

**SUPREME COURT OF NIGERIA**

17TH JULY, 1998. SC. 37/1992.

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

BALA UMARU & ANOR. .... APPELLANTS

AND

ABDUL-MUDALLABI & ORS. .... RESPONDENTS

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**APPEALS** - Evidence - Admission of an exhibit which was prominently made an issue throughout the lower courts proceedings by the Court of Appeal - Is in order - Even if it does not arise from any of the grounds of appeal.

**APPEALS** - Islamic Law - Prescription - Raising of the issue suo motu by the Court of Appeal is wrong - And whatever it decided on the point goes to no issue.

**APPEALS** - Issues - Should not ordinarily be raised suo motu by an appellate court - But where raised no decision should be based on it - Unless the parties are afforded the opportunity of being heard.

**ISLAMIC LAW** - Evidence - Preference - The applicable law is that the evidence of two male credible witnesses is to be preferred - To that of one male credible witness with a complimentary oath.

**RES JUDICATA** - Decision - In a Previous Proceeding that is inconclusive - Cannot be used as a res judicata

### **FACTS**

The plaintiffs/respondents in an action before the Upper area court II Kano claimed against the defendants/appellants a house at No. 53 Grader Salga in Unguwar Jumma Quarters Kano City and a farm at Rangaza Village, Kano, left behind by their grand father Mallam Yahaya who died about 60 years ago. The plaintiffs claimed that Mallam Yahaya inherited both the house and farm from his father Muhammadu. The plaintiffs stated that they are the offsprings of two out of the three daughters that survived Yahaya (i.e. ) 1. Aminatu (Shekara) (2) Hadizatu (Gambo). The 1st defendant admitted that he is the grandson of the 3rd daughter of Yahaya. But he claimed that both the house and the farm were properties of his grandfather Inuwa the husband of Mariya and on his death 60 years ago his father Umaru inherited both the house and farm. He further stated that about 2 years before his father's death, the house was sold to Alhaji Magaji Dano. The case then proceeded to trial. The plaintiffs called five witnesses the evidence of four of which was rejected by the trial court. The defendants on the other hand called four witnesses out of which the court accepted the evidence of three.

At the conclusion of hearing the trial judge relying on the statement of the law by Asbagu which preferred the evidence of one credible witness with a complimentary Oath to that of two or more witnesses. Judgment was then entered in favour of the plaintiffs. Dissatisfied with this decision, the defendants appealed to the Sharia Court of Appeal, Kano, which allowed the appeal and set aside the judgment of the trial Upper Area Court II. Dissatisfied with the Sharia Court of Appeal decision, the plaintiffs appealed to the Court of Appeal, Kaduna Division. Before the Court of Appeal and with the consent of the parties a copy of a record of trial at the Emir's Court, Kano dated 21/7/29 and which is the genesis of this case was admitted and marked as Exhibit A1.

The Court of Appeal unanimously allowed the appeal, set aside the judgment of the Sharia Court of Appeal and reinstated the judgment of the trial Upper Area Court. Aggrieved, the defendants have appealed against the decision of the Court of Appeal to the Supreme Court raising four issues.

**ISSUES FOR DETERMINATION**

(I) *Whether the Court of Appeal was right in taking the issue of the ages of witnesses of the Appellants before the trial Court suo motu, without hearing the parties and drawing the inference that the evidence of the Appellants' witnesses is unreliable and or suspect.*

(ii) *Whether the Court of Appeal was right in referring to the decision of the Emir of Kano's Court dated 2nd July 1923 (21st July 1929 Exhibit A1 Court of Appeal) when none of the grounds of appeal before the Court raised the issue.*

(iii) *Whether the Court of Appeal was right in holding that the possession of the properties by Inuwa for a period of 22 years could not be a ground for a claim of Hauzi long possession and or prescription in Muslem Law.*

(iv) *Whether the evidence before the Upper Area Court, which was reviewed by the Court of Appeal, can be said to be of sufficient weight to sustain the affirmation of the Upper Area Court's judgment in view of the objection to the evidence of the only witness for the Respondents which objection was nowhere considered by the trial Upper Area Court, and the preponderance of the evidence adduced by Appellants."*

**HELD** (Unanimously allowing the appeal per lead judgment of **WALI JSC**)

***Appeals - Evidence***

1. As Exhibit A1 was prominently made an issue by both parties throughout the proceedings in the Upper Area Court, the Sharia Court of Appeal and the Court of Appeal, the Court of Appeal was in my view perfectly right and in order to admit it in evidence. It is not necessary that it is related to or arises from any of the grounds of appeal, particularly when the parties arguing the appeal are lay people and not represented by counsel, and they were heard on the same. See Order 3 rule 2 sub rules (5) and (6) of the Court of Appeal Rules, 1981 (as amended). (p. 1966 E)

**Appeals - Issue**

2. An appellate court should not ordinarily suo motu raise an issue or issues which the parties do not raise, but if so raised, no decision should be based on the same unless the parties or their counsel are afforded the opportunity of being heard.<sup>8</sup> This is in consonance with the provisions of section 33 (2) (a) of the 1979 Constitution and Order 3 rules 2 (5) and (6) of the Court of Appeal Rules, 1981 (supra). See Din v. A.G. Of the Federation (1988) 4 NWLR (pt. 84) 147 at 150. (p. 1968 A)

**C Islamic Law - Evidence**

3. The statement of law by Asbagu on which the trial court relied, is not the predominately accepted law, it being that of the minority jurists. The trial court did not give or show any reason why the evidence of one witness on the side of the plaintiff / respondents is more credit worthy to that of the witnesses that testified for the Defendants/Appellants. The applicable law in my respectful view, is as correctly stated by the Sharia Court of Appeal, Kano. See volume 7 of Dasuki, commentary on Mukhtasar el-Khalil at pages 231 - 232, the law is elaborated as follows:

*"If one side of litigating parties adduces the evidence of two credible witnesses as against the other side that adduces the evidence of one male credible witness with complimentary oath or one male and two female credible witnesses, the evidence of two male credible witnesses will have preference over that of a male witness with a complimentary oath, even if the latter is the most credible worthy witness of his time. It is the view of one of the jurists that evidence of a credible witness with a complimentary oath shall not be given preference over that of two male witnesses in taking a judicial decision, relying on that part of the verse in the Holy Qur'an which states- "And if there are not two men [available] a man and two women ." Holy Qur'an, chapter 11 verse 282. (p. 1970 H)*

H \_\_\_\_\_

<sup>8</sup> See Ladebo v. Ajani (1997) 7 KLR (pt 54) 1709 and Adonri v. Ojo-Osagie (1994) 11 KLR 15 where the same point was made by the Supreme Court

***Res judicata - Decision***

4. As stated by the Court of Appeal, Exhibit A1 neither declare title of the properties in dispute in favour of Umaru, the father of the 1st appellant, nor Yahaya, the grandfather of the respondents, nor did it order for the distribution of the estate involving the properties in dispute. Exhibit A1 is inconclusive and could not be used as *res judicata* against the respondents. (p. 1974 F)

***Appeals - Islamic Law - Prescription***

5. The issue of prescription raised in Issue 111 was not raised and litigated upon before the trial Upper Area Court, nor before the Sharia Court of Appeal. The mere fact that Exhibit A1 was formally admitted in evidence in the Court of Appeal would not automatically raise the issue of prescription before that court. None of the parties before it raised it, and this is very evident from the proceedings before the Court of Appeal. The Court of Appeal was therefore wrong to raise it suo motu. What ever the Court of Appeal decided on that point goes to no issue and has been totally ignored by me in arriving at my decision. (p. 1975 H)

**REPRESENTATION**

Mohammed Gafar for the appellants

Respondents absent and not represented

**CASES REFERRED TO**

Jowo v. Shehu (1992) 10 SCNJ 26.

Abdulkareem v. Incar Nigeria Limited [1984] 10 SC. 1 at 22-23

Awwal v. Shu'aibu (1996) 12 SCNJ 1 at 27-28

Akanbi v. Mamudu (1989) All NLR 424.

Din v. A.G. of the Federation (1988) 4 NWLR (pt. 84) 147 at 150;

Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (pt.7) 393;

A.G. of Oyo State v. Fairlakes Hotel Ltd. (1988) 12 SCNJ 1

Odiase v. Agho (1972) 1 All NLR (pt.1) 170 at 176 11

**STATUTES AND RULES REFERRED TO**

Supreme Court Rules, 1985, Order 2 rule 11(1)

Court of Appeal Rules, 1981 as amended, Order 3 rule 2 (5) (6)

Constitution of the Federal Republic of Nigeria, S.33 (2) (a)

B

**BOOKS REFERRED TO**

Inkamul Ahkami Commentary on Tufa, Page 47

Jawahirul - Iklil Vol. 11 page 250

Dasuki, Commentary on Mukhtasar el -Khalil, vol. 7 pages 231-232

C

Holy Quran, chapter 11, verse 282

**LEAD JUDGMENT BY WALI JSC**

D This case seems to have a chequered history. It's origin dated  
back to 1929 when one Umaru from Madabo Quarters, Kano City through  
his representative, Mallam Maikara complained before the Court of Emir  
of Kano on 21/7/29 that a woman named Bidda who came from the west  
had entered the house that he inherited from his father Inuwa, claiming  
E the same house to belong to her father Dalha. Bidda and her two sisters  
namely Rukayya and Gambo were joint defendants to Umaru's com-  
plaint. The matter was referred to the Chief Alkalis Court by the Emir's  
court for further investigation. At the conclusion of the investigation,  
F the following report was made to the Emir's Court-

*"When they were arraigned before the Alkali it was alleged that  
the boy was a grandson to the owner of the house. The witnesses ap-  
peared before the Alkali but they did not testify that the boy was related  
by blood to the owner of the house and when they came back to us (the  
G Emir's Court) Jekada (Emissary between the Emir's and the Chief Alkali's  
courts) told us that the boy had not been ascertained through witnesses to  
be related by blood to the owner of the house. But there is long residence  
of his father Inuwa in the house and these women it is the distribution of  
H inheritance which they are demanding."*

*(Words in bracket supplied by me)*

It appears from the record of proceedings, particularly that of  
the Sharia Court of Appeal, that there was an appeal against the judgment

of the Emir's Court, Kano delivered in 1929 The appeal was registered as No. SCA/CA/KN/191/79 and the Sharia Court of Appeal, Kano in its judgment delivered on 4/3/80 allowed the appeal and made an order for a fresh trial.

The case was tried by the Upper Area Court I presided over by B Rufai Bello (as he then was) who distributed the house in dispute between the heirs. The then defendants appealed to the Sharia Court of Appeal, Kano which affirmed the decision of the Upper Area Court I and dismissed the appeal. On further appeal by the then defendants to the Court of Appeal Kaduna, the appeal was allowed and a retrial ordered. Hence the trial before Upper Area Court II Kano presided over by Bashir Ahmed (as he then was) leading to the present Appeal.

Abdul-Mutallabi, Ado Abba and Usman Musa were the plaintiffs before the Upper Area Court II, Kano claiming against Alhaji Bala and Alhaji Inuwa representing Binta, a house No. 53 Gadar Salga in Unguwar Jumma Quarters Kano city and a farm at Rangaza village, Kano, left behind by their grandfather Mallam Yahaya who died about 60 years ago. The plaintiffs claimed that Mallam Yahaya inherited both the house and the farm from his father Muhammadu. The plaintiffs stated their pedigree as follows:

Yahaya their grandfather was survived on his death by three daughters as follows: (1) Aminatu (Shekara) (2) Hadizatu (Gambo) and Mariya (Sake) and his wife Safiyatu. Aminatu [Shekara] is the mother of Abdul Mudallabi (1st plaintiff), Hadizatu (Gambo) gave birth to Abba and Musa who are the fathers of Audu (Ado) (the 2nd plaintiff) and Usman (the 3rd plaintiff) respectively.

Alhaji Bala and Alhaji Inuwa, (representing Binta) denied the plaintiffs claim. Alhaji Bala admitted that he is a grandson of Mariya, (Sake) the daughter of Yahaya and the wife of his grandfather Inuwa, and the latter gave birth to his father Umaru. He claimed that both the house and the farm were properties of his grandfather Inuwa and on his death about 60 Years ago, his father Umaru inherited both the house and the farm. He further stated that about 2 years before his father's death he (his father) sold the house to Alhaji Magaji Dano for N26,000.00. (Words in

bracket supplied by me)

Alhaji Inuwa who was representing Binta and related to her through his mother agreed with what Alhaji Bala, (the 1st defendant) stated.

B The case then proceeded to trial. The learned trial Upper Area Court Judge called upon the plaintiffs to prove their claim. The plaintiffs called five witnesses the evidence of four of which was rejected by the trial court. It reversed ruling on whether or not to accept the evidence of Mai'unguwar Juma Bako, who was P.W. 2.

C The court then turned on the defendants to prove their case. They called four witnesses out of which it accepted the evidence of Alhaji Mohammed Bashir the village Head of Rangaza [D.W.1, [D.W.3] Muhammadu Rangaza and M. Zubairu Unguwar Juma [D.W. 4].

D The defendants also called three witnesses to prove that the house in dispute was sold by Umaru the 1st defendant's father to Alhaji Magaji Dano for N26,000 before the former's death.

E After the i'zar, which is the equivalent of allocutus in a criminal trial, the trial judge reviewed the evidence and made the following finding:-

1. *"In the opinion of the court you the plaintiffs have got one good evidence for your claim and you the representatives (1st and 2nd defendants) have got witnesses on your views (complaints) which said the origin of the house and the farm belongs to Inuwa, therefore the court preferred the saying of Mallam Asbazu which states that he preferred the evidence of one witness to be completed by the plaintiff's oath as stated on page 47 of Ihkamul Ahkam- commentary on Tuhfa."*

G The oath was offered to the plaintiffs and they took it. The learned judge then passed judgment in favour of the plaintiffs and shared the properties between them in accordance with Islamic law of inheritance. He also set aside the sale of the house in dispute to Alhaji Magaji Dano with option to H repurchase the same from the plaintiffs if they so wished.

Dissatisfied with the decision of the Upper Area Court 11 Kano, the defendants appealed against it to the Sharia Court of Appeal, Kano which after careful and dispassionate consideration, allowed the appeal,

set aside the judgment of the trial Upper Area Court 11 and stated-

*"I affirm that both the house and the farm in dispute are part of the estate being claimed by the defendants to have inherited; and that the said house has been validly sold and also the farm belongs to them as they have inherited it. The appeal therefore succeeds."*

B

Dissatisfied with the Sharia Court of Appeal decision, the plaintiffs appealed to the Court of Appeal, Kaduna Division.

Before the Court of appeal and with consent of both the plaintiffs and the defendants a copy of a record of trial before Emir's court, Kano dated 21/7/29 was admitted and marked as Exhibit A1 at the instance of the plaintiffs and consented to by the defendants. In a considered and unanimous judgment of the Court of Appeal after hearing parties to the appeal orally, as none was represented by counsel, it allowed the appeal, set aside the judgment of the Sharia Court of Appeal and reinstated the judgment of the trial Upper Area Court.

C

D

It is now against the judgment of the Court of Appeal that the defendants have appealed to this court. Henceforth the defendants and the plaintiffs will be referred to in this judgment as the appellants and the respondents respectively.

E

In compliance with the Rules of this court the appellants through their learned counsel filed brief of argument on 29/1/93. No respondent's brief was filed, nor did any one of them appear on the day the appeal was heard. They were neither represented by counsel. By the effect of Order 2 rule 11 (1) of the Supreme Court Rules, 1985, the court proceeded to hear the appeal ex parte.

F

In the brief filed by the appellants the following four issues have formulated:-

G

(i) *Whether the Court of Appeal was right in taking the issue of the ages of witnesses of the Appellants before the trial Court suo motu, without hearing the parties and drawing the inference that the evidence of the Appellants' witnesses is unreliable and or suspect.*

H

(ii) *Whether the Court of Appeal was right in referring to the decision of the Emir of Kano's Court dated 2nd July 1923 (21st July 1929 Exhibit A1 Court of appeal) when none of the grounds of appeal*

*before the Court raised the issue.*

(iii) *Whether the Court of Appeal was right in holding that the possession of the properties by Inuwa for a period of 22 years could not be a ground for a claim of Hauzi long possession and or prescription in Muslim Law.*

(iv) *Whether the evidence before the Upper Area Court, which was reviewed by the Court of Appeal, can be said to be of sufficient weight to sustain the affirmation of the Upper Area Court's judgment in view of the objection to the evidence of the only witness for the Respondents which objection was nowhere considered by the trial Upper Area Court, and the preponderance of the evidence adduced by Appellants."*

In the brief of the appellants the four issues supra were argued together.

It was the submission of learned counsel for the appellants that throughout the entire proceedings in both the trial court and the Sharia Court of Appeal the question of age of witnesses called by the appellants was never made an issue, but it was the Court of Appeal that raised it suo motu. Parties were not given opportunity to address on the issue. The

Court of Appeal proceeded to consider the issue and concluded that the witnesses called by the appellants were suspect and unreliable because they did not state their respective ages when testifying before the trial court. Learned counsel submitted that the appellants were not given fair hearing on the issue and cited in support the decisions in Alhaji Shaibu

Abdulkareem v. Incar Nigeria Ltd. (1984) 10 SC 1 and Alhaji Mohammed Jowo v. Alhaji Shehu & 1 or. (1992) 10 SCNJ 26. Learned counsel further submitted that if the Court of Appeal had not suo motu raised the issue and proffered the reason in support, the position in Muslim Law

would have been that the evidence of two or more witnesses would be treated as stronger and the judgment of the Sharia Court of Appeal would have been affirmed by the Court of Appeal. Learned counsel contended that the trial Upper Area Court failed to investigate the challenge by the appellants of the only respondent's witness evidence, to wit Mai-unguwa Bako (P.W. 2) which was accepted and relied upon by the trial Upper Area Court in its judgment that was subsequently restored and affirmed by the Court of Appeal.

On Exhibit A1 which is the 1929 proceedings before the Emir's Court Kano, learned counsel submitted that the issue was raised suo motu by the Court of Appeal without hearing counsel and came to definite conclusions which adversely affected the case of the Appellants. Learned counsel cited in support the cases of Abdulkareem v. Incar Nigeria Limited [1984] 10 SC. 1 at 22-23 and Juwo v. Shehu & 1 Or. [supra]

On Hauzi (prescription) learned counsel submitted that there was no evidence that the possession of Sake and Inuwa of the properties in dispute was due to the fact that Sake was the heir of Yahaya and had inherited the properties in dispute from Yahaya. Learned counsel further said:

*"The evidence which the Appellants adduced at the trial and which the trial Upper Area Court accepted, is that Inuwa owned both the farm and the house in dispute between the parties. There was no qualification as to Inuwa's possession of the properties. What is more, it was the Respondent's case at the trial, that Inuwa was in possession of the properties at any time by virtue of his marriage to Sake or Maryam the daughter of Yahaya."*

Learned counsel then submitted:-

*"It is submitted that by introducing this aspect of the matter, the Court of Appeal was making for the Respondents, a new and different case, from the one which they presented in the two Courts below. If the Court of Appeal had not taken that stance it would not have applied the principle of Muslim Law which requires a period of 40 years possession on the part of a blood relation before (Hauzi) prescription and or long possession can apply."*

Learned counsel urged this Court to allow the appeal and restore the judgment of the Sharia Court of Appeal, Kano.

It is apparent from the record of proceedings that the original of Exhibit A1 is in Arabic language which was then the official language in the emir's Court, Kano, and as the official language in the Court of Appeal is English, the Arabic version was translated into English language and with consent of both parties, admitted in evidence and marked as

Exhibit A1.

Both the appellants and the respondents appeared in person as none was represented by counsel and no brief of argument was filed. They parties made oral submissions.

B It is pertinent at this stage to deal with and dispose of issue 11 which relates to the decision of the Emir's Court dated 21/7/29. The decision in Emir's Court is the genesis of this case. Both the trial Upper Area Court and the Sharia Court of Appeal made mention of and reference to this decision and with the tacit consent of both parties the Court of Appeal formally admitted it in evidence as Exhibit A1. See Alhaji Ibrahim Awwal v. Galadima Shu'aibu Barde & ors. (1996) 12 SCNJ 1 at 27-28 and Bello Akanbi & 3 Ors. v. Mamudu Alao & Anor. (1989) All NLR 424.

D The argument of learned counsel on Exhibit A1 is that it was not made an issue in any of the Grounds of Appeal filed in the Court of Appeal. I have perused through the grounds of appeal and I have found the argument of learned counsel to be correct. This does not necessarily mean that, and having regard to the prominence Exhibit A1 has in the proceedings, the Court of Appeal cannot raise it if the necessary procedure to do so is followed.

F **As Exhibit A1 was prominently made an issue by both parties through out the proceedings in the Upper Area Court, the Sharia Court of Appeal and the Court of Appeal, the Court of Appeal was in my view perfectly right and in order to admit it in evidence. It is not necessary that it is related to or arises from any of the grounds of appeal, particularly when the parties arguing the appeal are lay people and not represented by counsel, and they were heard on the same. See Order 3 rule 2 sub rules (5) and (6) of the Court of Appeal Rules, 1981 (as amended) which provides as follows:-**

H *"(5) The appellant shall not without the leave of the court urge or be heard in support of any ground of appeal not mentioned in the notice of appeal, but the court may in its discretion allow the appellant to amend the grounds of appeal upon payment of the fees prescribed for making such amendment and upon such terms as the court may deem*

just.

(6) Notwithstanding the foregoing provisions the court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

Provided that the court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on the grounds."  
(Underlining supplied for emphasis)

Issue 11 is therefore resolved against the appellants.

The main contention of the appellant in issue 1 is the raising suo motu of the issue of the age of witnesses called by the appellants in the trial court. On this, I agree with the arguments of learned counsel. The Court of Appeal suo motu and without hearing parties on the same raised the issues of the age of appellants' witnesses and resolved it against them wherein it stated in the lead judgment:

*"It is pertinent to ask, why had all the witnesses for the respondents avoided giving their age before giving evidence. Age is definitely a factor in determining whether the witness is old enough to know Inuwa whom they alleged was the original owner of the house and the farm in dispute. The trial Upper Area Court Judge did not give a clear reason for rejecting the evidence of these witnesses, but it could be seen quite clearly that since they gave the time of Inuwa's death as 65 years their respective ages must be around 80 before each one of them could know Inuwa very well and know that he possessed the farm and the house in dispute."*

After the preceding statement the Court of Appeal then concluded-

*"I am therefore in agreement with the Upper Area Court Judge that the evidence of P.W. 2 Mai-Unguwa Bako is more reliable than those of the witnesses for the respondents. The testimony of the respondent's Witnesses is suspect and I will affirm the trial court's rejection of them. The trial court was right therefore to ask the appellants to offer a complimentary oath since they had only one witness in support of their claim."*

As I have earlier said the Court of Appeal was wrong in raising this issue suo motu and resolving the same against the appellants without

hearing them. This is clear and evident from the proceedings before the Court of Appeal. The Court of Appeal should have invited the appellant and the respondents to address on the issue that it so much felt strong about before its resolution (supra). **An appellate court should not ordinarily suo motu raise an issue or issues which the parties do not raise, but if so raised, no decision should be based on the same unless the parties or their counsel are afforded the opportunity of being heard. This is in consonance with the provisions of section 33 (2) (a) of the 1979 constitution to wit-**

*"(a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person."*

**And Order 3 rules 2 (5) and (6) of the Court of Appeal Rules, 1981 (supra). See Din v. A.G. of the Federation (1988) 4 NWLR (pt. 84) 147 at 150; Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (pt. 7) 393; A.G. of Oyo State v. Fairlakes Hotel Ltd. (1988) 12 SCNJ 1; Odiase & Anor. v. Agho & Ors. (1972) 1 All NLR (pt. 1) 170 at 176 and Juwo v. Shehu & 1 Or. (1992) 10 SCNJ 26 at 31.**

It is as a result of this error that the Court of Appeal misdirected itself in law and preferred the evidence of P.W. 2 and the respondent's complimentary oath to that of the unimpeached evidence of D.W.1, D.W.3 and D.W.4 when it said:

*"The testimony of the respondent's is suspect and I will affirm the trial court's rejection of them."*

The trial Upper Area Court did not expressly state why it preferred the evidence of one witness to that of three witnesses, as all it said is this:

*"In the opinion of the court you plaintiff have got one good evidence for your complain, and you the respondents (defendants) have got witnesses on your views which said the origin of the house and the farm belongs to Inuwa, therefore the court preferred the savings of Mallam Asbago which states that, one witness should be picked who will take an oath in respect of what was said in Ihkamul Ahkami Sharhin Tufo page*

47, is states."

The above is a bad and very inadequate translation of the Hausa version of the proceedings which is at page 21 lines 5 to 10. The correct translation should read as follows:-

*"In the opinion of this court you the plaintiffs (side) have secured the evidence of one witness in support of your claim, while you the defendants have adduced evidence of witnesses in support of your assertion wherein you stated that originally both the house and the farm belonged to Inuwa. In my view I prefer the statement of Asbagu in which he preferred the evidence of one witness with complementary oath as contained on page 47 of Ihkamul Ahkami commentary on Tufa, to wit:"*

The authority the trial court seemed to have relied upon states that [as per Asbagu] the court should uphold the evidence of one witness with the plaintiff's complimentary oath when such a witness is of exceptional integrity and credibility in preference to that of two credible witnesses. The trial Upper Area Court did not say that the one witness of the respondents accepted by it is of exceptional integrity and credibility. In fact the appellants challenged the evidence of this witness that he could not have known Yahaya who died 60 years ago when the said witness came to the area only 30 years ago. This challenge was not investigated by the learned trial Upper Area Court Judge. The Sharia Court of Appeal is therefore right when in considering this legal point said-

*Accepting only one witness, and predominating or neglecting two or more witnesses over the single one is really regarded as a mistake. The authority given by the trial court from the Ihkamul Ahkam book at page 47, where it stated that the learned slick (sic) Asbagu agreed with only one witness plus oath, the trial court didn't pay attention properly, because, it was indicated that the learned Asbagu choosed one witness who is highly just person together with his oath, means he dominate the testimony of only one other then two, what we should understand here is mean to be the most just person the witnesses, so since that is the case, its for sure the trial court does not knew that the said single witness, are more better (just) than entire three, because it did not explain or justify*

so.

Even though, if its so, no matter just the one witness is, even if he just more than any dominated over the two or more witnesses. See jawahirul - Ikhilil, volume 2 at page 250, paragraph 4 on top, where it explained about predominating the two witnesses over one, saying it should be done so, even the said one is just more than anybody during the period of his times, he should not be considered over the two, it continue saying:-

Therefore, that statements by Asbagu has a weakness, i.e. there are deficiency in his speech, although, the trial court did not work with it properly and accordingly, hence it was mentioned to be the most just person, because there was nothing shown or indicated by the trial court that said one single witness whose testified in favour of the respondents is regarded as the most just witness more than that of the appellants, thereon, this grounds No. 2 are acceptable."

This again is another very poor translation of the Hausa version of that part of the record which is on page 53 lines 1 -13. The correct English translation of that portion should be:-

"As regards the authority quoted and relied upon by the trial court which is at page 47 of Ihkamul Ahkam wherein Asbagu expresses the view of preferring the evidence of one witness with complimentary oath, the trial court did not correctly apply that view, as Asbagu stated, in support of his view, that the one witness must be a man of exceptional integrity and credibility. The trial court did not properly consider and evaluate the evidence given by the one witness [for the plaintiffs] viz-a-viz the 3 witness [for the defendants] to know which of the two sets of witnesses, excels in credibility. There is no finding to that effect by the trial court. Even if it is so, however credit worthy a witness is, in this modern time, his evidence will not be preferred to over and above that of two or more witnesses."

See Jawahiru - Iklil Vol. 11 page 250 where the law is stated thus:-

"The evidence of two acceptable witnesses adduced by one side of the parties to the litigation shall be preferred to the evidence of one acceptable witness called by the other side."

**The statement of law by Asbagu on which the trial court**

relied, is not the predominately accepted law, it being that of the minority jurists. The trial court did not give or show any reason why the evidence of one witness on the side of the plaintiff / respondents is more credit worthy to that of the witnesses that testified for the Defendants/Appellants. B

The applicable law in my respectful view, is as correctly stated by the Sharia Court of Appeal, Kano. See volume 7 of Dasuki, commentary on Mukhtasar el-Khalil at pages 231 - 232, the law is elaborated as follows:

*"If one side of litigating parties adduces the evidence of two credible witnesses as against the other side that adduces the evidence of one male credible witness with complimentary oath or one male and two female credible witnesses, the evidence of two male credible witnesses will have preference over that of a male witness with a complimentary oath, even if the latter is the most credible worthy witness of his time. It is the view of one of the jurists that evidence of a credible witness with a complimentary oath shall not be given preference over that of two male witnesses in taking a judicial decision, relying on that part of the verse in the Holy Qur'an which states- "And if there are not two men [available] a man and two women ." Holy Qur'an, chapter 11 verse 282. C D E*

The above exposition of law as can be seen, is based on the interpretation of the above quoted verse of the Holy Qur'an in the sequence the categories of witnesses are mentioned therein. It is pertinent to mentioned that the authority relied on by the Sharia Court of Appeal i.e Jawahirul - Ikilil is also a commentary of Mukhtasar-el-khalil which is one if the famous law books recognized and accepted universally as an authority in Islamic Law. F G

Issue 1 is therefore resolved in favour of the appellants.

On Issue 111, the respondents denied any blood relating with Inuwa, the husband of Sake [Maria]. Inuwa was in possession of both the house and the farm and on his death the properties were inherited by his son Umaru the father of 1st appellant. Both D.W. 1 Alhaji Mohammodu Bashari, D.W. 3 Mohammed Rangaza and D.W. 4 Zubairu testified that H

Inuwa died about 60 years ago and was in possession of the house and the farm in dispute up to the date of his death. They further testified that on Inuwas, death the properties in dispute were inherited by his son Umaru and on whose demise his heirs, including Bala, the 1st appellant, B inherited his estate. This evidence was not rejected by the trial Upper Area Court.

There was a private settlement involving the parents of the parties to the present litigation over the house in dispute as shown in the proceedings. Two years thereafter misunderstanding arose between musa, C the father of P.W. 3 and Ado [P.W.2] who is also the son of Abba. Both Musa and Abba are sons of Hadizatu [Gambo] daughter of Yahaya. As a result Musa complained to the Sharia Court of Appeal, Kano against the decision of the Emir of Kano Court of 21/7/29. The Sharia Court of D Appeal sat over the case on appeal, reversed the decision of the Emir's Court, Kano and ordered a fresh trial. The trial was accordingly carried out. There was an appeal to the Sharia Court of Appeal which dismissed the appeal and affirmed the trial Upper Area Court judgment. There was E further appeal to the Court of Appeal, Kaduna. In its decision of 1/8/81 where the parties were Umaru Danbirni, the father of the 1st defendant / appellant and the 1st plaintiffs /respondents. The Court of Appeal set aside the judgment of the Sharia Court of Appeal on ground that some of F the necessary parties to the case were not joined.

The present appeal in this court is as a result of the retrial involving the decisions of the lower courts and the court below.

It was therefore wrong for the Sharia Court of Appeal to say that its decision over the Emir's court still subsists as it has not been set G aside by any court higher above it. The order of the Court of Appeal for a retrial after setting aside the earlier judgment of the Sharia Court of Appeal, brought the judgment of the Emir's court, Kano dated 23/7/29 into focus again.

H The parties raised the issue of the decision of the Emir's court and by consent of both parties, it was formally admitted in evidence as Exhibit A1. The Court of Appeal rightly in my view, after hearing the parties on the issue, declared the decision of the Sharia Court of Appeal

in which it purported to set aside the decision of Emir's court, void. The Court of Appeal said thus-

*"Above is the proceeding and judgment before the court of Emir of Kano in 1929. The judgment did not show whether the court had ordered for the distribution of the inheritance or not and neither did it declare title in favour of the boy (Umar). It was this judgment that the Sharia Court of Appeal said, in its judgment, that it had set aside. The Sharia Court of Appeal has no power whatsoever to set aside the judgment of a court which when it was delivered the Sharia Court of Appeal had not been established. The Sharia Court of Appeal has been set up by a statutory instrument, viz, the Sharia Court of Appeal Law 1960. The statute has not given the Sharia Court of Appeal jurisdiction to determine appeals from the decision of Emir's courts. We have mentioned, in a previous decision, in the case of Umaru Baba v. Galadima Yada & 5 Ors. CA/K/94s/87 delivered on 24/11/87 that the Sharia Court of Appeal, Kano could not entertain an appeal from the decision of Emir of Kano, Sanusi. This is the second time of erroneous interference with decisions of Emir's courts which the Sharia Court of Appeal, Kano has committed. I must emphasize that any decision which is outside the jurisdiction of a court is null and void. All those decisions of the Sharia Court of Appeal, Kano, have no legal backing and are therefore void."* It was a wrong submission therefore by the learned counsel to say that the Court of Appeal raised the issue suo motu.

Exhibit 1A states as follows:-

*"15.2 1349 - 21.7. 1929 Umar from the people of Madabo quarters (Kano City) came to us together with his representative, Mallam Maikara. He complained against a woman who came from the west and is called Bidda, that she had entered the house which he inherited from his father, Inuwa, and submitted that it was her father's house, Dalha. She said she wanted to take part of the house and sell it. This is the reason why he has lodged a complaint against her. Bidda came together with her two sisters, Rukayya and Gambo. We then asked Bidda about the house and she answered that the house belonged to her and her sisters."*

*The fact is that one Sake who was a consanguine sister to them married Inuwa, the father of the boy [Umar]. She had a child with Inuwa and this Umar is the child and this was the reason which made Inuwa the father of the boy [Umar] to enter the house.*

B *We asked the boy to explain and his representative Mallam Maikara told us that the house originally belonged to Mallam Mahman the father of Yahaya who begat these women, and Sake, the mother of this boy [Umar] . He was also the father of Dalhatu. When Mahman died, Yahaya and Dalhatu inherited the house and when Dalhatu died*  
C *Yahaya took in Inuwa and got him married to his (Yahaya's) daughter, Sake, Inuwa and Sake remained in the house until after the death of Yahaya. Inuwa continued to stay in the house for 22 years until he died.*

*Umar inherited the house from Inuwa for two years now. Now*  
D *Bidda has come and is trying to take over the house and sell it.*

*When we heard his explanation from both sides we sent them together with Jakada Namalam to the Alkali of Kano and directed him to investigate the matter and report them back to us. When they were ar-*  
E *raigned before the Alkali it was alleged that the boy was a grandson to the owner of the house. The witnesses appeared before the Alkali but they did not testify that the boy was related by blood to the owner of the house and when they came back to us Jekada told us that the boy had not*  
F *been ascertained through witnesses to be related by blood to the owner of the house. But there is long residence of his father, Inuwa, in the house and these women it is the distribution of inheritance which they are demanding."*

**As stated by the Court of Appeal, Exhibit A1 neither de-**  
G **clare title of the properties in dispute in favour of Umaru, the father of the 1st appellant, nor Yahaya, the grandfather of the respondents, nor did it order for the distribution of the estate involving the properties in dispute.**

H *Whether or not Exhibit A1 was set aside it decided nothing in favour of either the present appellants or the present respondents as each side was claiming ownership of the properties through their grandmothers and great grandfathers. Bidda was the defendant in Exhibit A1 and*

her statement in that Exhibit A1 is that the house in dispute belonged to her father Dalhatu. Among the tree daughters of Yahaya, the alleged owner of the house and the farm in dispute, namely Aminatu alia Shekara, Hadizatu alias Gambo and Mariya alias Sake, none is called Bidda. There is no proof in Exhibit A1 that Yahaya is the owner of the house as the excerpt from that exhibit shows and which reads:

*"We asked the boy to explain and his representative Mallam, Maikara told us that the house originally belonged to Mallam Mahman the father of Yahaya who begat these women and Sake, the mother of this boy [Umar]. He was also the father of Dalhatu. When Mahman died, Yahaya and Dalhatu inherited the house and when Dalhatu died yahaya took in Inuwa, and got him to his daughter Sake. Inuwa and sake remained in the house until after the death of Yahaya. Inuwa continued to stay in the house for 22 years until he died. Umar inherited the house from Inuwa ....."*

All that Exhibit A1 purported to establish is that the house in dispute was the property of Mallam Mamman, the father of Yahaya and Dalhatu. The Respondents denied any blood-relationship with Dalhatu. When the matter went on trial on the respondent's claim that both the house and the farm in dispute belonged exclusively to their grandfather Yahaya, they got the evidence of one shaky witness and the Sharia Court of Appeal rightly in my view and in consonance with the majority view of Islamic Law jurists on the issue, preferred the evidence of three witnesses on the side of the appellants to one witness and complimentary oath on the side of the respondents.

**Exhibit A1 is inconclusive and could not be used as res judicata against the respondents.**

Issue 11 is resolved against the appellants. In the course of my discussion on issue 11 I have covered issue IV sufficiently to need any further separate treatment.

**The issue of prescription raised in Issue 111 was not raised and litigated upon before the trial Upper Area Court, nor before the Sharia Court of Appeal. The mere fact that Exhibit A1 was formally admitted in evidence in the Court of Appeal would not**

automatically raise the issue of prescription before that court. None of the parties before it raised it, and this is very evident from the proceedings before the Court of Appeal. The Court of Appeal was therefore wrong to raise it suo motu. What ever the Court of Appeal decided on that point goes to no issue and has been totally ignored by me in arriving at my decision.

For the reasons stated above, I allow the appeal and restore the judgment of the Sharia Court of Appeal given in favour of the appellants with regard to the possession and ownership of the house and the farm in dispute.

The appellants are awarded N10,000.00 costs against the respondents.

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#### UWAIS CJN

I have had opportunity of reading in draft the judgment read by my learned brother Wali, JSC. I entirely agree and have nothing to add.

Accordingly the appeal succeeds and it is hereby allowed. The decision of the Court of Appeal is set-aside thus affirming the decision of the Sharia Court of Appeal, Kano, with N10,000.00 costs to the Appellants.

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#### BELGORE JSC

I have read in advance the judgment just read by my learned brother, Wali, JSC. and I am in full agreement that this appeal has merit. For the reasons fully advanced in that judgment to which I have nothing more to add, I also allow the appeal and award N10,000.00 costs to the appellants against the respondents.

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**OGUNDARE JSC**

I agree with the reasoning and conclusion reached in the judgment of my learned brother, Wali JSC just delivered. Having myself read the authorities in Islamic law on the relevant issue of acceptable evidence required in proof of a claim I think the Court of Appeal was wrong to B have restored the decision of the trial Upper Court which the Sharia Court of Appeal, Kano, quite rightly in my respectful view, set aside.

I, too, allow this appeal, set aside the judgment of the Court below and restore that of the Sharia Court of Appeal, Kano which found C in favour of the present Appellants.

I abide by the order for costs made by my learned brother Wali, JSC.

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**OGWUEGBU JSC**

I agree with the judgment just read by my learned brother Wali, JSC. And I have nothing further to add.

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