Babale in his own statement before the Court, disagreed with the plaintiff and claimed the land in dispute as the one he inherited from his father who also inherited it from the defendant's grand-father. Dallatu Muhammadu. According to the defendant the farmlands belong absolutely to his own family. He was specific about his father's children: Alhaji Ahmadu Babale (is the defendant) (2) Hassan, (3) Husaini, (4) Gambo, (5) Rayyamuna. (6) Ali. (7) Shatin and (8) Jamilatu.

The Upper Area Court later went to the locus in quo. A careful reading of the proceedings shows unmistakably that the issue of inheritance can only arise where the parties are related. The court appreciated this when in its decision of 20/2/87 it said inter alia:

“This is a very wide case in which the Defendant is claiming that he inherited the farmlands in dispute from his father, the plaintiff on the other hand has delegated her daughter (Fatima) to speak on her behalf due to old age; she is contending that the farmlands belong to her father Dangaladima Abdulkadir who died and the farmlands were handed over to Alhaji Babale and after his death, his son Alhaji Ahmadu took over; she now wants her farmlands back.”

In the course of its judgment, the Upper Area Court did not come positively on the said joint inheritance, for the court said:

“If it is confirmed that the farmlands are for joint inheritance, then they will all be shared equally including the ones Alhaji Babale sold out and the one he gave out free of charge.”

In their decision called Ruling/Judgment, the court said:

“It is hereby ordered that all the farmlands in dispute are for joint inheritance between Amina (i.e the plaintiff) and Alhaji Ahmadu (the defendant), the ones sold by Alhaji Babale and Alhaji Ahmadu sold out (sic) will be counted among their share.”

Earlier on it was the observation of the court that there was no credible evidence on which the court could rely. The judgment of the Upper Area Court led to an appeal by the defendant to the

Kaduna State High Court.

The High Court was of the firm view that it was a case of inheritance under Islamic law and consequently the jurisdiction of the State High Court is ousted, and is within the exclusive jurisdiction of the Sharia Court and ordered that the appeal be transferred to the Sharia Court
5 of Appeal.

This has led to the appeal to the Court of Appeal, Kaduna Division. The lower court appreciated that in determining a cause of action in respect of a case filed in the Native Court, Customary Court
10 or Area Court, that great latitude must be given to the case and that one must read carefully the entire proceedings and see the nature of evidence led in support of the claim so as to ascertain the nature of the claim. The court should lean towards the substance of the claim rather than the form. The lower court then relied on the finding made
15 by the trial court to support a claim of inheritance. These findings although already stated above should, for the purpose of emphasis, be repeated here: The Upper Area Court ordered thus:

*"It is hereby ordered that all the farmlands in dispute are for joint inheritance between Amina and Alhaji Ahmadu, the ones sold
20 by Alhaji Babale and Alhaji Ahmadu sold out (sic) will be counted among their share."*

The Court of Appeal per Uthman Mohammed, J.C.A. said:

*"The finding I have reproduced above explains unambigu-
25 ously that the decision of the trial Upper Area Court was based on the issue of inheritance. What guides a litigant in filing his appeal is the finding, order or opinion delivered by the court from whose judgment a party is appealing."*

The learned Justice of the Court of Appeal had earlier dealt
30 with the provisions of section 242 (1) of the 1979 Constitution and finally came to the conclusion that the Sharia Court of Appeal has jurisdiction. The appeal against that decision of the Court of Appeal is based on six issues. I will deal with the 2nd issue which reads:

*"The appellant will contend that it is the claim of the Plaintiff
35 that determines jurisdiction, irrespective of the findings of the trial Court."*

Closely connected with this issue is one of the questions raised for the determination of the appeal. It reads:

"What determines the jurisdiction of special appellate courts

such, as the Sharia Court of Appeal and Customary Court of Appeal to adjudicate on an appeal? Is it the claims of the plaintiff in the court below or is it the decision of the said court of first instance?"

In answering this question, it will, in my view, be a better approach to ask: what determines the jurisdiction of any court? There are cases where jurisdiction is conferred by statute but generally the jurisdiction is determined on the claim of the plaintiff: Adeyemi & Ors. v. Opeyori; (1976) 9-10 S.C. 31. It is not the finding of a court that confers jurisdiction; neither will it be the ratio of the case. There are cases or situations where a finding made by the trial court is not even supported by evidence. It will then clearly be wrong to rely on the finding so as to sustain an issue of jurisdiction. The question of jurisdiction is so fundamental that any action brought in a court that has no jurisdiction is an abuse of the process of court. Before a court makes a finding, there must have been evidence led in support of the statement of claim or defence. In this case, it is the claim which will decide the issue of jurisdiction.

In the case of Attorney-General of Kwara State & 2 Ors. v. Raimi Olawale (1993) 1 NWLR (Pt.272) 645/674-5; Karibi-Whyte, J.S.C. in discussing the issue of jurisdiction said:

"There is no doubt the issue of whether a plaintiff's action is properly within jurisdiction or indeed justiciable can be determined even on the endorsement of the writ of summons, as to the capacity in which action was being brought, or against who action is brought. It may also be determined as the subject matter endorsed on the writ of summons, if this is not actionable. The statement of claim when served before the statement of defence is even filed, the defendant can bring an application to strike out the writ of summons on the same grounds. This is the position before trial. The issue can be determined on the papers already before the court, namely the writ of summons and statement of claim."

I agree. The approach of the Kaduna High Court in coming to a conclusion before submissions were made should be avoided. An appellant should be allowed to argue his case before an opinion is formed. I agree with Mr. Daudu in his submissions when he said that before an appellate Court decides the issue of jurisdiction *"the entire proceedings, particularly the claim and the evidence of the parties should be critically considered and scrutinized before pronouncing*

on which court has jurisdiction”

I consider it unnecessary at this stage to consider the provisions of sections 236(1) and 242 (1) of the 1979 Constitution in view of the fact that I will allow the appeal. The appeal is therefore allowed, the decisions of the Kaduna State High Court and the Court of Appeal, Kaduna Division are hereby set aside and the appeal is remitted back to the Kaduna High Court to hear it on its merits. It is for these reasons and the fuller reasons given in the judgment of my learned brother Kawu, J.S.C that I allow the appeal. I also award the sum of N1,000.00 in favour of the appellant.

OMO JSC

I have been privileged to read in draft the judgment of my learned brother Kawu, JSC

I am in complete agreement with his views and conclusions therein expressed and adopt same as mine.

Accordingly I also allow this appeal and set aside the judgment of the court below. The matter is hereby remitted for hearing on its merits by the High Court of Kaduna State. Costs to the appellant is assessed at N1,000.00 only.

KUTIGI JSC

I have had a preview of the judgment just delivered by my learned brother Kawu, JSC, I agree with it. The claim before the Court is decisive in this case. It reads –

“I am suing Alhaji Amadu because I want him to give me back my father’s farmlands. They are situated at Shika, Jushi, U/kaya and also here at Kwarbai.”

One is therefore clearly at a loss how the learned trial Upper Area Court Judge came to the conclusion that the claim related to inheritance under Islamic law and then proceeded to determine same on that basis. He was clearly in error to have arrived at that conclusion. The claim shows that the High Court has jurisdiction to hear the appeal.

I will also allow the appeal and endorse the orders proposed in the lead judgment of Kawu, JSC.