

**SUPREME COURT OF NIGERIA**

16TH JULY, 1998. SC. 208/1991

**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, M. E.  
OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED, JJSC.**

ALHAJI GARBA GIDAN KADA ..... APPELLANT  
AND  
ALHAJI SALIHU GIDAN YAWA ..... RESPONDENT

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***ISLAMIC LAW*** - Oath of rebuttal - Claim of property in the possession of another - The claimant is required to prove his claim by calling witnesses - If he fails the defendant will be called upon to take the oath of rebuttal - Unless the defendant has been in undisturbed possession for up to the period of hauzi (Prescription).

***ISLAMIC LAW*** - Title by prescription - Where the appellant saw the respondent farming the land in dispute - And did not raise any objection - There is ample evidence to hold that the respondent acquired title by prescription.

***ISLAMIC LAW*** - Oath of judgment - Claim affecting a deceased person's estate - Where the respondent acquired title over the land through prescription (hauzi) - He must be made to take the oath.

***WORDS AND PHRASES*** - Hauzi (Prescription) - Under Islamic law - What it means.

***WORDS AND PHRASES*** - Yaminul Qada'i (oath of judgment) - Under Islamic Law - How defined.

**FACTS**

The plaintiff/appellant sued the defendant/respondent at the Koforkoshi Area court claiming repossession of a farmland which was originally cultivated by one Kado, the appellant's father. The appellant's

father cleared the bush and established the farm in dispute. After working in it he left the area and settled in Rijiyar Tsakar Dawa, a village about 10 miles away from the farm in Gusau District. After 27 years, the appellant, representing the children of Kado, came into the farm and began to build a house in it. The respondent challenged the appellant and explained that he bought the farm some 16 years ago. The respondent explained to the Area Court that he did not know the origin of the farm. He told the trial court that the farm was given to some Fulanis by the District Head of Kotor Koshi, Alhaji Abdu. The Fulanis worked in the farm for 24 years and when they were about to migrate to Gombe they sold the farm to him. He had been working in the farm for 16 years and throughout this period nobody had claimed ownership of it. The respondent further testified that the appellant and his family had seen him working in the farm and had never challenged him over its ownership. Three witnesses gave evidence for the appellant and their testimonies agreed that the father of the appellant established the farm.

The Area Court judge considered the evidence before him and found that the respondent had acquired title to the disputed farm through Hauzi (Prescription) since he had worked in it for 16 years without being challenged by any one. He also found that the appellant's family abandoned the farm for 40 years and were present in the area seeing others working in the farm and had made no attempt to assert their right over it. The appellant made series of appeals through all the hierachies of court viz Gusau Upper Area Court, the High Court sitting at Gusau and the Kaduna Division of the Court of Appeal. He lost in all the courts. He has finally appealed to the Supreme Court. From the grounds of appeal filed the Supreme Court found the issues raised by the respondent to be apt and pertinent for the determination of the appeal.

**ISSUES FOR DETERMINATION**

*"1. Whether the respondent acquired title to the farmland by prescription (Hauzi).*

*3. Whether the court below was right in remitting the case to the trial court to proffer judicial oath on the respondent.*

*4. Whether the decision of the court below could be said to be*

*altogether unreasonable and unwarranted, having regards to the weight of evidence."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **MOHAMMED JSC**)

***Hauzi (prescription)***

1. Under Islamic law of Hauzi (prescription) ten years' peaceable enjoyment of possession of property without its being called in question bars all action against the 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. See Ruxton on Maliki Law, the translation of Mukhtasar of Sidi Khalil, at page 309. (p. 1883 E)

***Oath of rebuttal***

2. In Islamic law where a person claims property which is in possession of another, the claimant is required to prove his claim by calling witnesses. If he fails to call witnesses the defendant will be called upon to take the oath of rebuttal; but where the defendant has been in undisturbed possession for up to or beyond the period of hauzi (prescription) the defendant will not be called upon to subscribe to the oath of rebuttal- see Muhammadu and ors. v. Idi & ors. (1961 - 1981) 1 Sharia L.R.N. page 146. See also Ihkam Al-Ahkam, short commentary on Tuhfatul-Hukkam, page 262-263. He may however be made to take the oath of judgment. (p. 1885 A)

***Title by prescription***

3. The learned justice of the Court of Appeal, Maidama JCA, who wrote the lead judgment with which Wali JCA (as he then was) and Ogundere JCA, concurred, stated the correct position of the Islamic Law of prescription in the following findings:

*"Therefore, if the owner in the present case has full knowledge of the adverse possession and did nothing, his claim is extinguished. It would be otherwise, if the appellant is away to another far away place which is equivalent to a minimum distance of 2 days journey or where the*

property is situated within enemy territory or where the person in possession is a blood relation, in which case, the period extends to 40 years or where the property is on loan or was for life tenancy only. In the instant case, the respondent stated that the appellants were there and saw him farming in the farm and did not raise any objection. His statement was not contradicted. In my view, there is ample evidence to hold that the respondent acquired title by prescription."

The same principle applies in equity. In the case of Said v. Akinwunmi 1 FSC 107 the Federal Supreme Court held that a person who was in occupation of a property for 20 Years or more acquired title by prescription, if the real owner of the land failed to assert his right timeously. I entirely agree with the opinion of Maidama JCA and for the same reasons I resolve issue 1 in favour of the respondent. (p. 1885 E)

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***Yaminul Qada'i (oath of judgment)***

4. Oath of judgment has been defined at page 98 in Mayyara Vol.1 commentary on Tuhfa as follows:

"an oath proffered to a claimant over a deceased person's property in protection of such property since the deceased will not be available to dispute and rebut the claim. It is also proffered where the claim involves the property of a person who has been absent and his whereabouts is unknown or a minor." (p. 1886 C)

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***Oath of judgment - Claim affecting a deceased person's estate***

5. The appellant's father Kado is dead. He was the person who established the farm and later abandoned it. It passed through many hands before the respondent possessed it. I have affirmed the decisions of the lower courts that the respondent has acquired title over the land through prescription (hauzi). In view of the fact that the subject matter involves a claim affecting a deceased person's estate the respondent must be made to take the oath of Yaminul Qada'i (oath of judgment). See page 50 of Ihkamu AI-Ahkam, short commentary on Tuhfatu AI-Hukkam. The Court of Appeal is therefore right to order the trial area court to proffer the oath of judgment to the respondent. (p. 1886 E)

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**REPRESENTATION**

A. O. Oyebanji for the appellant  
Respondent absent and not represented

**CASES REFERRED TO**

Said v. Akinwunmi 1 FSC 107  
Muhammadu v. Idi (1961 - 1981) 1 sharia L.R.N. page 146

**RULES REFERRED TO**

Area Court (Civil Procedure) (Amendment) Rules, 1980 Rules 7, 16 (3) B

**BOOKS REFERRED TO**

RUXTON on Maliki Law, the translation of Mukhtasar of Sidi Khalil, at page 309 D  
Ihkam Al - Ahkam, Short commentary on Tuhfatul - Hukkam page 262 - 263.  
Mayyara Vol. 1 Commentary on Tuhfa at page 98 E

**LEAD JUDGMENT BY MOHAMMED JSC**

This is an appeal by Alhaji Garba Gidan Kada who as plaintiff at Kotorkoshi Area Court sued Alhaji Salihu Gidan Yawa claiming repossession of a farmland which was originally cultivated by one Kado, the plaintiff's father. The case went through Kotorkoshi Area Court, Gusau Upper Area Court, Sokoto State High Court, sitting at Gusau, and the Kaduna Division of the Court of Appeal, before it arrived on appeal to the Supreme Court. The appellant lost in all the four lower courts. F

The facts so far as relevant were as follows: The appellant's father, Kado, cleared the bush and established the farm in dispute. He worked in the farm until when he began to encounter some difficulties in connection with his domestic animals in Kotorkoshi district due to scarcity of grazing area. He therefore moved to a village called Rijiyar Tsakar Dawa, about 10 miles away from the farm, in Gusau District. After 27 years, the appellant, representing the children of Kado, came into the farm and began to build a house in it. The respondent challenged the G  
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appellant and explained that he bought the farm from some Fulanis 16 years ago. The respondent explained to the Area Court that he did not know the original of the farm. He told the trial court that the farm was given to some Fulanis by the District Head of Kotorkoshi, Alhaji Abdu.

B The Fulanis worked in the farm for 24 years and when they were about to migrate to gombe they sold the farm to him. He had been working in the farm for 16 years and throughout this period nobody had claimed ownership of it. The respondent explained further and said that the appellant and his family had seen him working in the farm and had never  
C challenged him over its ownership.

The Area Court judge directed the appellant to call his witnesses. Three witnesses gave evidence for the appellant and their testimonies agreed that Kado, the father of the appellant, cleared the bush and estab-  
D lished the farm. After working in it he left the area and settled in Rijiyar Tsakar Dawa. Two of the witnesses, PW1 and PW3 told the Area Court that when Kado was leaving Kotorkoshi district he entrusted the farm to one, Ajia Mato. The farm later came into possession of the district head  
E of Kotorkoshi, Alhaji Abdu. When some Fulanis arrived in the area the district head gave the farm to them and they worked in it for 24 years.

It is not in dispute therefore that the father of the appellant cleared the bush and established the farm. It is also in evidence that the father of  
F the appellant left the farm and did not come back to it and his children who inherited his estate did not challenge the respondent or raise any objection to his possession of the farm.

The Area Court judge considered the evidence before him and found that the respondent had acquired title to the disputed farm through  
G Hauzi (prescription) since he had worked in it for 16 years without being challenged by anyone. He found also that the appellant's family abandoned the farm for 40 years and were present in the area seeing others working in the farm and had made no attempt to assert their right over it.  
H All the three lower courts, viz, Upper Area Court, the High Court and the Court of Appeal agreed with the decision of the Area Court and affirmed it. It is against the judgment of the Kaduna Division of the Court of Appeal that the appellant has filed this appeal. From the grounds of

appeal filed I find the issues raised by the learned counsel for the respondent to be apt and pertinent for the determination of this appeal. I will therefore reproduce those issues. They are as follows:

*"1. Whether the respondent acquired title to the farmland by prescription (Hauzi).*

*2. Whether the appellant dislodged by credible evidence the presumption of ownership which is in favour of the respondent by being in possession, by showing how the farm was entrusted and how it passed to the respondent.*

*3. Whether the court below was right in remitting the case to the trial court to proffer judicial oath on the respondent.*

*4. Whether the decision of the court below could be said to be altogether unreasonable and unwarranted, having regards to the weight of evidence."*

There is no dispute over the fact that the father of the appellant, Kado, was the person who first cleared the bush and established the farm in dispute. What is in dispute is whether due to the effluxion of time the appellant's family have forfeited their right to repossess the farm which Kado was cultivating before he left Kotorkoshi district. **Under Islamic law of Hauzi (prescription) ten years' peaceable enjoyment of possession of property without its being called in question bars all action against the 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. See Ruxton on Maliki Law, the translation of Mukhtasar of Sidi Khalil, at page 309.**

Learned counsel for the appellant submitted, in appellant's brief, that the trial area court found, in the evidence, how the farm in dispute changed hands. When Kado, the father of appellant was leaving the area he placed the farm in custody of one Ajia Mato who later gave it to Sarkin Kotorkoshi on loan. Sarkin Kotorkoshi gave it to some Fulanis who after working in it for 24 years sold it to the respondent. Learned counsel thereafter referred to the provisions of Area Court (Civil Procedure) (Amendment) Rules, 1980, Rule 16 (3) which reads:

*"If a party is silent over his right and does not ask for it until the*

*period of prescription expires and later claims that the party in possession of the land is holding it on loan or for (Is Kani) lodging or for tenancy for life (ta, amiri) or tenancy, his right of claim is not forfeited. The judge will investigate the claim AND require proof from him by producing evidence. If he can establish his claim by adducing evidence the judge will enter judgment in his favour, but if he fails to establish the claim the judge shall require the defendant to take oath in order to absolve himself."*

C Learned counsel referred to Rule 7 of Area Court (Civil Procedure) (Amendment) Rules, supra, which provides that if a judge is satisfied that the plaintiff has furnished him with sufficient evidence to support his claim, that is to say, he has produced two unimpeachable male witnesses or one male and two female witnesses and submitted that since D the evidence of the three male witnesses he called was not discredited the Judgment should be given in his favour. Learned counsel argued that the Court of Appeal was in error to affirm the judgment of the courts below. Mr. Salimonu Olodo went further and submitted that the lower E court was in error to order for oath to be administered to the respondent since the appellant had not failed in establishing his claim.

With respect to the submission of the learned counsel for the appellant it is quite clear that the issue of hauzi (prescription) can be F deduced even in the evidence given by at least two of the three witnesses called by the appellant before the trial Area Court. PW2 said in evidence as follows:

*What I know is that the farm was for Kado the father of plaintiff. Because he made it by clearing the bush when he migrated to Rijiyar G (sic) in Gusau I don't know to whom he left the farm. He only saw the land suitable for farming he started farming it when he was tired he left it and another person continued on it, it is now around 30 years, because it was in the period of S/Kotorkoshi Abdu when he left. Kado left the H farm and he didn't come that is all what I know."*

PW3 told the trial court that Sarkin Kotorkoshi borrowed the farm from Ajia Mato and planted cotton. When the Fulanis came he lent the farm to them and they worked for 24 years. After the Fulanis had left



the witness said that he did not know anything. In short, there is no evidence adduced, by the appellant showing how the respondent took possession of the farmland. **In Islamic law where a person claims property which is in possession of another, the claimant is required to prove his claim by calling witnesses. If he fails to call witnesses the defendant will be called upon to take the oath of rebuttal; but where the defendant has been in undisturbed possession for up to or beyond the period of hauzi (prescription) the defendant will not be called upon to subscribe to the oath of rebuttal- see Muhammadu and ors. v. Idi & ors. (1961 - 1981) 1 sharia L.R.N. page 146. See also Ihkam Al-Ahkam, short commentary on Tuhfatul -Hukkam, page 262-263. He may however be made to take the oath of judgment.** I will explain later in this Judgment how and when the oath of judgment is administered.

The Court of Appeal considered the case of the appellant and looked into the allegation that the farm was given on loan to Sarkin Kotorkoshi by Ajia Mato. The lower court found that such assertion was not proved since the appellant had not called either Ajia Mato or Sarkin Kotorkoshi as a witness to show how the farm was entrusted and how it was passed to respondent. **The learned justice of the Court of Appeal, Maidama JCA, who wrote the lead judgment with which Wali JCA (as he then was) and Ogundere JCA, concurred, stated the correct position of the Islamic Law of prescription in the following findings:**

*"Therefore, if the owner in the present case has full knowledge of the adverse possession and did nothing, his claim is extinguished. It would be otherwise, if the appellant is away to another far away place which is equivalent to a minimum distance of 2 days journey or where the property is situated within enemy territory or where the person in possession is a blood relation, in which case, the period extends to 40 years or where the property is on loan or was for life tenancy only. In the instant case, the respondent stated that the appellants were there and saw him farming in the farm and did not raise any objection. His statement was not contradicted. In my view, there is*

*ample evidence to hold that the respondent acquired title by prescription."*

The same principle applies in equity. In the case of Said v. Akinwunmi 1 FSC 107 the Federal Supreme Court held that a person who was in occupation of a property for 20 Years or more acquired title by prescription, if the real owner of the land failed to assert his right timeously. I entirely agree with the opinion of Maidama JCA and for the same reasons I resolve issue 1 in favour of the respondent.

The conclusion I reached in this judgment on issue 1 has affected the submission in respect of issues 2 and 4. I do not have to repeat what I have already highlighted and considered. The matter raised in issue 3 is Yaminul Qada'i - (oath of judgment). Oath of judgment has been defined at page 98 in Mayyara Vol.1 commentary on Tuhfa as follows:

*"an oath proffered to a claimant over a deceased person's property in protection of such property since the deceased will not be available to dispute and rebut the claim. It is also proffered where the claim involves the property of a person who has been absent and his whereabouts is unknown or a minor."*

The appellant's father Kado is dead. He was the person who established the farm and later abandoned it. It passed through many hands before the respondent possessed it. I have affirmed the decisions of the lower courts that the respondent has acquired title over the land through prescription (hauzi). In view of the fact that the subject matter involves a claim affecting a deceased person's estate the respondent must be made to take the oath of Yaminul Qada'i (oath of judgment). See page 50 of Ihkamu AI-Ahkam, short commentary on Tuhfatu AI-Hukkam. The Court of Appeal is therefore right to order the trial area court to proffer the oath of judgment to the respondent.

This appeal has therefore failed. The judgment of the Court of Appeal affirming the decision of the Sokoto High Court is hereby affirmed. The respondent is entitled to the costs of this appeal which I

assess at N10,000.00 against the appellant.

**UWAIS JSC**

I have had the advantage of reading in draft the judgment of my learned brother Mohammed, JSC. I entirely agree. I have nothing to add. B  
I, therefore, adopt the judgment as mine.

The appeal is hereby dismissed and the decision of the Court of Appeal is affirmed with N10,000.00 costs to the Respondent.

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**BELGORE JSC**

I have read in advance the judgment of my learned brother, Mohammed, JSC, and I am in agreement with him that the principle of HAUZI applies to this case. The respondent was on the land for more D  
than twenty years and remained there uninterrupted. Whoever takes possession of land without force, without let and without secrecy and has so remained for not less than twenty years as in this case and he is not by any means related by blood to whoever ultimately shows up to E  
make a claim of remote right over the same land has in his favour the operation of the Islamic Law of HAUZI. The appellant's right has been obliterated by prescription because he has slept over his right, if any, for so long that the law governing his personal right on the land bars his F  
claiming the same land.

I therefore dismiss this appeal as lacking in merit with N10,000.00 costs to the respondent.

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**OGUNDARE JSC**

I agree with the judgment just delivered by my learned brother Mohammed JSC. For the reasons given by him in the said judgment I too dismiss this appeal and abide by the order for costs made by my H  
learned brother.

**OGWUEGBU JSC**

I had a preview of the judgment just read by my learned brother Mohammed, J.S.C. I entirely agree with the judgment and I also dismiss the appeal. I adopt all the orders made in the said judgment including the order as to costs.

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