

**SUPREME COURT OF NIGERIA**  
6TH. OCTOBER, 2000. SC. 135/1994  
**CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU,**  
**O. ACHIKE, E. O. AYoola, JJSC.**

ALHAJI JIDDUN	.....	APPELLANT
AND		
1. ABBA ABUNA		
2. GONI ADAM	.....	RESPONDENTS

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***APPEALS*** - Judgment - Nullity - A court that is competent when it heard an appeal - Its decision could be wrong but certainly not a nullity.

***ISLAMIC LAW*** - Claim for money - Proof - Oath - Where the plaintiff fails to prove his case in a claim for money or which can be estimated in money's worth - The defendant shall be called upon to take the oath rebutting the plaintiff's claim.

***ISLAMIC LAW*** - Procedure - Action - Proper plaintiff - It is not always necessary that a litigant who complains first before the court - Shall always be the plaintiff - It is the judge based on the facts of the case that decides who is to be the plaintiff.

***ISLAMIC LAW*** - Succession - Sharing of estate - Where a muslim dies - His heirs are permitted to appoint a person learned in Islamic law to share his estate among them - And a court of law will enforce the sharing if it conforms with the law.

***ISLAMIC LAW*** - Succession - Survivors - Evidence - Two spouses who died almost contemporaneously - How to establish who predeceased the other.

**FACTS**

In the Bornu Upper Area court the plaintiffs/respondents claimed their

mother's (Hajiya Kwayisu ) share from the eight portion of inheritance which was denied by the defendant/appellant. The reasons for the opposition to the claim by the defendant was that the plaintiff's mother had predeceased her husband (Alhaji Ramat) by death. Following the murder of Alhaji Ramat and one of his wives Hajiya Kwayisu by a gang of armed robbers, the relations of Alhaji Ramat, in consultation with some Islamic Scholars learned in sharia, shared the estate of Alhaji Ramat among his surviving heirs. They gave 1/8th of the estate to the wives, Hajiya Kwayisu inclusive. Hajiya Kwayisu was allotted a house with six rooms. The defendant was among the relations of Alhaji Ramat that witnessed the sharing of the estate. It was after the sharing that the defendant denied the plaintiffs the share of Hajiya Kwayisu whom they claim to be their mother; on the ground that the plaintiffs' mother had predeceased her husband by death.

The trial upper Area Court took the view that the burden of adducing evidence and establishing the fact of Hajiya Kwayisu predeceasing her husband was on the defendant. After a consideration of the evidence of defendant's only two female witnesses, the court held that those witnesses did not elicit nor establish the defendant's assertion and accordingly gave judgment for the plaintiffs in terms of the sharing and allotment of 1/8 share in favour of Hajiya Kwayisu. Aggrieved, the defendant appealed to the sharia court of appeal, Bornu. That court held that since it was not established who preceded who by death, the plaintiffs' mother had no right of succession to her husband's estate. Having said so it allowed the appeal. The plaintiffs appealed to the Court of Appeal Jos which allowed the appeal, reversed the judgment of the sharia court of Appeal and restored the judgment of the trial Upper Area court. The defendant has now appealed to the Supreme Court raising four issues but the appeal was determined on a single issue.

**ISSUE FOR DETERMINATION**

*Whether the Court of Appeal was right to restore the judgment of the trial Upper Area Court I, Maiduguri, regard being had to the evidence adduced by the appellant.*

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

***Appeals - Judgment - Nullity***

1. The Court of Appeal wrongly declared the Sharia Court of Appeal judgment a nullity when it manifestly allowed the appeal. There is nothing to show that the Sharia Court of Appeal was incompetent when it heard the appeal. Its decision could be wrong but Certainly not a nullity. If it were so, the proper order the Court of Appeal should have made would be for a fresh hearing of the appeal before a competent tribunal instead of allowing the appeal at the tail end of its judgment, and no such order for a fresh hearing was made. (p. 2886 D)

***Islamic law - Procedure - Proper plaintiff***

2. Under the Sharia procedural law, it is not always necessary that a litigant who complains first before the court shall always be the plaintiff. It is the judge, based on the dictates of the facts of the case, that decides who is to be the plaintiff. The judge has to determine, from what is most reasonable and in conformity with the normal state of things, which of the two parties is to be cited as the defendant. (p. 2887 G)

***Succession - Survivors***

3. The appellant had failed to prove his claim by the evidence of two unimpeachable male witnesses or one unimpeachable witness with the appellant's complimentary oath, or evidence of two or more unimpeachable female witnesses with his complimentary oath. See page 240 vol. II, Jawahirul - Ikil

[Commentary on Mukhtasar - el khalil] where the author stated the law as follows:

Meaning:

or who preceded by death: That is who died first between the two, or who between the two spouses died first; in such a situation the claim as to who preceded by death shall be established by the evidence of one male unimpeachable witness plus that of two female unimpeachable witnesses or by the evidence of one of the two [a male witness or two

female witnesses] with the claimant's complimentary oath. (p. 2888 H)

***Islamic law - Claim for money - Proof***

4. In Islamic Law or Sharia, where a person who is declared by the court  
B to be the plaintiff fails to prove his case in a claim for money or which  
can be estimated in money's worth, the defendant shall be called upon to  
take the oath rebutting the plaintiff's claim.

In the present case, the appellant has failed to substantiate his  
C allegation as required by law; the respondents as heirs of Hajiya kwayisu  
shall subscribe to the oath of rebuttal of the appellant's claim. If they  
decline to do so, the appellant will be asked to take oath affirming his  
assertion. If both decline to take the oath, the court will dismiss the  
appellant's claim and enforce the settlement reached by the parties.  
D (p. 2890 F)

***Islamic law - Succession - Sharing of estate***

5. Where a Muslim dies, his heirs are permitted by law to appoint a  
E person learned in Islamic law to share his estate among them according  
to such law, and if subsequently the matter is taken before a Court of  
law, that Court will enforce the sharing, provided it conforms with the  
law. See Ashalul Madarik Fi Irshadis Salik volI. 3 page 209 (p. 2891 D)  
F

**NOTABLE POINT OF INTEREST**

**AYOOLA JSC**

1. *Appellate procedure and practices must be adhered to*  
G The case with which the parties have shifted their positions, abandoning  
pervious position taken by them, on every appeal is not only embarrass-  
ing but is to be deprecated. Notwithstanding that there may be informal-  
ity of procedure in some of the courts from which cases originated,  
H which eventually come on appeal to the Court of Appeal or to this court,  
the point must be emphasized that appellate procedure set by the Rules of  
Court and practices of our appellate courts must be respected and ad-  
hered to. Counsel are not permitted to canvass fresh points in this court

without leave. (p. 2896 G)

**REPRESENTATION**

No appearance for the appellant

K. T. Turaki Esq. for the respondents

B

**CASE REFERRED TO**

Abdullahi Mogaji Mafolaku v. Usman Akanbi Ita Alamu [1961 - 1989]

Sharia Law Reports of Nigeria vol. I 105 at 107

C

**BOOKS REFERRED**

Ihkamul Ahkam [Commentary on Tuhfatul - Hukkam] pp.8, 9, 34 and 36

Ruxon on Maliki Law, pp. 281, 282 and 302

D

Jawahirul - Ikilil Vol. II, [Commentary on Mukhtasar - el- Khalil ] pp. 225, and 240

Hashiyatud Dasuki, Vol. 4, [Commentary on Mukhtasar el- Khalil ], p. 188

E

Khirshi, Vol 4 [Commentary on Mukhtasar el- khalil], p. 203

Ashalul Madarik Fi Irshadis Salik, Vol. 3, p 209

Ambali on The Practice of Muslim Family Law in Nigeria, p. 125

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**LEAD JUDGMENT BY WALI JSC**

The facts of this case are not seriously in dispute between the contestants. The deceased, Alhaji Ramat and Hajiya kwayisu were husband and wife living in the matrimonial residence provided by the husband. Apart from Hajiya kwayisu, Alhaji Ramat had two other wives namely, Ya Adama and one other. They were both living with him in the same house.

G

One night a gang of armed robbers attacked and broke into the residence of Alhaji Ramat causing serious injuries to Alhaji Ramat and one of his wives Hajiya kwayisu, resulting in their death.

Following the death of Alhaji Ramat and Hajiya kwayisu the guardians of Hajiya kwayisu and the relations of Alhaji Ramat, in consultation

with some Islamic scholars learned in sharia, shared the estate of Alhaji Ramat among his surviving heirs. They gave 1/8th of the estate to the wives, Hajiya kwayisu inclusive. Hajiya kwayisu was allotted a house with six rooms. Alhaji Jiddun the 1st Defendant in this case was among the relations of Alhaji Ramat that witnessed the sharing of the estate. It was after the sharing that Alhaji jiddun denied the plaintiffs Alhaji Abba Abuna Goni and Goni Adam the share of Hajiya kwayisu whom they claim to be their mother. Part of the Plaintiff's Claim reads-

*"The house with six rooms was said to be my mother's share but thereafter Alhaji juddun denied us the house saying that my mother had predeceased her husband by death. We therefore disagreed to that. If he is claiming that my mother had predeceased her husband by death let him produce his witnesses and confirm to that effect before the court."*

In answer to the preceding statement by the plaintiff the 1st Defendant replied-

*"I heard, she had preceded her husband by death and that was why we said she had no share."*

The trial Upper Area Court then proceeded as follows:-

Ct/Alh. Juddum: Are you aware that the deceased's relatives had given three houses as eighth portion of inheritance to the deceased's wives?

Answer: Yes, I Know.

Ct/Alh. Juddum Since the relatives of the deceased Alhaji Ramat and other members of the public had apportioned three houses as "thumun" [i.e 1/8th] to the three wives, what right do you have to prevent somebody her share?

Answer: This is left for the court to decide.

Ct/Alh. Juddum: Have you got witness (es) who could testify that she had preceded her husband by death?

Answer: Yes, I have two witnesses."

The Defendant who had now the burden to prove that Hajiya kwayisu predeceased Alhaji Ramat called Ya Adama Alhaji Abbas who was one of the two surviving wives of Alhaji Ramat, and Hajiya Hamra Shuwa, a neighbour's wife. None of them testified in support of the

Defendant's allegation.

The trial Upper Area Court after considering the evidence, stated:

*"At this juncture the court told Alhaji juddum that his two witnesses did not confirm his claim and that the deceased's husband relatives had mentioned before this court that they had picked out three houses as the one eighth portion each of the house wives inheritance and that whether he has another witness he said he has none."*

The trial court then affirmed the settlement reached by the representatives of the deceased persons which the house with six rooms was given to Hajiya kwayisu as her share from 1/8th of the estate of her deceased husband.

Aggrieved by the decision of the trial Upper Area Court, Alhaji juddum, the 1st Defendant, appealed to the sharia Court of Appeal. The sharia Court of Appeal, after considering the record of proceedings and oral submissions by the parties to the appeal, observed that-

*"In view of that Adama Alhaji Abbas and Hajiya Hamra shuwa had not confirmed that anything before the Upper Area Court I regarding who preceded the other by death among Alhaji Ramat and his wife Hajiya kwayisu. The Bornu Upper Area Court I had agreed that Hajiya Adama Abbas and Hajiya Hamra shuwa had confirmed anything before it but unfortunately the Upper Area Court I had included late Hajiya kwayisu among the heirs of late Alhaji Ramat and this is not proper under the sharia Law since it was not established who preceded who by death."*

The sharia Court of Appeal cited Ihkamul Ahkam page 348, as its authority for the preceding statement. And having said so it allowed the appeal, set aside the judgment of the trial Upper Area Court I and directed as follows:-

*"In view of that we order the lower court to receive back the eighth portion of inheritance which it had given to Hajiya Kwayisu and give it to the heirs of Alhaji Ramat."*

The plaintiffs, Abba Abuna Goni and Goni Adam appealed to the Court of Appeal, Jos Division, against the judgment and order of the sharia Court of Appeal, Bornu.

Before the Court of Appeal, both parties were represented by

counsel who filed and exchanged briefs of argument for and on behalf of their clients. In the Court of Appeal learned counsel adopted their respective briefs of argument and offered no additional oral submissions.

The Court of Appeal painstakingly considered the appeal and in its unanimous decision delivered by Tanko Muhammad JCA, allowed the appeal and concluded-

*"In the circumstances therefore, I have no other alternative than to declare the decision of the Borno State Sharia Court of Appeal a nullity and confirm the decision of the trial Upper Area Court. Position of the parties therefore, must be in line with this decision, revert to the status quo ante . The Respondent has no right to keep on withholding the share of the appellants as distributed among the heirs by the prepositious relation as nothing has been established to rebut such a decision."*

The 1st Defendant has now appealed to this court against the Court of Appeal judgment.

Before I go into the appeal, I wish to observe that **the Court of Appeal wrongly declared the Sharia Court of Appeal judgment a nullity when it manifestly allowed the appeal** as I shall later on in this judgment show. **There is nothing to show that the Sharia Court of Appeal was incompetent when it heard the appeal. Its decision could be wrong but Certainly not a nullity. If it were so, the proper order the Court of Appeal should have made would be for a fresh hearing of the appeal before a competent tribunal instead of allowing the appeal at the tail end of its judgment, and no such order for a fresh hearing was made.**

In compliance with Rules of this Court the plaintiffs as appellants and the 1st Defendant as respondent filed and exchanged briefs of argument through their respective learned counsel. Henceforth the plaintiffs and the 1st Defendant will be referred to in this judgment as respondents and appellant respectively.

In his brief of argument learned counsel for the appellant, J. S. Kamalu - Din Esq of Mohammed Kaloma Ali & Co. formulated four issues for determination to wit:

*"1. was the creation of missing link, vide failure to administer*

*oath on the plaintiff/appellant the mistake of the trial Upper Area Court I?*

2. *If the answer to the above is in the affirmative, is it then right to visit a party in a suit with such a mistake?*

3. *Should this matter be remitted to the Sharia court of Appeal for the missing link to be provided in order to judge in the plaintiff's favour?*

4. *If the answer equally is in the affirmative, was the Court of Appeal right in over - turning the decision of the Sharia Court of Appeal and affirming that of the trial Upper Area Court I, Maiduguri?"*

Learned counsel for the respondents, K. T. Turaki Esq of K. T. Turaki & Co. raised the following issue in his brief-

*"whether the decision of the court of Appeal, Jos Division restoring parties to status quo ante, was right in Islamic Sharia, regard being had to the Appellant's claim and special peculiarities of this case relating to the common belief of the parties to this case and justiciability of the Appellant's claim."*

On the day the appeal came up for hearing, neither the appellant nor his counsel appeared in Court. His appeal was taken as argued on his brief as provided by the Rules of this Court. Learned counsel for the respondents appeared and adopted the brief he had already filed. He also made oral submission elaborating some points in his brief.

Having regard to the judgment of the court of Appeal and the grounds of appeal filed, in my view the only issue validly arising in this appeal is whether the Court of Appeal was right to restore the judgment of the trial Upper Area Court I, Maiduguri, regard being had to the evidence adduced by the appellant.

As correctly stated by the Court of Appeal, **under the Sharia procedural law, it is not always necessary that a litigant who complains first before the court shall always be the plaintiff. It is the judge, based on the dictates of the facts of the case, that decides who is to be the plaintiff. The judge has to determine, from what is most reasonable and in conformity with the normal state of things, which of the two parties is to be cited as the defendant. See Ihkamul**

- Ahkam [Commentary on Tuhfatul - Hukkam] page 8; Ruxon on Maliki Law, pages 281 - 282 and Jawahirul - Iklil vol. 11 [Commentary on Mukhtasar - el - khalil] page 225.

The Respondents' complaint before the trial Upper Area Court is not that who between Alhaji Ramat and Hajiya kwayisu predeceased the other but that the Appellant denied the heirs of Hajiya kwayisu the share from the estate of her deceased husband, to wit: a house consisting of six rooms which also formed part of 1/8th of Alhaji Ramat's estate given to his wives that survived him. It was the appellant that introduced the issue that Hajiya kwayisu predeceased Alhaji Ramat. Based on this new element introduced by the appellant the learned trial judge, and rightly too in accordance with the Sharia Law, in my view asked him to prove the allegation. None of the two witnesses called by him gave evidence in his favour. His first witness, Ya Adama Alhaji Abbas, one of the surviving wives of Alhaji Ramat testified as follows:

*"I was together with my husband. When the robbers came to my husband ordered me to put my Golds into the box and asked me not to go out. As for him on going out, they fell on him and beat him, when I went out I saw my rival and she was shot at her thigh. She called me and said that I should tie her thigh with her head - tie, I tied it for her and went to my husband's place when I heard that he too was killed, that is all I know."*

The 2nd witness Hajiya Hamra Shuwa, a wife's neighbour of Alhaji Ramat, stated thus in her evidence-

*"when the Robbers came to their house, I went out. I saw the thigh of Hajiya Alhaji Ramat's wife was tied with a head tie. I was taking care of her when I heard that my husband was beaten. From there I became confused. In view of that I cannot exactly say whether Hajiya or that Alhaji Ramat was first to die because it was the following day that I heard that Hajiya had died."*

This case involves a claim in the share of the estate of Alhaji Ramat. It can be estimated in money's worth. **The appellant had failed to prove his claim by the evidence of two unimpeachable male witnesses or one unimpeachable witness with the appellant's compli-**

mentary oath, or evidence of two or more unimpeachable female witnesses with his complimentary oath. See page 240 vol. II, Jawahirul - Ikil

[Commentary on Mukhtasar - el khalil] where the author stated the law as follows:

*"au sabqiyyatihi" ai mautu ahadil fariqaini awiz zaujaini ala mautil akhar, fa tuthbitus sabqiyyati bi adlin wamra' ataini au ahadihima ma' a yaminin."*

**Meaning:**

**or who preceded by death: That is who died first between the two, or who between the two spouses died first; in such a situation the claim as to who preceded by death shall be established by the evidence of one male unimpeachable witness plus that of two female unimpeachable witnesses or by the evidence of one of the two [a male witness or two female witnesses] with the claimant's complimentary oath."**

See also pages 35 - 36 Ihkamul - Ahkam [Commentary on Tukhfalul - Hukkam] ; suit No. CA/k/81/84: Abdullahi Mogaji Mafolaku v. Usman Akanbi Ita Alamu [1961 - 1989] Sharia Law Reports of Nigeria vol. I 105 at 107; page 188 Hashiyatud Dasuki vol. 4 [Commentary on Mukhtasar el - khalil] and page 203 khirshi vol. 4 [Commentary on Mukhtasar el - khalil].

The Court of Appeal is therefore perfectly right when Tanko Mohammed JCA in the lead judgment said-

*"I am of the view that the procedure adopted by the trial .Upper Area Court was the right one as it is trite that under Islamic Law, a Judge has the capacity and competence to determine the plaintiff in a given case notwithstanding which of the parties brought the case to the court."*

The respondents' claim before the trial Upper Area Court is more or less seeking for enforcement of the mutual settlement of the sharing of late Alhaji Ramat, reached by the parties interested in it. The Sharia Court of Appeal, Bornu was wrong in its approach to the facts of the case and the issue introduced by the appellant in it. The death of the two spouses was not in question nor in doubt. It was the appellant that

complained that Hajiya kwayisu predeceased her husband. His complaint was clear and unambiguous that Hajiya kwayisu predeceased Alhaji Ramat, and this he was not able to substantiate. This misapprehension of the issue and the facts by the Sharia Court of Appeal, Bornu led it into serious error of setting aside the decision of the trial Upper Area Court. The Court of Appeal was partly right when it stated in the lead judgment that

*"In this case it must be proved that one of the spouses predeceased the other so that the survivor could inherit no matter how short his survival. The Sharia Court of Appeal Maiduguri, after having considered the evidence led before the trial Upper Area Court not meritorious, ought to have dismissed the appeal before it. By dismissing the appeal, it ought not to have pronounced a different decision, an unsubstantiated one which would alter the position of the parties prior to their appearance before the trial Upper Area Court.*

*In the circumstances, I have no other alternative than to ..... confirm the decision of the trial Upper Area Court: Position of the parties therefore must in line with this decision revert to the status quo ante. The Respondent has no right to keep on withholding the share of the appellants as distributed among the heirs by the prepositus relation as nothing has been established to rebut such a decision. The appeal is allowed."*

**In Islamic Law or Sharia, where a person who is declared by the court to be the plaintiff fails to prove his case in a claim for money or which can be estimated in money's worth, the defendant shall be called upon to take the oath rebutting the plaintiff's claim.**  
 See Ihkamul - Ahkam [Commentary on Tukhfatul - Hukkam] page 9 where the law is stated thus-

*"The defendant shall subscribe to oath of rebuttal when the plaintiff fails to prove his complaint by evidence of witnesses."*  
 See also Ruxton on Maliki Law paragraph 1600, page 302 where it is stated-

*"1600. If the plaintiff cannot furnish complete judicial proof, the defendant will make oath in order to remain in position."*

**In the present case, the appellant has failed to substantiate his allegation as required by law; the respondents as heirs of Hajiya kwayisu shall subscribe to the oath of rebuttal of the appellant's claim. If they decline to do so, the appellant will be asked to take oath affirming his assertion. If both decline to take the oath, the court will dismiss the appellant's claim and enforce the settlement reached by the parties.**

See pages 34 and 36 of IhkamuI Ahkam [Commentary on Tukhfal, particularly on page 36 where the procedural law is stated thus-

If the defendant refuses to take the oath of rebuttal of plaintiff's claim] the plaintiff shall be asked to take oath of confirmation of his claim. Where both refuse to take the oath, the court shall dismiss the plaintiff's claim.

**Where a Muslim dies, his heirs are permitted by law to appoint a person learned in Islamic law to share his estate among them according to such law, and if subsequently the matter is taken before a Court of law, that Court will enforce the sharing, provided it conforms with the law. See Ashalul Madarik Fi Irshadis Salik vol. 3 page 209 wherein the law is thus stated-**

*"It is permitted to appoint an Arbitrator and to enforce what he decides."*

The appeal fails and it is dismissed. The judgment and orders of the Court of Appeal is affirmed subject to the taking of oath of rebuttal by the respondents. N10,000.00 costs is awarded to the Respondents against the Appellant.

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### KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Wali, JSC. I agree with his reasoning and conclusions. I will therefore dismiss the appeal and confirm the decision of the Court of Appeal with N10, 000.00 costs against the appellant.

**ONU JSC**

I was privilege to read in draft before now the judgment of my learned brother Wali, JSC just delivered. I am in entire agreement with him that the appeal lacks substance and must perforce fail subject, however, to the taking of oath off rebuttal by the respondents as required by Islamic or Sharia Law with costs of N10, 000.00 to them (respondents) against the Appellant.

C

**ACHIKE JSC**

The appeal came closely to raising the interesting, and often difficult, point of establishing which of two spouses or persons who died almost contemporaneously predeceased the other for purposes of determining one who would inherit the properties of the other in circumstances where the survivor, albeit briefly, is entitled to succeed to the property of the party that predeceased him. That point, at the end of the day, was not squarely decided by the court in this appeal.

The facts of this case though hardly in dispute have been fully set out in the leading judgment of my learned brother, Wali, JSC. And I respectfully adopt them as mine. Consequent to the murder of Alhaji Ramat and one of his three wives, Hajiya kwayisu by a gang of armed robbers, the relations of Alhaji Ramat, after due consultation with Islamic scholars, in keeping with Islamic practice, shared the estate of Alhaji Ramat among his surviving heirs in accordance with Sharia principles of succession. A portion of Alhaji Ramat's estate was allotted to Hajiya Kwayisu. The plaintiffs, Abba Abuna and Goni Adam, children of late Hajiya Kwayisu, brought this action claiming to be entitled to the share allotted to their mother (1/8 of the estate to the wives) which was denied by the defendant, Alhaji jiddun who was one of the relations of Ramat that shared his estate among the surviving heirs. The reasons for the opposition to the claim by the defendant was that he heard that the plaintiffs' mother had predeceased Alhaji Ramat (her husband) by death.

Upon this opposition the trial Upper Area Court took the view, and rightly under Sharia Law, that the burden of adducing evidence and

establishing the fact of Hajiya kwayisu predeceasing Ramat was on the defendant. After due evaluation by the trial court of the evidence of defendant's only two female witnesses, the court held that those witnesses did not elicit nor establish the defendant's assertion and accordingly gave judgment for the plaintiffs in terms of the sharing and allotment of 1/8 share in favour of Hajiya kwayisu. B

On appeal, the Sharia Court of Appeal allowed the appeal on the ground that the trial court, under the Sharia Law was in error to have allotted a share to the deceased Hajiya Kwayisu as one of the heirs of late Alhaji Ramat. C

One may pause to observe briefly that the decision of the Sharia Court of Appeal did not focus on the point in controversy between the parties on appeal, to wit, whether the appellant in that court had duly established his assertion, by evidence, that the late Hajiya kwayisu predeceased her husband, Ramat. D

Be that as it may, on a further appeal, the Court of Appeal reversed the judgment of the Sharia Court of Appeal and restored the judgment of the trial Upper Area Court. The defendant again has appealed to this Court. E

Although on record, the respondents were the plaintiffs, and the appellant was the defendant, nevertheless having regard to the main complaint before the trial court, under Sharia procedural Law, it is the nature of the complaint before the court, and not necessarily the party who initiates the action that may be designated "plaintiff" by the court. At the trial court, contrary to the main complaint of the plaintiffs,, herein respondents, the defendant, herein respondent, while denying the plaintiffs' claim to their mother's allotted share under the settlement of late Ramat's estate, introduced the new element that Hajiya Kwayisu having predeceased Alhaji Ramat was disentitled to the latter's estate as one of the heirs of the estate. Consequent to the introduction of the new dimension to the case, the learned trial Upper Area Court judge, rightly in accordance with the Sharia procedural law, held that the burden lay on the appellant, as defendant, to elicit evidence in proof of the new element he has introduced. F G H

As already stated, a careful evaluation of the testimonies of the two witnesses who testified on behalf of the appellant woefully fell short of establishing the appellant's allegation in this regard. Under Sharia Law, where a plaintiff, such as the appellant herein who was so designated (a plaintiff for the purposes of this case) failed to establish his allegation, the defendant would be invited to subscribe to oath of rebuttal to enable him succeed in the case. Should he decline to so subscribe, the plaintiff would be asked to do so. Again, if both of them decline to do so, the plaintiff's case would be dismissed by the court. The authorities on the Sharia Law are unanimous on this procedural provision. Thus, for example, F. H. Ruxton on Maliki Law (1978 Reprint edition ) at p. 302, paragraph 1600 put it quite lucidly:

*"If the plaintiff cannot furnish complete judicial proof, the defendant will make oath in order to remain in possession".*

The result is that the Court of Appeal was partly right to have restored the decision of the learned trial Upper Area Court judge but manifestly wrong in part to have declared the judgment of the Sharia Court of Appeal a nullity. The judgment of the latter court was never a nullity; the judgment of that court was insupportable and ought to have been dismissed ordinarily.

In the final analysis, this appeal fails and is dismissed. The judgment of the Court of Appeal and the orders made therein are affirmed with the proviso that the respondents subscribe to oath of rebuttal. There will be N10, 000.00 costs in favour of the respondents.

## G AYoola JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Wali, JSC. I am in agreement with the conclusion and the reason he gave for that conclusion. I am content to adopt his detailed narration of the facts and his lucid exposition of the law. I wish to make some comments of my own, albeit briefly.

In the Borno Upper Area Court ("the Upper Area Court") the respondents to the appeal claimed 1st respondent's mother's (Hajjia

kwayisu) share from the eighth portion of inheritance. The present appellant who was defendant to that action, defended the action on the main ground that since the 1st respondent's mother predeceased her husband, Alhaji Ramat, she had no right of succession to her husband's estate. Before the Upper Area Court the appellant was unable to establish B that defence. In consequence, he was unable to fault the distribution of the husband's estate by his relations whereby part of one "eighth portion of inheritance" was given to the 1st respondent's deceased mother. That court held that;".....since there is no established evidence that proved C that Hajjia was first to die, Alhaji jiddun has no right to deny the house." The main point of the decision of the Upper Area Court was that:

*"The Court has the right to make an estimate of the houses and share it out to three housewives equally but since the matter had already D been settled among them that the house with six rooms had been given as Hajjia's shares, the court has confirmed her that houses since they did not formally seek this court to re-examine the issue of sharing their whole estate for them. Their action was on claim of houses."* (Emphasis mine) E The Upper Area Court granted the claim.

On appeal to the Sharia Court of Appeal, the appellant raised the issue, for the first time, that the 1st respondent's mother and her husband died contemporaneously and that it was not possible to ascertain who predeceased the other. The Sharia Court of Appeal proceeded on the F footing that since it was not established who preceded who by death, the 1st respondent's mother had no right of succession to her husband's estate. In the result, that court set aside the judgment of the trial Upper Area Court and ordered that court "receive back one eighth portion of inheritance which it had given to Hajjia and give it to the heirs of Alhaji G Ramat."

The respondents appealed to the Court of Appeal complaining, in the main, that the trial court was wrong in the procedure it adopted and that the Sharia Court of Appeal should have ordered a retrial. It is to be H noted that the respondents on their appeal to the Court of Appeal had abandoned the contention that the judgment of the trial Upper Area Court should be affirmed, and replaced it with a contention that the proceed-

ings in that court being tainted by procedural error, a re-hearing should be ordered. The procedural error alleged was that the respondents were denied a hearing.

The present appellant argued in the Court of Appeal that the  
B procedure adopted by the Upper Area Court was proper in that proceedings in such courts are inquisitorial and not adversarial.

The Court of Appeal had no difficulty in rejecting the contention, raised by the respondents, that the trial Upper Area Court adopted a  
C wrong procedure in not calling on the respondents to give evidence. They were of the view that the Sharia Court of Appeal should have affirmed the judgment of the trial court. They found it inconsequential that the respondents were not offered an opportunity to present their case. They  
D further held that the Sharia Court of Appeal had no basis for arriving at the conclusion it did when the appellant had not proved his assertion. In the result, the Court of Appeal allowed the appeal before it and restored the judgment of the trial Upper Area Court.

On this further appeal, the appellant conceded that the appellant,  
E though a defendant, had assumed the position of a plaintiff. However, it was argued that the Upper Area Court was duty bound to call and should have called upon the appellant to complement the evidence given by his two female witnesses. At the end of the day the appellant, by his counsel  
F reverted to the position that the proceedings before the trial Upper Area Court were thus procedurally defective.

For their part, the respondents on this appeal abandoned the position which they had taken before the court below, that the proceedings  
G at the trial Upper Area Court were faulty, but argued that the court below was right to have restored the judgment of the trial court.

The case with which the parties have shifted their positions, abandoning previous position taken by them, on every appeal is not only embarrassing but is to be deprecated. Notwithstanding that there may be  
H informality of procedure in some of the courts from which cases originated, which eventually come on appeal to the Court of Appeal or to this court, the point must be emphasized that appellate procedure set by the Rules of Court and practices of our appellate courts must be respected

and adhered to. Counsel are not permitted to canvass fresh points in this court without leave.

The respondents' counsel in the respondents' brief of argument raised issues which were not canvassed in any of the courts below when it was submitted (i) that Islamic Law enjoins a party who alleges B particular pattern of death between person persons in point of time to call just two unimpeachable witnesses and that the question of oath is "completely out-ruled for the purpose of ascertaining the issue of death". (ii) that the court should not allow the common belief of committee of elders, Alhaji Ramat's relations, Islamic Scholars, and the guardians of the C deceased's other two wives, to be displaced by the appellant; and (iii) that there having been settlement and agreement on the distribution of heritable estate, it is not permissible to rescind it.

Be that as it may, it seems clear that was required of the appel- D lant (who was in position of plaintiff) was to substantiate his assertion that the 1st respondent's mother predeceased her husband with full proof as required by Islamic Law. He tried to substantiate his assertion by calling two female witnesses. The deficiency in the proof he produced is E that he neither called a male witness nor added his oath. The law, I venture to think, is stated in Ambali on The Practice of Muslim Family Law in Nigeria at p125 thus:

*"Like the determination of whom should be given the burden of F proof and as the kind of evidence which court should demand depends on the nature of the statement of claims, so the applicable oath and to whom depends on the kind of claim on the one side and the parties involved in the dispute on the other. The first type of oath is Yamin Munkar. It is due G when the Plaintiff's claim has to do with money in which case he is expected to substantiate his claim with at least one male competent witness and two female competent witnesses but failed to being the full proof before the court. For instance if the produces one male witness or H two female witnesses only, we say he has failed to satisfy this legal requirement, the defendant is liable to take Yamin Munkar, i.e the oath to deny liability. In this circumstance, the defendant takes the oath to deny the allegation. He should be declared innocent on two grounds, if he,*

that is the defendant takes it: (i) the failure of the plaintiff to prove his allegation, and (ii) his audacity to take an oath. If he has the courage to take the oath, the judgment should be entered in his favour. He is due for the judgment because the defendant declines to take the oath, while the plaintiff was prepared to support his half proved claim with the oath. If the plaintiff, like the defendant declines to take oath, the claim will be dismissed. This is because the plaintiff failed to substantiate his claim and declines also to take an oath. In this circumstance the innocence of the defendant is upheld until otherwise proved."

The appellant's counsel argued that the trial court should have called upon the appellant to complement the evidence of the two female witnesses, whom he called. However, the record shows that the appellant, apparently, abandoned his allegation that the 1st respondent's mother predeceased her husband, when he said, after his two witnesses had testified,:

*"I heard I agree that only Allah can decide."*

He had earlier, when the trial court asked for "other evidence to the effect that Hajjia had died before her husband's death," responded:

*"I have nothing to say, except what the court decides."*

(Emphasis mine).

It is evidence that one view of the matter is that the appellant having failed to bring full proof before the trial court, the respondents became liable to take the oath to deny liability (i. e. The appellant assertion) before judgment could be given.

Apparently, the trial court and the court below seemed to have proceeded on the footing that not only was there an absence of judicial proof due to failure to adduce the type of evidence demanded by law, but also, that the two female witnesses did not at all testify in support of the appellant's assertion. Counsel for the parties have been silent in this appeal on the question whether an oath of the claimant added to the evidence of two female witnesses would have satisfied the requirement of proof notwithstanding that those two female witnesses have themselves not testified at all in support of the claimant's assertion. The issue was not raised in the court below as to the possible value of the appellant's

complementary evidence in such circumstance. The court did not deal with or pronounce on the matter.

Approaching this appeal on the footing, as the court below to some extent did, that the appellant who made an assertion before the trial Upper Area Court had failed to furnish "complete judicial proof" of the assertion, what should have followed was the procedure of oath taking as already explained in the leading judgment delivered by my learned brother, Wali, JSC. The final determination of the case by the Upper Area Court should have awaited the eventuality that may arise from that procedure.

While I agree that the Court of Appeal rightly allowed the respondents' appeal and set aside the decision of the Sharia Court of Appeal, I am of the opinion that since the case in the trial Upper Area Court could not have been properly brought to finality until the respondents took an oath (or refused to take an oath). I must entertain some reservation about that aspect of the decision of the court below confirming the decision of the trial Upper Area Court. The order I am inclined to prefer is that the case should be remitted to the trial Upper Area Court for the limited purpose that the oath of rebuttal by the respondents (or if need be, of assertion by the appellant) be taken before the matter is brought to finality. This, at the end of the day, in my understanding, is the purport of the conclusion arrived at by my learned brothers in this appeal. Once the respondents take the oath of rebuttal the matter ends there and the judgment of the trial court in their favour stands re-established.

Subject to what I have said above, since the grounds on which this appeal have been brought and the issues raised by them have failed, I too would dismiss the appeal with costs of N10,000.00 to the respondents.