

SUPREME COURT OF NIGERIA

12TH MAY, 2000. SC. 136/1994

**CORAM:- A. G. KARIBI-WHYTE, A. B. WALI, U. MOHAM-
MED, A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC**

ALHAJI USMAN MAGAJI	APPELLANT
AND		
MAIDOROWA MATARI	RESPONDENT

JURISDICTION - Sharia Court of Appeal - Form CA 9 - The fact that the parties signed Form CA 9 - Would not confer jurisdiction on the Sharia Court of Appeal - Since the matter did not involve Islamic Personal law.

JURISDICTION - Sharia Court of Appeal - S. 242 (2) of the 1979 Constitution - That provision confined Sharia Court of Appeal to Islamic Personal Law.

FACTS

In the Nabardo Area Court, the plaintiff/respondent sued the defendant/appellant over ownership of the piece of land in dispute. The plaintiff claimed that he inherited the land in dispute from his late father and his said father cultivated the land for many years. The defendant on his part also claims to have inherited the same land from his own father. Hence the plaintiff brought an action against the defendant.

The learned trial judge after hearing evidence called by the parties decided in favour of the plaintiff. The Defendant dissatisfied appealed to the Upper Area Court, Toro which allowed the appeal on the ground that the same case was litigated upon between one Mangai (described as senior brother to the plaintiff) and Alhaji Usman Magaji, the defendant, in CUA/215/72 of 25/2/72 wherein the Upper Area Court Bauchi affirmed the decision of Nabardo Area Court in Suit No. 345/70 in favour of the defendant. Aggrieved, the Plaintiff appealed to the Sharia Court of Appeal, Bauchi, which unanimously dismissed the appeal and affirmed

the decision of the Toro Upper Area Court of Appeal. The plaintiff then appealed to the Court of Appeal, Jos Division. The Court of Appeal in its unanimous judgment came to the conclusion that both the Upper Area Court Bauchi and the Sharia Court of Appeal, Bauchi were wrong in their conclusions that the judgment of Nabardo Area Court in Suit No. 345/70 between Mangai v. Usman Magaji which was subsequently affirmed by the Upper Area Court Bauchi and the Sharia Court of Appeal, Bauchi respectively, operated as *res judicata* against the plaintiff. The Court of Appeal restored the initial judgment of the Nabardo Area Court. The defendant has now appealed to the Supreme Court raising seven issues while the Plaintiff also raised seven issues but the appeal was determined on a single issue.

ISSUE FOR DETERMINATION

Whether or not the Court of Appeal was wrong in holding that the Sharia Court of Appeal had jurisdiction to hear the Appeal before it having regard to S. 242 of the 1979 Constitution as amended?

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

Jurisdiction - Sharia Court of Appeal

1. Section 242 (2) of the 1979 Constitution confines Sharia Court of Appeal to what has been termed in that section as 'Islamic Personal Law', in other words Islamic law of personal status. Looking at the facts involved in this case, the dispute cannot fit in any of the matters listed in s. 242 (2) of the Constitution. It is neither a case for a claim of inheritance, nor that of a gift, a Wakf or a Will. It is simply a case involving ownership of the piece of land in dispute between the contending parties. It is therefore a misconception by learned counsel for the respondent to say that the dispute involves question of inheritance "within the contemplation and provisions of section 242 (2) (c) and (e) which was being withheld from the Respondent and his privies." (p. 1548 A)

Sharia Court of Appeal - Form CA 9

2. The case of Abuja v. Bizi (supra) is quite apposite and applicable. The

fact that it was alleged that the parties signed Form CA9, would not confer jurisdiction on the Sharia Court of Appeal since the matter did not involve Islamic Personal Law as stated in section 242 (2) (e) of the Constitution. (p. 1548 D)

NOTABLE POINTS OF INTEREST

WALI JSC

1. Several futile attempts to amend S. 242 (2) of the 1979 Constitution

There have been several futile attempts to amend section 242 (2) supra to enlarge the jurisdiction of the Sharia Court of Appeal, particularly by the Constitution [Suspension and Modification] [Amendment] Decree No. 26 of 1986. In considering this Decree Uthman Mohammed JCA [as he then was] in Abuja v. Bizi (supra) commented and stated as follows and rightly too in my view -

"The anomaly which the Kadis wanted the Government to correct is to stop the division of cases determined by the Area Courts into those determined under Islamic Personal Law and others. Thus, all appeals from the decision of the Area Courts, where Islamic Law and Procedure is involved could be made part of their jurisdiction. The Constitutional Amendment, however, failed to enhance the jurisdiction of the Sharia Court of Appeal because it left the original jurisdiction of the Court under s. 242 intact. Thus, even though the Constitution [Suspension and Modification] [Amendment] Decree No. 26 of 1986 provided for the deletion of the word "personal" wherever it occurs after the word "Islamic" in the Constitution, it left untouched the specific jurisdiction of the Sharia Court of Appeal. In other words, the jurisdiction of the Sharia Court of Appeal remains limited to those items enumerated under S. 242(2) (a) (b) (c) and (d) of the Constitution." (p. 1548 H)

KARIBI-WHYTE JSC

2. Where the jurisdiction of the court is in issue, that issue must first be determined

It is both fundamental and elementary principle in the adjudatory process that where the jurisdiction of the Court or the Judge is in issue in respect

of a matter, that issue must first be considered and disposed of. See Kalio v. Daniel-Kalio (1975) 2 SC. 15. This is because any determination in the absence of jurisdiction is a nullity. See Peenok Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1. (p. 1551 A)

B

3. It is the plaintiff's claim that determines the issue of jurisdiction

There can be no doubt in the instant case that on analysis, the facts of the case concern competing claims to the ownership of the same land, each claiming to have inherited the land from his father. The contention of learned Counsel to the Respondents that the claim bordered on inheritance as inheritable title to the land is strange reasoning. It is the plaintiff's claim that determines the issue of jurisdiction. - See Tukur v. Government of Gongola State (1989) 4 NWLR (pt. 117) 517. The claim undoubtedly does not fall within the provisions of section 242 (2) (c), since it does not come within the concept of wakf, gift, will or succession. (p. 1553 C)

E **MOHAMMED.JSC**

4. When a Sharia Court of Appeal can determine a land dispute

Land dispute can only be pertinent for determination of Sharia Court of Appeal if it involves any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim. The dispute between the appellant and the respondent does not involve any of the matters I mentioned above. The Sharia Court of Appeal has therefore no jurisdiction to adjudicate in the dispute - Mallam Ado v. Hajiya Dije (1984) 5 N.C.L.R. 260, Garba v. Dogonyaro (1991) 1 NWLR (pt. 165) 102, Fannani v. Saiki (1961 - 1989) 1 Sharia Law Reports of Nigeria. (p. 1556 B)

REPRESENTATION

H A. A. Sangei Esq. for the appellant
M. Y. Saleh Esq. for the respondent

CASES REFERRED TO

Garba v. Dogonyaro (1991) 1 NWLR (pt. 165) 102

Abuja v. Bizi (1989) 1 NWLR (pt. 119) 120

Ado v. Dije (1984) 5 N.C.L.R. 260 at 267

Garba vs. Yaro (1991) 1 NLR (part 165) page 107

Peenok Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1

B

Madukolu v. Nkemdilim (1962) 1 ALL NLR. 587

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979. s. 242 (2)

C

LEAD JUDGMENT BY WALI JSC

Following the order for a retrial made by the Sharia Court of Appeal Bauchi in 1986, the plaintiff Maidorowa Matari lodged the following complaint in the Nabardo Area Court against the defendant Alhaji Usman Magaji -

D

"I sued (sic) the defendant about the farm land I inherited from my late father [called Zaranda], which the defendant took to use with the assertion that it is his own. And this is land that has been cultivated long ago by my parents, then how could the defendant a stranger as he is could claim its ownership just of a sudden?"

E

The defendant Alhaji Usman Magaji denied the plaintiff's claim with the assertion that he inherited the farmland in dispute from his father, Magaji.

F

The learned trial Judge after hearing evidence called by the plaintiff and the defendant in proof of their respective claims, visited the farmland in dispute in company of the parties and their witnesses and decided as follows:-

G

"In my opinion since the plaintiff was able to produced five tentative male witnesses who confirmed it before this court that the disputed property (farm land) is his father's own and that the defendant's father only possessed it by way of manipulation (Hauzi). This court hold the view that whenever there is ownership, possession will have no position in sharia, no matter whatever longer period stood. Therefore considering all the facts stated above I hereby confirmed the subject matter

H

of this case (farm land) to the plaintiff since it was known to be his late father's property. This is in accordance with Tuhfa vol. II page 172."

Dissatisfied with the trial court's judgment, the defendant Alhaji Usman Magaji appealed to the Upper Area Court Toro which allowed the appeal on ground that the same case was litigated upon between one Mangai [described as senior brother to the plaintiff] and Alhaji Usman Magaji, the defendant, in CVA/215/72 of 25/2/72 wherein the Upper Area Court Bauchi affirmed the decision of Nabardo Area Court in Suit No. 345/70 in favour of the defendant. The Toro Upper Area Court therefore struck out the case.

Aggrieved by the decision and order of the Supper Area Court Toro, the plaintiff appealed to the Sharia Court of Appeal, Bauchi which unanimously dismissed the appeal and affirmed the judgment of Toro Upper Area Court, opining as follows:-

"..... in our opinion the two complainants Mangai and Maidorowa the appellant in this case are just like a single person as regard to this matter. As such all they can do is to appeal against the decision of UAC Bauchi on its case No. CVA/215/72 of 25/2/72 which was an appeal the court heard against the decision of Nabardo A/C. This is because, that judgment delivered by UAC Bauchi is still effective."

The plaintiff then appealed to the Court of Appeal, Jos Division. The Court of Appeal in its unanimous judgment came to the conclusion that both the Upper Area Court Bauchi and the Sharia Court of Appeal, Bauchi were wrong in their conclusions that the judgment of Nabardo Area Court in Suit No. 345/70 between Mangai v. Usman Magaji which was subsequently affirmed by the Upper Area Court Bauchi and the Sharia Court of Appeal Bauchi respectively operated as res judicata against the plaintiff. The Court of Appeal also came to the conclusion that the decision of Nabardo Area Court in which it granted the farmland in dispute to the plaintiff is correct and it was restored.

The defendant Alhaji Usman Magaji has now appealed to this court.

Learned counsel representing respective parties filed and exchanged briefs of argument. Henceforth the plaintiff and the defendant

will be referred to in this judgment as respondent and appellant respectively.

The appellant in his brief formulated 7 issues for determination by this court, to wit -

"1. Whether or not the Court of Appeal was wrong in holding B that the defence of res judicata cannot avail the Appellant/Defendant herein?"

2. Whether or not the Court of Appeal was wrong in holding that the Sharia Court of Appeal had jurisdiction to hear the Appeal before it C having regard to S. 242 of the 1979 Constitution as amended?"

3. Whether, having regard to the provisions of ORDER 27 RULE 3(1) and (2) of the Area courts (civil Procedure) Rules 1971, the proceedings and judgments of the Upper Area Court, Toro, Sharia Court of Appeal, Bauchi, and the Court of Appeal, Jos, are not a nullity, having D been based upon unauthentic proceedings and judgment of trial Area Court, Nabardo?"

4. Whether or not the Court of Appeal, Jos, as well as the Sharia Court of Appeal, Bauchi were duly constituted for the purpose of hearing E this Appeal and if answered in the negative, whether or not the decision of the Court of Appeal and the Sharia Court of Appeal are a nullity?"

5. Whether or not the decision of the Court of appeal has determined the issues before it in this Appeal either way and whether the F decision is a valid judgment."

6. Whether or not there was a valid Appeal in this case before the Court of Appeal?"

7. Whether or not the Court of Appeal was wrong in holding that G the rule contained in the Islamic Law principle of Hauzi is inapplicable to this Appeal."

The respondent similarly raised 7 issues in his brief which are quoted below as follows:-

"1. Whether or not the Court of Appeal was right in law in H holding that the defence of res-judicature could not avail the present appellant as held by the Upper Area Court Toro and the Sharia Court of Appeal, in the circumstances of this case?"

2. *Whether or not the Court of Appeal was right in law in holding that the Sharia Court of Appeal had jurisdiction to entertain the appeal before it having regard to section 242 of the 1979 constitution as amended?*

B 3. *Whether or not by the provisions of order 27 Rule 3(1) and (2) of the Area Court's Civil Procedure Rules 1972, the proceedings and judgments of the Upper Area Court Toro, the Sharia Court of Appeal Bauchi, and the Court of Appeal Jos are valid, having been based on the records of the proceedings and judgment of the trial area court Nabardo*
C *certified and produced before this court?*

4. *Whether or not the constitution of the Court of Appeal, and the Sharia Court of Appeal Bauchi were proper in law for the purposes of the hearing and determination of the appeals lodged before the courts,*
D *and in law the validity nullity or otherwise of the court's decisions and judgments?*

5. *Whether or not the decisions and judgments of the Honourable Justices of the Court of Appeal Jos in this appeal are valid and proper in*
E *law?*

6. *Whether or not there was valid appeal to the Court of Appeal and as heard and determined by the Court of Appeal?*

7. *Whether or not the Court of Appeal was right in holding the*
F *inapplicability of Islamic law principle of Hauzi, having regard to the evidence and circumstances of this case?"*

The simple facts in this case are that each party is claiming to have inherited the land in dispute from his father. Can then it be said that the case comes within the ambit of section 242 (2) of the 1979 Constitu-
G tion which provides that -

"S. 242(2) *For the purposes of Subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide -*

(a) *any question of Islamic personal law regarding a marriage*
H *concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;*

(b) where all the parties to the proceedings are Moslems, any question of Islamic personal law regarding a marriage, including the validity to dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant;

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

(d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or

(e) where all the parties to the proceedings (whether or not they are Moslems) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question."

This takes me to the consideration of Issue 2 of the appellant's and the respondent's briefs of Argument respectively that deal with the jurisdiction of the Sharia Court of Appeal that entertained the appeal from the appellate Upper Area Court, Toro.

It was the submission of learned counsel for the appellant that the subject matter before the trial court was not for sharing out inheritance under section 242 (2) (c) of the 1979 Constitution and therefore not within the jurisdiction of the Sharia Court of Appeal. He contended that the issue before the trial court was a dispute over ownership of the land in dispute and not one of Islamic Personal Law as enumerated in subsection (2) of S. 242 (supra), and in support, cited and relied on Abuja v. Bizi (1989) 1 NWLR (pt. 119) 120.

In answer to the above submissions, it was the contention of learned counsel for the respondent that "the claim before the trial court bordered on inheritance, and as inheritable title to the land under Islamic law, the trial court's proceedings and judgment also reflected the application of Islamic law". He submitted that the Sharia Court of Appeal has jurisdiction over the matter under section 242 (2) (c) and (e) of the 1979 Constitution. He further submitted that the case of Abuja v. Bizi (supra)

cited and relied on by learned counsel for the appellant was not apposite and urged that the appeal be dismissed.

Section 242 (2) of the 1979 Constitution confines Sharia Court of Appeal to what has been termed in that section as 'Islamic Personal Law', in other words Islamic law of personal status. Looking at the facts involved in this case, the dispute cannot fit in any of the matters listed in s. 242 (2) of the Constitution. It is neither a case for a claim of inheritance, nor that of a gift, a Wakf or a Will. It is simply a case involving ownership of the piece of land in dispute between the contending parties. It is therefore a misconception by learned counsel for the respondent to say that the dispute involves question of inheritance "within the contemplation and provisions of section 242 (2) (c) and (e) which was being withheld from the Respondent and his privies." The case of Abuja v. Bizi (supra) is quite apposite and applicable. The fact that it was alleged that the parties signed Form CA9, would not confer jurisdiction on the Sharia Court of Appeal since the matter did not involve Islamic Personal Law as stated in section 242 (2) (e) of the Constitution. In the case supra, Uthman Mohammed, JCA [as he then was] in his lead judgment to which both Maidama and Aikawa JJCA subscribed emphasized the law as follows at page 267 -

"The Sharia Court of Appeal under 1979 Constitution has no jurisdiction to determine any matter which is not an issue of Islamic personal law regardless of the fact that the parties signed Form CA9 or, not; Mallam Ado & Anor. v. Hajiya Dije (1984) 5 N.C.L.R. 260 at 267."

The provision of section 242 (2) has been severally interpreted by the Court of Appeal in several of its decisions and many of which are yet to find their way to the Law Reports. Some of these cases were cited and relied upon by the Court of Appeal in Abuja v. Bizi (supra) to wit: Umaru Fannami v. Bukai Sarki (Appeal No. CA/J/16/84) and Alhaji Mudi Limai v. Alhaji Maiwadan Goga (Appeal No. FCA/IL/1105/80), both unreported.

There have been several futile attempts to amend section 242 (2) supra to enlarge the jurisdiction of the Sharia Court of Appeal, particu-

larly by the Constitution [Suspension and Modification] [Amendment] Decree No. 26 of 1986. In considering this Decree Uthman Mohammed JCA [as he then was] in Abuja v. Bizi (supra) commented and stated as follows and rightly too in my view -

"The anomaly which the Kadis wanted the Government to correct is to stop the division of cases determined by the Area Courts into those determined under Islamic Personal Law and others. Thus, all appeals from the decision of the Area Courts, where Islamic Law and Procedure is involved could be made part of their jurisdiction. The Constitutional Amendment, however, failed to enhance the jurisdiction of the Sharia Court of Appeal because it left the original jurisdiction of the Court under s. 242 intact. Thus, even though the Constitution [Suspension and Modification] [Amendment] Decree No. 26 of 1986 provided for the deletion of the word "personal" wherever it occurs after the word "Islamic" in the Constitution, it left untouched the specific jurisdiction of the Sharia Court of Appeal. In other words, the jurisdiction of the Sharia Court of Appeal remains limited to those items enumerated under S. 242(2) (a) (b) (c) and (d) of the Constitution."

The Court of Appeal is therefore manifestly wrong in its conclusion on this Issue of jurisdiction when it opined thus-

"It is clear that since the plaintiff's father Zaranda is now deceased he was claiming the farm land as part of item of inheritance under Islamic personal law since they are both Moslems. It must be either a dispute over any heritable estate which any person withholds away from the heirs or a dispute over the right to make a particular property within the estate in contemplation of Section 242 (2) (c) and (e) of 1979 Constitution. See Garba vs. Dogon Yaro (1991) 1 NLR (part G 165) page 107 at all p. III paragraphs C-F per Okunola JCA."

The consideration of this issue on jurisdiction having succeeded, is enough to settle this appeal without considering the remaining Issues raised.

The appeal succeeds and it is allowed. The judgment of the Court of Appeal is set aside and that of the Sharia Court of appeal Bauchi is hereby declared a nullity for want of jurisdiction. The appeal against

the judgment of the Upper Area Court, Toro dated 21/3/88 is hereby transferred to the appellate division of High Court Bauchi State, for hearing. N10,000.00 costs is awarded to the appellant.

B

KARIBI-WHYTE JSC

I have had the privilege of reading in advance the leading judgment of my learned brother Wali, JSC in this appeal. I agree entirely that the appeal succeeds.

C

The judgment is based on the interpretation of section 242 (2) (c) of the Constitution 1979, which is founded on one of the issues for determination formulated by Appellant in the appeal before us.

D

The facts of the case are quite simple and short. Plaintiff inherited a farmland from his late father Zaranda. It is the case of Plaintiff that his father Zaranda cultivated this land for many years. Defendant who is now claiming the same farm land claims to have inherited it from his own father Magaji. Plaintiff has brought an action against the Defendant in the Nabardo Area Court, which decided in favour of the Plaintiff. The Defendant dissatisfied appealed to the Upper Area Court, Toro, which allowed the appeal. Aggrieved, the plaintiff appealed to the Sharia Court of Appeal, Bauchi, which unanimously dismissed the appeal and affirmed the decision of the Toro, Upper Area Court. Plaintiff then appealed to the Court of Appeal, Jos Division.

F

In a unanimous decision, the Court below held that both the Upper Area Court, Bauchi, and the Sharia Court of Appeal, Bauchi were wrong in their conclusion that the Judgment of the Nabardo Area Court in Suit No. 345/70 between Mangai v. Usman Magaji, subsequently affirmed by the Upper Area Court Bauchi and the Sharia Court of Appeal, Bauchi operated as res judicata against the plaintiff. The Court of Appeal restored the initial judgment of the Nabardo Area Court. The appeal before us is against this decision of the Court of Appeal, Jos Division.

G

H

Both parties formulated issues for determination from the grounds of appeal filed. This judgment is concerned with issue 2 of the Appellant, which is identical with issue 2 of the Respondent. It is as follows -

"2. Whether or not the Court of Appeal was wrong in holding that the Sharia Court of Appeal had jurisdiction to hear the Appeal before it having regard to S. 242 of the 1979 Constitution as amended."

It is both fundamental and elementary principle in the adjudicatory process that where the jurisdiction of the Court or the Judge is in issue in respect of a matter, that issue must first be considered and disposed of. See Kalio v. Daniel-Kalio (1975) 2 SC. 15. This is because any determination in the absence of jurisdiction is a nullity. See Peenok Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1. I have already stated the contention before the Area Court of Nabardo. Although both plaintiff and Defendants claim to derive their title from inheritance from their fathers; the issue before the Area Court, which went on appeal is that Defendant was interfering with the use of Plaintiff of the land. It seems to me obvious this interference cannot be said to be related even if remotely to inheritance.

The jurisdiction of the Sharia Court of Appeal is Constitutional and circumscribed as prescribed in Section 242 (2) of the Constitution 1979.

Section 242 (2) provides as follow -

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

(a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;

(b) Where all the parties to the proceedings are Moslems, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant;

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

(d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance

or guardianship of a Moslem who is physically or mentally infirm; or
 (e) *Where all the parties to the proceedings (whether or not they are Moslems) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question"*

It seems to me unambiguous on a fair construction that the jurisdiction of the Sharia Court of Appeal is confined to and limited to all questions of Islamic personal law regarding the matters prescribed in Sub-sections (2) (a) (b) (c) (d) (e). These subsections relate to marriage and its dissolution, family relationship and guardianship of infants - (a) (b). They also include Islamic personal law regarding wakf, gift, will or succession where the endower, donor, testator or deceased person is a Moslem - (c). The determination of any question of Islamic personal law regarding a Moslem an infant, prodigal or person of unsound mind, or the maintenance of guardianship of a physically or mentally infirm Moslem (d). In all other cases where the parties have requested the Court to determine the case in accordance with Islamic personal law (e).

The contention of Appellant is that the subject matter before the trial court was not for the sharing out of inheritance under section 242 (c), and therefore not within the jurisdiction of the Sharia Court of Appeal. It was submitted that it is a dispute over the ownership of land and does not fall within the provisions of section 242 (2). Learned Counsel cited and relied on Abuja v. Bizi (1989)1 NWLR (pt. 119) 120.

In answer to this contention, learned Counsel for the Respondent relied on the provisions of S. 242 (2) (c) and (e) of the 1979 Constitution to argue that the Sharia Court of Appeal had jurisdiction. The claim before the Court bordered on inheritance and as inheritable title to the land under Islamic law, the trial Courts proceedings and judgment also reflected the application of Islamic law. He argued that Abuja v. Bizi (supra) relied upon by the Appellant is not apposite.

It is well settled by Madukolu v. Nkemdilim (1962) 1 ALL NLR. 587 and numerous other decisions of this Court that a Court has and can only exercise jurisdiction when,

(1) It is properly constituted as regards number and qualification

of members of the bench, and no member is disqualified for one reason or another, and

(2) the subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction, and

(3) the case comes before the Court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

There can be no doubt in the instant case that on analysis, the facts of the case concern competing claims to the ownership of the same land, each claiming to have inherited the land from his father. The contention of learned Counsel to the Respondents that the claim bordered on inheritance as inheritable title to the land is strange reasoning. It is the plaintiff's claim that determines the issue of jurisdiction. - See Tukur v. Government of Gongola State (1989 4 NWLR (pt. 117) 517). The claim undoubtedly does not fall within the provisions of section 242 (2) (c), since it does not come within the concept of wakf, gift, will or succession.

Learned Counsel to the Appellant is quite right to rely on Abuja v. Bizi (supra). The Court of Appeal had construed S. 242 (2) in that case and said;

"The Sharia Court of Appeal under 1979 Constitution has no jurisdiction to determine any matter which is not an issue of Islamic personal law regardless of the fact that parties signed Form CA9 or nor. Mallam Ado & Anor. v. Hajiya Dije (1984) 5 NCLR. 260 at 267."

I entirely agree with this view. The intention of the constitutional provision which is very clear is to confine and limit the exercise of the jurisdiction of the Sharia Court of Appeal to subject-matters of Islamic personal law. The intention cannot be subverted by strained construction of the provision to give it an unintended meaning. The Court of Appeal cannot be right on this issue of jurisdiction when it concluded in this case as follows -

"It is clear that since the Plaintiff's father Zaranda is now deceased he was claiming the farm land as part of item of inheritance under Islamic personal law since they are both Moslems. It must be a

dispute over any heritable estate which any person withholds away from the heirs or a dispute over the right to make a particular property within the estate in contemplation of section 242 (2) (c) and (e) of 1979 Constitution. See Garba v. Dogon Yaro (1991) 1 NLR (pt. 165) page 107 at p. B paragraphs C-F, per Okunola JCA."

This is a complete misunderstanding of the issue before their Lordships. The evidence is not that plaintiff is claiming inheritance from his father Zaranda as part of his inheritance. Plaintiff has already had the farm as inheritance from his father. The Defendant not being a co-inheritor, there can be no dispute over any heritable estate. As I have pointed out already in this judgment, the competing claims of Plaintiff and Defendant to the same farmland cannot be said to be based on inheritance. It is therefore incontestable that the claim of the plaintiff against D the Defendant is not founded on Islamic personal law, and therefore does not come within the provisions of section 242 (2) (c) and (e) as claimed by the Court below.

This case is different and distinguishable from Gwabro v. E Gwabro (1998) 4 NWLR 60 where the disputed farmland constituted part of the heritable estate of the late father of plaintiff which Appellant withheld from him. It was held that the dispute qualified as one of succession which falls within section 242 (2) (c) of the 1979 Constitution. F In Korau v. Korau (1998) 4 NWLR. 212 a unanimous Court of Appeal held that it has no jurisdiction to entertain an appeal which does not raise issues of Sharia personal law.

The question of jurisdiction having succeeded, it is not necessary to consider any other issue. The appeal succeeds and it is allowed. G The judgment of the Court below is set aside, and that of the Sharia Court of Appeal, Bauchi is hereby declared a nullity. The matter decided in the Upper Area Court, Toro dated 21/3/88 is hereby transferred to the Appellate Division of High Court, Bauchi State, for hearing.

H Appellant shall have costs of this appeal which I assess at N10,000.00.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Wali, JSC, that the Sharia Court of Appeal, Bauchi, has no jurisdiction to hear this appeal which is in respect of a dispute over a farmland between the parties. The jurisdiction of the Sharia Court of Appeal has been quite clearly set out in s. 242 of 1979 Constitution. The jurisdiction involves:

"(a) Any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;

(b) Where all the parties to the proceedings are Moslems, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant;

(c) Any question of Islamic personal law regarding a Wakf, gift, will or succession where the endower, donor, testator or deceased person is a Moslem;

(d) Any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or

(e) Where all the parties to the proceedings (whether or not they are Moslems) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question".

The jurisdiction was further confirmed in Section 223 (i) of the Constitution where it was provided thus;

"S. 223 (1) An appeal shall lie from decisions of the Sharia Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law which the Sharia Court of Appeal is competent to decide".

An attempt was made to enhance the jurisdiction of Sharia Court of Appeal when Constitution (Suspension and Modification) Amendment

Decree No. 26 of 1986 provided for the deletion of the word "personal" where ever it occurred after the word "Islamic" in the Constitution. As has been said in the lead judgment, the amendment left untouched the exclusive jurisdiction of the Sharia Court of Appeal in matters concerning Islamic personal law as are disclosed in S. 242 (2) (a - e) of 1979 Constitution. See Abuja v. Bizi (1989) 5 NWLR (part 119) 120.
 B
 C
 D
 E
 F

Land dispute can only be pertinent for determination of Sharia Court of Appeal if it involves any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim. The dispute between the appellant and the respondent does not involve any of the matters I mentioned above. The Sharia Court of Appeal has therefore no jurisdiction to adjudicate in the dispute - Mallam Ado v. Hajiya Dije (1984) 5 N.C.L.R. 260, Garba v. Dogonyaro (1991) 1 NWLR (pt. 165) 102, Fannani v. Saiki (1961 - 1989) 1 Sharia Law Reports of Nigeria.

I therefore agree entirely with my learned brother, Wali, JSC, that the Sharia Court of Appeal, Bauchi has no jurisdiction to determine the dispute between the appellant and the respondents. The appeal is therefore allowed. I abide by all the consequential orders made in the lead judgment, including the assessment on costs.

F

KATSINA-ALU JSC

The issue here is whether this case comes within S. 242 (2) of the 1979 Constitution so as to confer jurisdiction on the Sharia Court of Appeal. A close reading of the facts of this case would reveal that it does not fall within the ambit of S. 242 (2) of the 1979 Constitution. The Constitution has limited the jurisdiction of the Sharia Court of Appeal to "Islamic Personal Law." The claim of the plaintiff is not one based on inheritance. A claim of inheritance presupposes that the parties are claiming from a common owner. This is clearly not the case here even though the parties' claim involves ownership of a piece of land which each party claimed to have inherited from his own father.

I entirely agree with the reasoning and conclusion of my learned brother Wali JSC. I also declare the judgment of the Sharia Court of Appeal a nullity for want of jurisdiction. In the result I, too, allow this appeal and set aside the judgment of the Court of Appeal. The judgment of the Sharia Court of Appeal, Bauchi is a nullity for want of jurisdiction. B
The appeal against the decision of the Upper Area Court, Toro dated 21 March 1988 is hereby transferred to the appellate division of the High Court, Bauchi State for hearing. I also award N10,000.00 costs to the appellant. C

EJIWUNMI JSC

As I was privileged to have read in advance the judgment just delivered by my learned brother, Wali JSC, the appeal is also allowed by D
me for the reasons given in the said judgment. I also set aside the judgment of the Court of Appeal and that of the Sharia Court of Appeal is hereby declared a nullity for want of jurisdiction.

The appellant is awarded costs in the sum of N10,000.00 E

F

G

H