Motions and Appeals

(1) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF LAFIAGI DIVISION
HOLDEN AT LAFIAGI ON 5th THURSDAY OF JANUARY 2012.

BEFORE THEIR LORDSHIPS:

A.A. IDRIS - HON. KADI

M.O.ABDULKADIR - HON. KADI

A.A. OWOLABI - HON. KADI

APPEAL NO. KWS/SCA/CV/AP/ LF/13/2011

BETWEEN

HALIMA TSWAYAN - APPELLANT

AND

TSWAYAN MAMUDU - RESPONDENT

Principle:

Whatever a man gives his wife as a gift shall not be retrieved except where the marriage is terminated before consummation.

BOOKS/STATUTES REFERRED TO:

1. Mukhtasar al – Khalil Ala2 Jawahirul - iklil vol. I p.332
2. Mayyarah vol. 1 on Tuhfa p 224.
3. Ihkamul- Ahkam ala- sharih Ukkam by Abi bakr Muhammed al- Audalusi p. 107.

JUDGEMENT: WRITTEN AND DELIVERED BY M.O. ABDULKADIR

This is an appeal against the decision of the Area court Lafiagi delivered on 27th September 2011. The appellant **HALIMA TSWAYAN** was the plaintiff /complainant while **TSWAYAN MAMUDU** the respondent was the defendant before the trial court. On 22/12\2011 when this appeal came up for hearing both parties appeared before the court, the appellant was represented by Abdul Hameed Rabiu who argued the appeal for and on her behalf while the respondent replied to the argument of the appellant in person.

The cause of action of the appellant before the trial court was petition for divorce. In her words, the plaintiff /appellant stated before the trial court that ; I sue to divorce my husband which for the past two months we have not being living together (sic).

The reaction of the respondent to this claim was that he wanted settlement' and the trial court adjourned the case till another date.

On the adjourned date, the respondent told the court that the settlement was not possible and he prayed the court to grant the request of the appellant for divorce but counter claimed the sum of Ninety Six Thousand Two Hundred Naira Only (₦96,200) In his words on page 2 on lines 3 -4 . The respondent stated as follow:-

> *"I want the court to grant her request*
> *I have dowry to claim from her which*
> *is Ninety six thousand two hundred*
> *naira only (₦96.200.00) (sic)"*

The appellant denied the counter claim except the sum of eight thousand Naira (₦8 000.00) which she knew about.

In her word the appellant said.“

”No. the money is not up to that amount, the court should give me time to call my parent. I only know about the dowry which is according to her ₦8.000.00”(sic)

See page 2 line 5-6 of the trial court record of proceedings. The court adjoined the case till 27/09/2011.

The respondent gave the analysis of how he spent the amount for the appellant, and also called two witnesses. The plaintiff /appellant also called 2 witnesses to defend the counter claim against her.

The trial court having reviewed the case dissolved the marriage and ordered the appellant to pay back to the respondent the sum of seventy thousand two hundred Naira (₦70, 200.00) only.

The appellant being dissatisfied with the decision of the trial court appealed to this court and filed omnibus ground of Appeal and original grounds.

On the 22nd day of December 2011 hearing of this appeal came up before this court. The appellant counsel submitted that out of the five grounds of appeal, he intended to lump grounds, 1, 2 & 5 together while he intended to abandon grounds 3 & 4, The learned counsel also submitted that he would argue grounds 2 & 5 together and argue ground I separately. The counsel also formulated two ssues out of the grounds 2, 4 & 5. they are:-

> *(a) Whether the Respondent is entitled to the refund of all that were given to the appellant as gift under Islamic law.*

(b) Whether under Islamic law a cruelty has been Established against the Respondent.

Under ground 1 the appellant formulated one issue that is

(a) Whether the lower court elicited necessary information and facts from the party before arriving at the decision.

In his submission, the appellant counsel told the court that going by the 1st page of the record of proceeding lines 16-17 where the complainant said that " I sue to divorce my husband which for the past two months we have not been living together (sic)

The learned counsel submitted that for that singular reason, the dispute between the parties has been established and based upon this, some expenses must have been incurred towards the marriage. these expenses are contained on pages 2-3 lines 19 and page 3 line 19 of the lower court record of proceeding.

The counsel also submitted that those expenses were gift in nature (Hadiyah) and gift by husband to his wife is not returnable or refundable under Islamic Law;

The counsel stated further that the only refundable item is eight thousand Naira (₦8.000.00) only. The counsel referred the court to page 2, lines 5 – 6 that if the appellant admitted anything at all therein they are the items of gift. The counsel also referred us to the case of **AISHA IGE VS. ABUBAKAR LAMIDO BANI** (2003) SCA ALR page 101 at 105, He urged us to be persuaded by the

holding of this court in the case and to allow the appeal on this issue alone, and to also restrict to the refundable ₦8, 000.00.

On issue No2, the learned counsel submitted that the appellant who wanted to seek her release on the basis that they had ceased to live together for 2 months gave rise to a presumption that the husband did not care for her and it also showed cruelty and which ought to have been expressly denied by the respondent. The learned counsel submitted that since the respondent did not deny the allegation it means that he admitted it and it was on the basis of lack of staying together for 2 months by the appellant and the respondent that led the court to order for the release of the appellant, The counsel went on to say that if this court upholds issue No. 2 above the respondent would not be entitled to anything.

On issue No3, the appellant counsel submitted that judging from the record of proceedings the lower court had failed to elicit vital issues refundable fact presented before it

The complaint of the appellant at the lower court gave rise to 2 issues.

(a) *What caused the 2 parties staying apart.*

(b) How long have they stayed together before departing.

The learned counsel submitted that these 2 questions had bearing on the claim of the respondent under Islamic law, the 2 questions ought to have been investigated, and by so doing the court would have concluded that the respondent would not be entitled to anything. The learned counsel finally prayed this court to hold that the trial court did not properly try the case and he therefore urged the cour to order for retrial of the case.

In his own part, the respondent submitted that he heard and understood all what the appellant counsel said.

On the issue of staying apart, the respondent said during that 2 months period of staying apart, he sent his people to the parents of the appellant for settlement.

On his own claim, the respondent told us that he enumerated all what he expended on the appellant before the lower court and she agreed with it, He said further that whatever the appellant wants to pay him in respect of the whole claim he is ready to accept it.

The reaction of the appellant counsel to the respondent is reply was that it was an after thought for the respondent to now say that he sent his people to the parents of the appellant during the stay apart because that is not contained in the record of proceeding of the lower court.

We listened attentively to the submission of the learned counsel for the appellant and carefully read through the record of proceedings of the trial court

From the facts of the entire proceedings of the trial court, there is no doubt that it was the appellant who instituted proceedings for divorce in the Area Court Grade 1 Lafiagi on the ground that for the past two months she and her husband had not been living together, that was her claim. While the respondent was asked by the trial court to react to the claim of the appellant he neither objected nor accepted the claim, he only said that he wanted settlement. It was on this bases that the trial court adjourned the case from 14/9/2011 to 21/9/2011 for settlement.

On the adjourned date, the respondent told the court that the settlement was not possible and therefore wanted the court to grant her request for divorce and that he had dowry to claim from her which was ninety six thousand two hundred Naira (#96, 200) only.

It is our view that, the respondent on the facts of this case intended that the appellant should be granted divorce if she paid him his dowry or marriage expenses

In other words, by the pronouncement of the appellant in the case, he intended (Khul'u **خلع**) as a condition precedent for granting the appellant divorce.

Be that is may, on our part we are of the view that the cause of action in this matter before us centers on 2 issues

1. Dissolution of marriage. By way of **khul'u خلع.** by the appellant
2. Counter claim for dowry and other marital expenses raised by the respondent.

On the 1st issue it is vividly clear from the record of proceedings of the lower court that on the 21/9/2011 the respondent herein had already consented to the request of the appellant herein for **khul'u خلع** where he said on page 2 lines 2, 3 & 4

> "*The settlement is not possible*
> *I want the court to grant her*
> *request, I have dowry to claim*
> *from her" (sic)*

From the above therefore, we are of the opinion that the first issue **khul'u خلع** had been properly dealt with by the trial court's decision held on 27th October . 2011.

See the book of Mukhtasar al- Khalil in Jawahiul lklil vol. 1 page 332 which reads:-

"KHUL'U" becomes binding once it is pronounced /consented (by the husband) with or without compensation"	"وبانت بلا عوض نصرعليه "

On issue No 2 i.e the counter claims of dowry and other marital expenses. The totality of the counter claim of the respondent after consenting to the request of the appellant for **Khul'u** was (#96,200) only, the list of which was contained on page 2 lines 14– 17 and page 3 lines 1- 19 under 13 heads.

One of the issues raised by the learned counsel for the appellant herein was whether the respondent was entitled to the refund of all that were given to the appellant as gift under Islamic law.

For proper determination of this issue we are of the view that, this counter claim listed by the appellant can be categorized into two:

(a) Claimable items

(b) Unclaimable items

(a) Claimable item:-The position of the law under Sharia is that:-

> **"*Where the marriage is not declared void, Its dissolution was approved by the trial court on account of khul'u and there was no prior agreement on the exact amount to be paid by the appellant, the permissible cause to take under the circumstance is to order the appellant to refund the dowry."***

We observed from the available facts we gathered from the record of proceedings and the submissions of both parties before us that it was apparent that the marriage between the parties was not declared void, although their marriage was dissolved by the trial court on account of **Khul'u** as the parties did not agree on the specific amount to be returned by the appellant.

This position is supported by the statement of the law in Mayyarah Vol 1 "Commentary on Tuhfa page 224 where lmam Maliki is reported to have said that :-

"I have not seen any woman being demanded

*to pay more than her dowry to get release"(**khul 'u Divorce**).*

See also the famous prophetic hadith of Jamilat Bint Abdullahi

*Where she complained before the prophet mahammed (peace be upon him) that she did not like the appearance of her husband and the prophet asked her to refund his dowry for **khul' u** divorce She was even offering to pay more. but the Prophet limited her to refund the exact dowry only.*

(b) Unclaimable items:-Looking at the list of items of counter claim by the respondent in this matter before us, virtually all of them apart from #8000. 00 given as dowry were items given by the respondent to the appellant herself, her parents, or her family members as gift. most of these items are the consumable and perishable gifts that are usually sent to a woman for winning her love or strengthening matrimonial relationship.

For the above reasons, we are of the view that all such items under category (b) are not claimable under Islamic law.See Ihkamul –Ahkam ala Sharh Hukam by Abi-Bakr Muhammed al Andalusi page 107 thus:-

"Whatever a man gives to his wife in form of Ornaments, cloths (consumable and perishable) Which were referred to as gifts shall not be retrieved except where the marriage is terminated before consummation"

وكل ما يرسله إلى زوجته من البنات والحلى فإن يكن هدية سماها فلا يسوغ أخذه إياه إلا يفسخ قبل ان يبثنيا.

On the whole, we restored the judgment of the trial court i.e. Area Court 1 Lafiagi to the extent of the amount to be paid by appellant which is eight thousand Naira (#8000.00) only. Any amount paid in excess therefore shall be paid back to the appellant by the respondent.

The appeal is therefore successes

SGD	**SGD**	**SGD**
A .A. OWOLABI.	**A.A. IDRIS.**	**M.O. ABDULKADIR**.
HON. KADI	HON. KADI	HON. KADI
05/01\201	05/01/2012	05/ 01/2012

(2) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF OFFA JUDICIAL DIVISION
HOLDEN AT OFFA ON TUESDAY 24TH DAY OF JANUARY, 2012.

BEFORE THEIR LORDSHIPS:-

S.M. ABDUBAKI - HON. KADI

M.O. ABDULKADIR - HON. KADI.

A.A. OWOLABI - HON. KADI.

MOTION. NO. KWS/SCA/CV/M/OF/02/2011.

BETWEEN

MRS. KEHINDE OLATUNDE - APPLICANT

AND

ALHAJI BASHIRU OLATUNDE - RESPONDENT

Principle:

A party will be left alone when he decides to terminate his case.

BOOKS/STATUTES REFERRED TO:

- fawakihu Dawainy Vol 2 p. 299.

RULING: WRITTEN AND DELIVERED BY HON. KADI S.M. ABDULBAKI

The applicant, Mrs. Kehinde Olatunde filed a Motion on Notice dated 17th August, 2011 and filed 18th day of August, 2011 seeking leave for extention of time within which the applicant may appeal against the judgment of Ibolo Area Court 1 No. 2 Offa (suit No.41/2011 delivered on 16th March, 2011; An order and leave of the court extending time within which the applicant may file Notice of Appeal against the judgment; An order deeming the attached notice of appeal as duly and properly filed and served; An order of accelerated hearing of

this appeal; And for such further order or orders as this Honourable court may deem fit to make in the circumstance.

The motion was supported by a four paragraphs affidavit deposed to by one Taiye Wahab, a Typist Secretary in the law office of M.A. Sannit & Co Ilorin. The affidavit has two exhibits A& B attached to it. Exhibits A is the ruling of the trial court while exhibit `B' is the Notice of Appeal.

On 24th day of January, 2011 when this matter was stated for hearing of the Motion on Notice, the parties were absent but S.Ibrahim Esq appeared for the applicant.

Counsel, S. Ibrahim Esq informed the court that he had the instruction of his client to withdraw this application. He therefore sought the leave of the court to withdraw the application due to the intervention of the family members to resolve the matter amicably between the parties.

In view of the application of the applicant's application to withdraw this motion, for amicable settlement between the parties, the court encourages amicable settlement of matters between the parties. Consequently, the court grants the application to withdraw this motion. The matter is hereby struck out.

(SGD)	**(SGD)**	**(SGD)**
(A.A. OWOLABI)	**(S.M. ABDULBAKI)**	**(M.O. ABDULKADIR)**
KADI,	**KADI,**	**KADI,**
24/01/2011	**24/01/2011**	**24/01/2011.**

(3) IN THE SHARIAH COURT OF APPEAL OF KWARA STATE OF NIGERIA IN THE SHARIAH COURT OF APPEAL IN THE SHARE JUDICIAL DIVISION HOLDEN AT SHARE ON (TUESDAY) 31ST JANUARY, 2012

BEFORE THEIR LORDSHIPS:

A.A. IDIRS - HON. KADI SCA

M.A. ABDULKADIR - HON. KADI SCA

A.A. OWOLABI - HON. KADI SCA

MOTION NO. KWS/SCA/CV/M/SH/04/2011

BETWEEN:

MURITALA YAKUBU - APPLICANT

VS

RUKAYAT MURITALA - RESPONDENT

Principles:

1. Grant of extension of time is within the power of the judge to exercise according to the facts and given circumstances of the matter between the parties before him.
2. The Court is to make any order within its powers and jurisdiction which it considers necessary for substantial justice.

BOOKS/STATUTES REFERRED TO:

1. Tabsiratu- Hukkam vol. 1p. 17
2. Order 9 Rule 1 of Shariah Court of Appeal Rules cap 5.4. Law of kwara state, 2006.

RULING: WRITTEN AND DELIVERED BY A.A. IDRIS

The applicant Muritala Yakubu filed an application on the 20th December, 2011. It was supported by a ten paragraph affidavit, deposed to by the applicant. Paragraphs 1-5 of the affidavit shed

light on the causes of action. The sixth paragraph elaborated on the episode that led to his lateness in filing the appeal within one month from the date of the decision of the trial Area Court Share on 15th June, 2011. Paragraphs 7-8 further related his sickness and to crown it all, noted that the respondent would suffer no prejudice or injustice if the application was granted. Paragraph 9 shows his determination to pursue this case diligently if his application succeeds.

On the hearing date, both parties were in court. The applicant showed remorse for his inability to file his appeal within the prescribed period. He stated that he became ill immediately after the decision of the trial court and he was not aware that he could send someone to appeal against the decision of the trial court on his behalf. He then prayed the court to grant his request.

In her brief reaction, the respondent maintained that she had no objection to the applicant's request.

Having listened attentively to both parties and having carefully considered the application in toto, we resolved that the sole issue for determination in this application is whether the applicant in the given circumstances and upon the materials placed before us, was entitled to the relief of extension of time within which to appeal against the decision of the trial court.

In our reaction to the above, we are of the opinion that the circumstances of the applicant especially as stated in paragraph 6 of the supporting affidavit led to the delay of the applicant in filing his appeal. Therefore, we are of the firm opinion that if not because of his health condition he would not have appealed out of time. Since his ill health was the primary cause of his delay, we opined that he should not be made to suffer for the natural predicament which is beyond his control.

Secondly, in his affidavit in support of his ground of appeal he maintained that the procedure followed by the trial court to terminate their marriage was too hasty.

We opined that these two grounds cited out of the four grounds of application have shown prima-facie good cause why the request should not be handled with levity. More so, Islamic law practice and procedure maintains:

> *Grant of extension of time is within the discretion of the judge to be exercised according to the facts and given circumstances of the matter between the parties. (see Tabsirat Hukkam vol. 1 page: 171)*
>
> **"وضرب الأجل مصروف إلى اجتهاد الحكام بحسب حسن النظر في أمر الخصمين ..." (تبصرة الحكام ج 1, ص 171).**

In furtherance to this, Order 9, Rule I, Shariah Court of Appeal Rules, Cap S.4 2006 Laws of Kwara State stipulates thus:

> *"The court in its discretion makes any order within its powers and jurisdiction on which it considers necessary for doing justice".*

The above quoted authorities show that the applicable laws in the issue before us are both statutory and under Islamic Law, practice and procedure. It is required that exercise of judicial discretion should not be made arbitrarily; rather, it must be exercised judicially and judiciously.

We observed that the reason for failure to file Notice of Appeal in time as enumerated in the affidavit is that he was ill which is a good reason for the success of this application because the issue of

illness cannot be dismissed with impunity and going by the above, we opined that this application has fulfilled the requirement of the law; thus, it is meritorious and the request is hereby granted.

We therefore extend time for appeal to a period of fourteen days from today, within which the applicant is to file his notice and grounds of appeal.

Application succeeds.

SGD	**SGD**	**SGD**
A. A. OWOLABI	A.A. IDIRS	M. A. ABDULKADIR
HON. KADI	HON KADI	HON. KADI
31st January, 2012	31st January, 2012	31st January, 2012

(4) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY 7TH DAY OF FEBRUARY, 2012.

BEFORE THEIR LORDSHIPS:-

S.M. ABDUBAKI - HON. KADI

M.O. ABDULKADIR - HON. KADI.

A.A. OWOLABI - HON. KADI.

MOTION. NO. KWS/SCA/CV/M/IL/02/2012.

BETWEEN

ABDULKADIR LANRE ABUBAKAR - APPLICANT

AND

MRS SHERIFAT TITILAYO ABDULKADIR - RESPONDENT

principle:

The applicant's prayer for the withdrawal of his application by himself should be granted as whose silence puts and ends to his case.

BOOKS/STATUTES REFERRED TO:

Fanrakihu Dawamy vol. p. 220.

RULING: WRITTEN AND DELIVERED BY HON. KADI S.M. ABDULBAKI

This is a Motion ex parte by the applicant herein. The motion is dated and filed 24th day of January, 2012 is praying for

1. Order granting leave to the Applicant/Appellant to serve the respondent in this appeal by means of substitution service to wit by pasting the Notice of the Appeal, Record of Proceeding of the lower court and other court processes in this appeal on the wall of the Respondent at his last known address of Abode along University Road Tanke Ilorin within the jurisdiction of

this court and deem same as order deeming this mode as good and proper services.

On 7th day of February 2012 when this motion was slated for hearing, the parties were absent. But counsel Akyinla Ismaila Aremu appeared holding the brief of the applicant's counsel for the applicant/appellant.

Aremu, Esq. informed this court that he has two motions before this honourable court. The first one is the one dated 24th January, 2012 and the second one is the one dated and filed on 31st day of January, 2012. He sought the leave of this court to withdraw the motion dated and filed 24th day of January, 2012.

This honourable court considers the leave to withdraw the motion ex parte dated and filed 24th day of January, 2012 and feels that the withdrawal of the ex parte motion will not be prejudicial to the interest of the respondent. So leave to withdraw the ex parte motion is hereby granted as prayed. The motion ex parte dated and filed the 24th day of January, 2012 is hereby struck out.

(SGD)	**(SGD)**	**(SGD)**
(A.A. OWOLABI)	**(S.M. ABDULBAKI)**	**(M.O. ABDULKADIR)**
KADI,	**KADI,**	**KADI,**
07/02/2012	**07/02/2012**	**07/02/2012.**

(5) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY 7TH DAY OF JANUARY, 2012

BEFORE THEIR LORDSHIPS:-

S.M. ABDUBAKI - HON. KADI

M.O. ABDULKADIR - HON. KADI.

A.A. OWOLABI - HON. KADI.

MOTION. NO. KWS/SCA/CV/M/IL/02A/2012.

BETWEEN

ABDULKADIR LANRE ABUBAKAR - APPLICANT

AND

MRS SHERIFATU TITILAYO ABDULKADIR - RESPONDENT

principle:

The plaintiff would be left alone if he decides to terminate his appeal.

BOOKS/STATUTES REFERRED TO:

- Fanrakihu Dawamy vol. p. 220.

RULING: WRITTEN AND DELIVERED BY HON. KADI S.M. ABDULBAKI

The applicant AbdulKadir Lanre Abubakar, filed a motion Ex parte dated and filed 31st day of January, 2012 praying for the following:

1. Order granting leave to the Applicant/Appellant to serve the respondent in this appeal by means of substitution service to wit by pasting the notice of Appeal, Record of proceeding of the lower court and other court processes in this Appeal on the wall of the Respondent at his last known address of Abode

along University Road, Tanke, Ilorin within the jurisdiction of this court and deem same as order deeming this mode as good and proper services.

2. AND for such order or further orders as the court may deem fit to make in the circumstance.

On 7th day of February, 2012 when this application was set for hearing the parties were absent. But Ayinla Ismaila Aremu, Esq. appeared for the Appellant/Applicant. He moved the motion ex parte informing the court that it is a motion ex parte supported with ten (10 paragraphs of affidavit sworn to by counsel Ayinla Islmail of No. 34 Unity Road Ilorin. He relied on the paragraphs of the affidavit especially paragraphs 3 and 4 thereof. He prayed the court to grant the application.

We consider this application and believe that by paragraph3 of the affidavit the applicant has explained clearly where the respondent can be reached with the court processes of this matter.

It is in the light of the above that the court believes that the respondent can become aware of this matter. Consequently, we hold that the application has merit and ought to be granted.

We further holds that if the Notice of Appeal in this instant appeal is pasted on the wall, as described in the affidavit together with the other court's processes, the respondent will become aware of this matter. Order as prayed.

Application succeeds.

(SGD)	**(SGD)**	**(SGD)**
(A. A. OWOLABI) **KADI,** **07/01/2012**	**(S.M. ABDULBAKI)** **KADI,** **07/01/2012**	**(M.O. ABDULKADIR)** **KADI,** **07/01/2012**

(6) & (7)

IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON THURSDAY 9TH FEBRUARY 2012

BEFORE THEIR LORDSHIPS:

I.A. HAROON - HON. GRAND KADI

A.A. IDRIS - HON. KADI

S.M. ABDULBAKI - HON. KADI

APPEAL NO. KWS/SCA/CV/AP/IL/10/2007
APPEAL NO. KWS/SCA/CV/AP/IL/01/2008

BETWEEN

KIRE LAWAL - APPELLANT/RESPONDENT

AND

HAJARA CHIROMA AUTA - RESPONDENT/APPELLANT

principle:

The plaintiff is he whose silence puts an end to litigation

BOOKS/STATUTES REFERRED TO:

Al- fawakhu Ad- dawaniy vol.2, P.220.

RULING: WRITTEN AND DELIVERED BY I.A. HAROON

The appellant in the instant appeal; Kire Lawal was the defendant while the respondent; Hajara Chiroma Auta was the plaintiff at the Upper Area Court I, Ilorin. She instituted a court action against the appellant at Upper Area Court I, Ilorin to seek for assistance in the distribution of the estate of her late husband and for the custody of her male child simply referred to as Rabo. The trial court, having listened to the statements of the two parties involved in the matter, granted the custody of the child in question to the plaintiff/respondent. The appellant who was aggrieved by this

decision of the trial Court thereafter appealed to our Court for a redress.

On the 9th day of February, 2012 when the matter came up for hearing before us, both parties were absent but their counsel were present. The appellant was represented by Yusuf O. Ojo, *Esq.*, while the respondent was represented by Nu'man Sulaiman, *Esq.* The appellant counsel; Yusuf O. Ojo, *Esq.* submitted that the appeal had been overtaken by events and had since been settled. He then prayed us to withdraw the matter. In his response, the respondent counsel; Nu'man Sulaiman, *Esq.* did not object to the prayer of the appellant for the withdrawal of the appeal in question. He went further to pray us to consider the withdrawal of a similar matter in **Appeal No. KWS/SCA/CV/AP/IL/01/2008** in which he is appearing for the respondent (therein the appellant) in a matter of inheritance of her late husband; while in the said appeal, Kire Lawal and three (3) others were the respondents.

It was our well considered view that since the counsel to the appellants opted for the withdrawal of the two appeals their matters became terminated and thus struck out in line with our law which says:

The plaintiff is he whose silence put an end to litigation. (see: Al-Fawaki Ad-Dawani, Vol. 2, p.220)

المدعي هو الذي لو سكت لترك على سكوته

(الفواكه الدواني، الجزه 2، صفحة 220)

SGD	SGD	SGD
S.M. ABDULBAKI	**I.A. HAROON**	**A.A. IDRIS**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
09/02/2012	**09/02/2012**	**09/02/2012**

(8) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF LAFIAGI JUDICIAL DIVISION
HOLDEN AT LAFIAGI ON TUESDAY 14TH FEBRUARY 2012

BEFORE THEIR LORDSHIPS:

A. A. IDRIS - HON. KADI

M. O.ABDULKADIR - HON. KADI

A. A.OWOLABI - HON. KADI

APPEAL NO: KWS/SCA/CV/AP/LF/06/2011

BETWEEN:

MALLAM YAMUSA - APPLICANTS

MALLAM NDAGI BA'A

AND

FATIMA SA'AGI YAMUSA - RESPONDENT

Principle:

An appellate court can affirm the decision of the trial court if it followed the laid down law and procedure under the golden rule of Islamic law

BOOKS/STATUTES REFERRED TO:

1. Muwata Malik vol. 4(Arabic) p.8
2. Fatiju Rabani Sharih al Nlzam Risalat bn Abi zaid by Mohammwd Ahmad p. 245& 246.
3. Area Court law cap A9 section 23(1)law of kwara state 2006.
4. Shaihu al- kabir bn Qudomat vol.9 p.299

JUDGMENT WRITTEN AND DELIVERED BY: A. A. IDRIS

This is an appeal by the AppellantS Mallam Yamusa, Mallam Ndagi Ba'a against the ruling of Area Court Lafiagi. At the trial

Court, the plaintiff / respondent, Fatima Sa'agi Yamusa sued her parents for maltreatment for refusal to marry a man of her choice. During the process of submission of the counsel for and against at the prevailing situation, the trial court ruled that the guardianship of the respondent was given to the Emir of Lafiagi pending the determination of the case.

Dissatisfied with the ruling, the appellants therein appealed to this court on the following grounds that:

The Lafiagi Area Court erred in law when he gave the custody of the plaintiff to the Emir of Lafiagi instead of either of the parents or their relation as prescribed by Islamic law.

Particulars of ERROR IN LAW

(i) The case of the plaintiff against the Appellant at the lower court, though affects choice of spouse or consent of the Girl child in matter of marriage gives rise to issue of custody (sic)

(ii) The custody of the plaintiff, not withstanding her case, resides with her parents and alternatively in the parent's relation (sic)

RELIEF SOUGHT FROM THE SHARIAH COURT

An order setting aside the order of the Lafiagi Area Court made on 30th day of March 2011 and an order giving the custody of the plaintiff to her parents alternatively an order giving the custody of the plaintiff to the relation of the mother pending the determination of the plaintiff case (sic)

When the case came up for hearing on the 5th January, 2012 the counsel for the appellant submitted that the appeal was against the ruling which was delivered by the Lafiagi Area Court Grade I on the 30th March, 2011 in which the court gave the guardianship of the appellant to the Emir of Lafiagi without exhausting the options provided under the Islamic Law. He further submitted that they filed

single ground of Appeal against the ruling which was in the amended notice of Appeal dated 5/1/2012. He then formulated one single issue for the determination of this appeal, thus:-

> *Whether in Islamic Law guardianship can be given to a monarch without exhausting the options provided by law?*

On this issue, he lamented a situation where award of a child was given to another person for safety which related to the issue of guardianship…..as it would be seen later in the record of proceeding. He elaborated further, that the terms '**guardianship**' and '**custody**' were interwoven, though, custody, to him, was wider in scope than guardianship…….

He explained that in the course of the hearing of the substantive case before the trial court on the 30th March, 2011, the guardianship of the appellant was withdrawn from the father to the Emir by the trial court against the provision of the Islamic Law. In order to support his stand, he cited a tradition in Muwwata Imam Malik Volume 4 (Arabic) page 8 where the Prophet (SAW) was reported to have said

> *Do not marry out a girl except with the permission of the guardian or those who have authority over her among her relations or a monarch.*
>
> **لا تنكح امرأة إلا بإذن وليّها أو ذي رأي من أهلها أو سلطان.**

According to him, he stated that the above hadith had illustrated the position of guardianship in Islamic Law and on whom it devolved and its hierarchical order. The learned counsel later explained that closely connected with that issue was the issue of custody in Islamic Law which covered the issue of guardianship, as shown on p2 lines 20-23. In that page the court held that the father had abused the privilege given to him by putting the Appellant into marriage against the order of the court. He maintained that the trial

court had jumped the order of the hierarch provided by the Islamic Law and awarded the guardianship to the monarch. He further submitted that the relations of the father were among the competent guardians in Islamic Law and where the father fails in his task, he asserted that uncle is still a competent guardian.

He again averred that the right of the custody did not exclude even the relations of the mother, but the trial court ignored to follow all these options which, to him, led to miscarriage of justice. He stated that in Islamic Law of justice had laid down criteria but not static. The Prophet was reported to have said.

Woe on those who separated child with their parents. لعن الله من فرّق بين الوالدة وولدها

He then quoted Fatihu al-Rabani Sharih al-Nizam Risalat bn Abi Zaid by Muhammad Ahmad P. 245 particularly P. 246 where it was reported from Abdullahi b. Umar b. As that the Prophet SAW said:-

Abdullahi b. Umar said that a woman complained to the messenger of Allah saying. This my child my stomach was his abode, my thigh was his playing centre, my breast was the reservoir to quench his thirst. His father wants to take him from me; He replied her saying: "You have better claim to the guardianship than his father as long as you have not married.

فعن عبد الله بن عمرو أن امراة قالت: " يا رسول الله إن ابني هذا كان بطني له وعاء وحجري له حواء وثدي له سقاء وزعم أبوه أنّه ينزعه مني فقال: أنت أحقّ به مالم تنكحي" راجع: فقه السنّة تأليف السيد سابق ج ٢, ص ٢١٨

According to the learned counsel to the appellant, the guardianship of a monarch occupied the ninth position in a hierarchical order as has been provided for in the commentary of this tradition which was agreed upon by the consensus of Malik Jurists.

He further submitted that in the case at hand where it was shown by the record of proceedings of the trial court that the father had abused the privilege given to him by subjecting the respondent to marriage as indicated in the ruling under discussion where he stipulated in lines 23 – 25 that

> ***"She is a matured girl on which we cannot be dictating to her an issue of guardian. But we are on issue of marriage. (sic)***

To him that was a negation of Islamic Law principle. This was because the issue of guardianship in Islamic Law of the female child is until her consummated marriage. He further submitted that the case at the trial court related to marriage, which gave rise to who would be the proper guardian to the appellant. He therefore urged the court to allow the appeal and give guardianship of the appellant to any of the relations of her father. To him, whoever had the right of custody had the right of guardianship.

In his response the counsel to the respondent submitted that he urged the court to discountenance the submission of his learned friend, because the authorities cited by his learned friend had no bearing on the appeal at hand. This was because the respondent filed a suit at Lafiag Area Court Grade I in which he sought for the order of the trial court to allow her marry a man of her choice. When they first appeared in court, the court ordered the respondent to follow her parents home and the parents were given stern warning not to put the respondent into forced marriage (see p.2 lines 1-4) but unfortunately, the court order was ignored with impurity by the appellant, and consequently, in order not to render the court helpless, it ordered the

appellant to be kept under the guardianship of Emir of Lafiagi pending the determination of the case. He therefore urged the court to dismiss the appeal and affirm the decision of the trial court. He cited Area Court Law Cap A9 section 23 (1) Laws of Kwara State 2006 which stipulated thus:-

> *In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration*

In line with the above quoted law he urged the court to allow the respondent to stay with the Emir of Lafiagi pending the determination of the case at the trial court for the welfare or well being of the respondent.

In his response, the learned counsel to the appellant submitted that on the issue of section 23 (1) Area Court Law cited by the counsel to the respondent that the welfare envisaged in that section should not be an imposed welfare and that there was no where the court mentioned anything relating to the welfare of the respondent. He submitted further that it was not only that section that concerned itself with the welfare but the Islamic Law cited earlier was after the wellbeing of the child (respondent). He further maintained that Malik Law is the applicable law in Nigeria and the provision of section 23 (1) of Area Court law had to conform with the Malik Law not vise-versa.

Finally, he submitted that welfare should be interpreted in the light of the Islamic Law provision and should not be based on speculation or imposition by the trial court.

Having gone through the grounds of Appeal filed by the appellants the record of proceedings and the ruling of the trial court which brought about this appeal. and having equally considered the authorities cited by the learned counsel on both sides, we are of the opinion that the main issue for determination is as follows:-

Whether the trial court was in error have to appointed the Emir of Lafiagi to serve as custodian/guardian for the respondent pending the determination of the case without having exhausted the options provided by the Islamic Law as reflected in his short ruling.

To do justice to this case we opined that the most important aspect that is required to be given more attention than anything else in this appeal, is the substance of the case which of course bothers on the appointment of the Emir of Lafiagi as the guardian of the respondent by the trial court pending the determination of the case at the trial court.

However, it is necessary to clarify the terminological misconception between the words custody and guardianship known in Islamic Law as Hadanah and Wilayat. According to Imam Malik, Hadanah means protection and care for a child in his worldly affairs such as providing provisions for feeding, clothing and cleanness of his body. This is applicable to a person who is not independent in taking care of his body. Therefore, Hadanah terminates at the attainment of maturity. This is in line with Islamic Law which stipulates, thus

The custody of a male child terminates with child attainment of puberty and for the female child till she sees her menstruation or marries

يحضن الغلام إلى أن يبلغ والجارية إلى أن تنكح أو تحيض " راجع: الموعونة على مذهب عالم المدينة الإمام مالك بن أنس تأليف القاضي عبد الوهاب البغدادي ج ٢, ص ٩٣١

The issue of Hadanah arises as a result of the death of the father or separation of the couples; see Sharh al-Kabir by Ibn Qudamat Vol. 9 page 299.

According to Malik, Hadanah means protection and care for

وعرّفها المالكية بأنّها: حفظ الولد في مبيته

ومؤنة طعامه ولباسه ومضجعه وتنظيف جسمه بمعني أنّ المحضون هو الأذى لايستقلّ بأمور نفسه, وعلى هذا لا تثبت الحضانة على البالغ الرّشيد؛ لأنّه يستقّ بأمور نفسه. (المغني مع الشرح الكبير لابن قدامة جزء٩ صفخة ٢٩٩)

a child in his worldly affairs such as providing provisions for feeding, clothing and cleanness of his body. This is applicable to a person who is not independent in taking care of his body. Therefore, Hadanah terminates at the attainment of maturity.

Guardian (Waliyyu on the other hand means one who has full authority over a girl and the right to give her away in marriage. Included in guardianship, is the father, followed by the full brothers and continues in an hierarchical order. These, in short, are those without whom a marriage cannot be contracted. They are known as natural guardians

In our view, we hold a strong point that in the instant situation neither Hadanah (custody) nor Wilayah (guardianship) was the issue. The two terms cannot be used interchangeably. The respondent in question cannot be regarded in Shariah as being under the custody of the Emir of Lafiagi because she has attained the age of puberty or maturity. Similarly the Emir is not considered the Waliyyu al-Amr of the respondent, because in Shariah under normal circumstance he has no first order authority to give her away in marriage. The respondent has only been kept under the protection of the Emir to prevent her further maltreatment before the determination of the case.

The position of the law is very clear on both Hadanah and Wilaya. Parents are always viewed as the most rightful and most appropriate persons to be responsible for the custody and guardianship of their wards under normal circumstances. It is clear that what led the trial court to order that the respondent be kept under

the guardianship of the Emir of Lafiagi pending the determination of the case was due to the harassment and intimidation of the respondent by her parents. The actions of the respondent and trial court in this respect were in line with the Islamic injunction which stipulates, thus:-

If one's fundamental Human Right is violated by another person which he could not bear, the injured person should complain his case before a judge who shall order for the stoppage of such violation and shall execute his order to allow peace and justice to prevail among the people.

إذا وقع على شخص من شخص آخر ضرر لم يحتمله ورفع أمره للقاضي وجب على القاضي أن يحكم بإزالة الضرر ووجب على الحاكم تنفيذ ما حكم به القاضي تحقيقا للعدل والأمن بين الناس.

راجع: القواعد الفقهيّة بين الأصالة والتوجيه
تأليف: الدكتور محمد بكر إسماعيل

Therefore, the protection order made by the trial court was in order, It was necessary to make such order to prevent human right abuse by the parents of the respondent. The Emir in this circumstance is seen as one who was formally appointed to look after the welfare of the respondent pending the determination of the case before the lower court. In Shariah it is only the court that can make such an order during family proceedings (like the case at hand) Prophet (S.A.W.) is reported to have said:-

There is no harm to be inflicted or reciprocated.

فلا ضرر ولا ضرار

We disagreed with the submission of the learned counsel for the appellant where he submitted that the lower court had withdrawn the guardianship of the respondent from the father of the respondent and concluded that such action negated the provision of the Islamic

law and to support his stand, he quoted hadith from Muwata al Imam Malik which says

Do not marry out a girl except with the permission of her guardian or those who have authority over her among her relations or a monarch.	لا تنكح امرأة إلا بإذن وليّها أو ذي رأي من أهلها أو سلطان

The above quoted tradition was misplaced and misconceived, because the issue at hand has no bearing on Waliy al-Amr. This is because there was no such order or decision in the ruling of the trial court that could convince this court that the respondent was kept under the guardianship of the Emir so that he could marry her to a man of her choice but to remain under his custody pending the decision of the lower court. This point is clearly stated in the ruling of the lower court where it stipulated thus:-

> *In view of the situation of the above case, and the attitude toward the defendants as they have done to her before, when the court handed over the plaintiff to them by forcefully putting her into marriage. The court can not repeat such again. She is a mature girl on which we cannot be dictating to an issue of custody. But we are on issue of the choice marriage.*
>
> *In view of this, the court ordered the Emir of Lafiagi to take care of the custody of Fatiman pending the determination of the case (sic)*

We opined that the right of custody/ guardianship of the appellants had been forfeited by subjecting their ward to marriage against her wish, which reflected a violation of human right and intimidation. It is trite in Islamic Law that in any matter relating to the guardianship of wards, the interest and welfare of the child involved shall be the first and paramount consideration. Thus, her

custody should lie within the secure and comfortable hand and as such she was kept under the guardianship of the emir pending the determination of the case at the lower court. We therefore, agree with the submission of the learned counsel for the respondent that the interest and welfare of the child shall be the foremost paramount, this is in tandem with Islamic Law of Imam Malik.

In Islamic Law, it is the court that can designate the guardianship or custody of a child to any secure and comfortable hand where there is a domestic violence and abuse. The lower court was therefore right to have designated the guardianship of the respondent to the Emir pending the determination of the case because of the hostility of the parents towards the respondent. This is because in this situation the only protection that the lower court could offer when the parents were no longer fit as guardians was to put the respondent under the guardianship of the Emir of Lafiagi, who is the real custodian of all the inhabitants of his domain pending the decision of the lower court. Therefore the tradition cited by the learned counsel and his submission on this aspect go to no issue and we so hold.

In the same vein, we disagree with the submission of the learned counsel for the appellant where he maintained that the trial judge had jumped the options of the hierarchy provided by the Islamic Law and awarded the guardianship to the monarch and relied on the hadith which stipulates thus:

> *Woe to man who separates child from their parents.* لعن الله من فرّق بين الوالدة وولدها

Both the submission and cited tradition were misconceived and misplaced. For this reason, therefore we do not find any substance in the submission of the learned counsel for the appellant on this issue,

since the trial court subject to particular rules, may, in all causes and matter, make and order which it considered necessary for doing justice, whether such order has been expressly requested for by any party to the case or not. This is because no judge can afford to ignore any thing that will assist the cause of justice which forms a vital part of the core values of Shariah.

Furthermore, the circumstance that led the Prophet (S.A.W) to say this tradition is completely different with the episode at hand.

We therefore resolved this issue against the appellant i.e. (his misplacement of argument).

We regarded the references and reliance placed by the learned counsel for the appellant on Fatihu al-Rabani Sharh al-Nizam Risalat from which he quoted laboriously on the issue of Hadanat and Wilayah was misplaced and misconceived, because the period set out by Islamic law for the Hadanah had elapsed; the character involved is a matured woman and both parents are still together, their right of guardianship was forfeited because of their human right abuse. And as such there was no substance in his submissions on this issue.

In view of the foregone and the authorities cited we over ruled the submission of the learned counsel for the appellant because he did not cite any relevant authority that would allow us to change the ruling of the lower court. We therefore affirm the ruling of the trial court pending the determination of the case by the same trial court.

Finally, we must mention here that we are not happy with both learned counsel for and against in this case which was filed sometime on the 6th April, 2011 barely ten months nine days instead

of them to pursue this case diligently, they involved themselves in requesting for frivolous adjournments which did not allow the court to hear the substantive case talk less of determining the appeal in time.

This appeal therefore fails and we so hold.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**A. A. IDRIS**	**M. O.ABDULKADIR**
HON. KADI	**HON. KADI**	**HON. KADI**
14/02/2012	**14/02/2012**	**14/02/2012**

(9) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON WEDNESDAY, 14TH DAY OF MARCH,2012
7TH RABIUL AWWAL 1433

BEFORE THEIR LORDSHIPS:

SHEHU .M. ABDULBAKI - HON. KADI
MUHAMMED .O. ABDULKADIR - HON. KADI
ABDULWAHAB .A. OWOLABI - HON. KADI

APPEAL NO. KWS/SCA/CV/AP/IL/14/2011

BETWEEN:

MRS.SHERIFAT ABDULRAZAQ - APPELLANT

AND

ALFA ABDULRAZAQ IBRAHIM - RESPONDENT

principles:

1. A husband divorcing his wife is enjoined to give her a gift according to his means.
2. The responsibility of maintenance of children of marriage is squarely on the father.
3. Maintenance of children under Islamic law connotes: feeding, clothing, Education, care for health of the children and their accommodation.
4. Cost or quantum of maintenance by the father on his children shall be assessed in line with his capability and give his financial disposition.

BOOKS/STATUTES REFERRED TO:

1. Quran chapter 2 verse 236

2. Bidayatul Mujtahid wanihayatul Muqtasid by Ibn Rusd Al-qurtabi Vol. 2 P.98.
3. **Ihkamul Ahkam** short commentary on **Tuhfatul Hukkam** by Muhammad Ibn Yusuf Al- Kafi page Page 147.
4. **Thamarul Dani** commentary on **Risalat** by **Ibn Zaid Al-qairawani** page 566-567.
5. **Al-Bahjat** commentary on **Tuhfatul Hukkam** by Abul Hassan Aliyu bn Abdulsalam Attasuli Vol 1 Page 382
6. **Ihkamul Ahkam** short commentary on **Tuhfatul Hukkam** by Muhammad Ibn Yusuf Al- Kafi page 148
7. Quran chapter 65 verse 7 states.
8. Section 23 of the Area Court Laws Cap A9 Laws of Kwara State 2006.

JUDGEMENT: WRITTEN AND DELIVERED BY A. A. OWOLABI

The respondent Mrs. Sherifat Abdulrasaq on 23/2/2011 sued the appellant Alfa Abdulrasaq Ibrahim before the Area Court I No. 1 Centre Igboro, Ilorin for dissolution of marriage between them on the premises that the appellant's behavior was no more compatible with his life therefore he had lost love and interest in her.

The appellant did not concede to the request on the ground that both of them had six (6) children out of which two are deceased while four are alive: two males and two females.

The trial court adjourned the case to 16/3/2011 for possible reconciliation and report. On 16/3/2011 it resumed sitting and requested for report on the attempt of settlement between the two parties. The respondent reported that settlement was "not possible in any way or form" and he prayed that the marriage between them be dissolved.

The appellant insisted on reconciliation but in the alternative she said "if that is what the plaintiff whishes, I have no option than to accept what he desires, while doing that by him, I will like the custody of my other three children under the custody of the plaintiff presently (sic). The children's names and ages are :(1). Abdulrasaq Falilatu 11 years (2) Aliyu 7 years sand (3) Ayisat 5 years (sic).

The father of the appellant reported to the trial court his unsuccessful effort to reconcile the parties. The trial court rightly exhorted the parties by applying purgation (Izar).

The trial court dissolved the marriage between the respondent and the appellant with an order that the respondent should pay the appellant the sum of N3,000:00 per month as maintenance and N1,500:00 for accommodation for the three months of waiting period **(Iddah**) totaling N13,500:00. The trial court further granted custody of the children of the marriage to the appellant and that the respondent should pay the sum of N2, 000:00 per month for each of the four children.

The appellant felt dissatisfied with that part of the judgment relating to the issue of maintenance of the children of the marriage, she then filed a Notice of Appeal dated 14/10/2011 pursuant to an order for an enlargement of time within which to file Notice of Appeal which was granted by this court on 30/9/2011.

The appellant filed the following three (3) grounds of appeal:

1- That the decision of trial Court Area Court 1 No. 1 Centre Igboro is unreasonable unwarranted.

2- That the amount of N13, 500 awarded by the trial Court is unreasonable to take care of the 4 children

3- That the respondent could not take care of the children since the house has been turned to hemp smoking & Alcohol drinking place with his new wife and friends.

On 25/1/2012 when the appeal came for hearing, this court acceded to the further plea of the appellant for reconciliation between her and the respondent. We therefore adjourned hearing of the appeal to 7/2/2012 for either report of settlement or hearing.

On 7/2/2012, after exhorting both parties on the issue of settlement, it was apparent that reconciliation was not possible and since the divorce sought by the respondent was a revocable one, this court moved to hearing of the appeal.

The summary of her address before this court was that the amount of N2,000:00 awarded for the maintenance of each child was inadequate.

The appellant stated that she wants the respondent to take responsibility of maintaining their four children of the marriage in terms of their accommodation, feeding, clothing health and education in the total sum of N35,000:00 and to order the respondent pay any such assessed sum as may be assessed by this court to the registry of this court. She further requested for vehicle to convey the children to and from school. She explained that this is possible and convenient for the respondent because he is having four vehicles in his fleet of cars. In addition, the appellant requested for business money. She gave this court the source of income of the respondent that he is an International Islamic cleric who coordinates and offers prayer for his clients within Nigeria and outside Nigeria. He is also an Arabic teacher. She stated that the respondent travels out of Nigeria to America and Ghana for that purpose and she mentioned that he always collects his fees through Western Union Money Transfer. She added that the respondent in addition does business of selling vehicles. She concluded that she could not estimate the total monthly income of the respondent. She then pleaded that the respondent should take up either a two bed room flat or a room and parlor self- contained apartment for the children to

avoid co-tenant's trouble or violence in line with their previous discussion with the respondent.

In response to the appellant's explanation of the respondent's income the respondent stated that he is not a businessman but admitted that he is an Islamic cleric and offers prayers for people. He therefore agreed to be paying the sum of N3,000:00 per month for each of the child for the general cost of maintenance. He also agreed to secure a room and a parlor apartment for the children.

On the money for business which was requested for by the appellant, the respondent informed the court that he had earlier provided the appellant with the sum of N30,000:00 to start a business. We hold that this exercise of the respondent is highly appreciated when a husband divorces his wife. This act is what is termed in Islamic law as gift of consolation Mut'at (المتعة) in line with the Quran chapter 2 verse 236.

" ومتعوهن علي الموسع قدَره وعلى المقترِ قدره متاعاً بالمعروف حقاً على المحسنين" .

سورة البقرة آية 236

Meaning: ''But bestow on them (a suitable gift) the wealthy according to his means and the poor according to his means. A gift of a reasonable amount is due from those who wish to do the right thing''

Imam Malik highly recommended gift of consolation to a divorcee. See **Bidayatul Mujtahid wanihayatul Muqtasid by Ibn Rusd Al-qurtabi** Vol. 2 P.98. It was added that gift of consolation is to show appreciation to previous marital relationship between the couple in Islamic law relating to divorce.

We find that the appellant in her grounds and address before this court is not contesting the order of divorce or the N3, 000:00 per month which was awarded for three month for her maintenance

during the waiting period (**Iddah)** or N1,500:00 per month for that period for her accommodation totaling N13,500:00. The appellant in sum is challenging the allowance of N2,000:00 which was awarded for maintenance of each child of the four children of marriage. The respondent before this court also conceded to increase the said sum to N3,000:00 per each child of the four children. This is in addition to accepting to be paying for the cost of a two room accommodation and also to take responsibility of the children's school fees and health. The respondent however stated that he could not afford to give out a vehicle for purposes of conveying the children to and from their schools because the children's schools are close to their residence.

The question to be asked now is that is the sum of N2, 000:00 or N3,000:00 per month adequate for total maintenance of a child in the circumstance of this case and at present time?.

It is unanimously agreed by Islamic jurists that responsibility of maintenance of children of marriage in Islamic law is squarely on the father. We refer to **Ihkamul Ahkam** short commentary on **Tuhfatul Hukkam** by Muhammad Ibn Yusuf Al- Kafi page Page 147.

{ويجب على الأب مواصلة النفقة على بنيه إلى الأمد الذي تسقط فيه النفقة عليه. وهو في الذكور لغاية البلوغ عقلاء قادرين على الكسب وإلا استمرت. وفي الإناث للدخول على الأزواج أو الدعوة إليه. وتنقطع بذلك فإن تأيمت قبل البلوغ رجعت لها النفقة}.

راجع إحكام الأحكام على تخفة

Meaning: ''It is obligatory on the father to extend maintenance to his children up to a stage when he will be relieved from the maintenance; in respect of male children who are sane and capable of engaging in work until they reach the age of puberty, become matured and capable

of engaging in works and earning living on their own, while for the females until they are married and their husbands consummate the marriage or invite them for that''.

الحكام لمحمد بن يوسف الكافي صفحة **147**.

See also **Thamarul Dani** commentary on **Risalat** by **Ibn Zaid Al- qairawani** page 566-567

الثمر الداني في تقرب المعاني شرح رسالة لابن أبي زيد القيرواني : ص 566 – 567

The question now is that what does maintenance connote in Islamic law?

In our contemporary period an order for maintenance should not be restricted to only feeding. It should involve all what will perfect the living of human being such as feeding, clothing, education, care for health and accommodation. This is a time where feeding, accommodation, education, clothing and care for health have the same cost value in human life. We refer to **Al-Bahjat** commentary on **Tuhfatul Hukkam** by Abul Hassan Aliyu bn Abdulsalam Attasuli Vol 1 Page 382

Ibn Arafat explained that *''Maintenance relates to all what human being will conveniently require for subsisting of his livelihood excluding extravagances. In this premises it includes clothing, feeding and accommodation.''*

وعرفها ابن عرفة بقوله النفقة ما به قوام معتاد حال الأدمي دون شرف وهذا الحد شامل للكسوة والطعام والسكني.

راجع البهجة في شرح التحفة لأبي الحسن علي ابن عبد السلام التسولي ج1 ص 382

We also refer to **Ihkamul Ahkam** short commentary on **Tuhfatul Hukkam** by Muhammad Ibn Yusuf Al- Kafi page 148

الحكم في الكسوة حكم النفقة .

(البيت) يعنى: إنه متى وجبت النفقة على من ذكر فالكسوة تابعة لها ومتى سقطت سقطت.

راجع إحكام الأحكام على تخفة الحكام لمحمد بن يوسف الكافى ص**148**

''The request for clothing relates to the request for maintenance….. Means whenever maintenance is compulsory for the benefit of those we mentioned the request for clothing follows and once request for maintenance stops, request for clothing terminates too''.

Maintenance should be assessed by the financial position, ability and capability of the father in accordance with various Islamic injunctions. Quran chapter 65 verse 7 states:

" لينفق ذو سعة من سعته ومن قدر عليه رزقه فلينفق مما ءاتاه الله لايكلف الله نفسا إلا ما ءاتاها سيجعل الله بعد عسر يسرا" . سورة الطلاق **7**

''Let the man of means spend according to his means and the man whose resources are restricted let him spend according to what Allah Has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief''

Also,from hadith : It was narrated that the prophet Mohammad, peace of Allah be upon him said to Hind

ومن السنة: قول النبي – صلَّى الله عليه وسلَّم – لهند: " خذي ما يكفيك

Meaning *"Take reasonably from your husband's wealth whatever will be adequate for*

you and your children.'' وَوَلَدَكِ بالمعـروف " متفق عليه.

it is always good if both parent could agree on the amount to be paid for the maintenance of child of their marriage particularly after an order of dissolution of marriage is made but in a case that there is no agreement reached by them, the judge should fix the amount in the best interest of the children.(Section 23 of the Area Court Laws Cap A9 Laws of Kwara State 2006).

The assessment or the amount to be fixed differs from individual, locality and environment. The assessment also involves the financial position and status of the father, whether he is rich or whether he is relatively rich or poor.

In respect of the case at hand, we could take each issue one after the other.

The appellant requested for the sum of N35, 000:00 for sundry expenses of the children except for accommodation, school expenses and health while the respondent agreement to be paying only N3, 000:00 per each child per month. The appellant or the respondent did not give this court the actual monthly income of the respondent but courts are enjoined to take a balance position in doing justice and taking into consideration the interest of the children of marriage.

(a) Accommodation:

There was no dispute that when the parties were husband and wife with the four children they lived in a four bedroom flat accommodation. The appellant requested for a two bedroom flat accommodation or a self contained room and a parlor for her own reason to avoid co-tenant trouble or violence. The respondent has initially agreed and paid for a two room apartment.

Taking into consideration, the type of life the children were living during the pendency of the marriage and the appellant's

alleged fear of co- tenant trouble or violence, it is our candid position as it will be equitable to order the respondent to secure a self contained room and parlor apartment for his children as accommodation. The respondent is hereby ordered to secure for the children a self contained room and parlor apartment near their school from the month of March, 2012. In the alternative, if the respondent fails to comply, the appellant should take up same facility and submit the payment acknowledgement receipt to the respondent for reimbursement. We do not see any need for provision of a vehicle for the children since the apartment is ordered to be near the children's school.

(b) School expenses and health:

The respondent has agreed to take care of the children's school expenses and health. By the agreement of the respondent, there was no need of evidence to prove the capability of the respondent. What is admitted needs no prove. Therefore, the respondent is hereby ordered to take care of the school expenses and health expenses of the four children of the marriage. This is our order.

(c) Feeding:

Also, in the best interest of the children of marriage, taking into consideration the prevailing economic position globally and the various engagement of the respondent to feed a child, the sum of N5, 000:00 is reasonable. We hereby order that the respondent shall pay the sum of N5, 000:00 for feeding of each of the four children of the parties marriage totaling N20, 000:00 per month at the first week of each month from the date of the judgment of the lower court.

(d) Clothing and other consumable items:

In the same token, the respondent is ordered to be paying the sum of N1000:00 for each child per month for purchase of washing

soap, bathing soap, tooth paste and brush items e.t.c. from the date of the judgment of the lower court.

Summary of the judgment

(1) The respondent is ordered to provide a self contained room and parlor accommodation for the children near their school from the month of March 2012 otherwise the appellant is at liberty to secure one and the respondent to reimburse her.

(2) The respondent should take responsibility for the children's school and health expenses.

(3) The respondent is also ordered to be paying the sum of N5, 000:00 for feeding of each child per month at the first week of each month starting from the date of judgment of the lower court.

(4) This court hereby assessed the sum of N1, 000:00 per month to be paid for each child for expenses on clothing and other sundry needs such as bathing soap, washing soap, tooth paste and brush from the date of judgment of lower court.

This is our judgment. The appeal succeeds.

SGD	**SGD**	**SGD**
A.A. OWOLABI	**S.M. ABDULBAKI**	**M.O . ABDULKADIR**
(HON. KADI)	**(HON. KADI)**	**(HON. KADI)**
14/03/2012	**14/03/2012**	**14/03/2012**

(10) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON THURSDAY 29TH DAY OF MARCH, 2012.

BEFORE THEIR LORDSHIPS:

S. O. MUHAMMAD - HON. KADI.
A. A. IDRIS - HON. KADI.
A. A OWOLABI - HON. KADI.

MOTION: NO. KWS/SCA/CV/M/IL/01/2012.

KASALI BABA MUJIDAT - APPLICANT
VS.
LIMOTA KASALI - RESPONDENT

principle:

An application for the withdrawal of a motion by the applicant or his counsel and there is no objection by the respondent or his counsel, puts an end to litigation.

BOOKS/STATUTES REFERRED TO:

Al – fawakhu Ad- dawaniy vol.2.p.220

RULING: WRITTEN AND DELIVERED BY S.O. MUHAMMAD

This applicant, Kasali Baba Mujidat was absent but represented by M. A. Lawal (Mrs), Principal Legal Aid Officer, Legal Aid Council, Ilorin. The respondent, Limota Kasali was present and also represented by Ahmad Abdul Yekin Esq.

The applicant counsel made oral application to withdraw this motion dated 5th January, 2012 and filed 20th January, 2012 to be substituted by the amended one **KWS/SCA/CV/M/IL/01A/2012** dated and filed 17th February, 2012. He urged us to allow the

withdrawal in the interest of justice adding that doing so would not affect the respondent negatively.

In his brief response, counsel to the respondent submitted that he had no objection to the oral application.

Based on this oral application to withdraw motion **NO. KWS/SCA/CV/M/IL/01/2012** dated 5th January, 2012, filed 20th January, 2012 as submitted by counsel to the applicant and also based on the no objection submission of counsel to the respondent, this motion stands withdrawn and it is hereby struck out.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**S. O. MUHAMMAD**	**A. A. IDRIS**
HON. KADI,	HON. KADI,	HON. KADI,
29/03/2012	29/03/2012	29/03/2012

(11) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF SHARE JUDICIAL DIVISION
HOLDEN AT SHARE ON MONDAY, 2ND DAY OF APRIL, 2012.
YAOMUL-ITNAIN 11TH JUMMADAL AWWAL 1433 A.H

BEFORE THEIR LORDSHIPS:

A. A. IDRIS - HON.KADI

M. O. ABDULKADIR - HON.KADI

A. A. OWOLABI - HON.KADI

APPEAL NO, KWS/SCA/CV/AP/SH/01/2012.

BETWEEN

MURITALA YAKUBU - APPELLANT

VS

RUKAYAT MURILATA - RESPONDENT

Principles:

1. The judge relies on evidence of witnesses before he passes his judgment.
2. Barden of proof is on he who asserts and oath is on he who denies.
3. An get two male witnesses out of your own men and if there are not up to two men, then man and two women.
4. Cruelty is to be proved.

BOOKS/STATUTES REFERRED TO:

1. Holy Quran chapter 2 verse 282.
2. Jawahirul Ikhlil Vol. 1, P 334.

JUDGEMENT: WRITTEEN AND DELIVERED BY M.O. ABDULKADIR

This appeal is against the Judgment of Grade one Area court share delivered on 15th June 2011, It was appealed out of time, this was brought about as a result of failure of the appellant to file the appeal within the limited period prescribed by the Law. we had earlier granted application of the applicant/appellant for an extension of time within which to file this appeal and as a result of which this appeal dated 13/2/20/12 was filed on the same date 13/2/2012 respectively by the Defendant/Appellant **Muritala Yakubu** against the Respondent/Plaintiff **Rukayat Muritala**. paragraph The fact of the case is that the plaintiff/Respondent petitioned the Defendant/Appellant at Area court Grade 1 Share for dissolution of her marriage with the appellant on the ground of lack of love and trust. At the trial court the appellant denied the complaint but applied for an adjournment to enable the two parties enter into amicable settlement or reconciliation .The request of the appellant for an adjournment was granted by the trial court.

When the matter came up on the adjourned date, the Respondent reiterated her previous prayer for divorce in the sense that the reconciliation bid was not possible, yet the appellant begged the trial court for a fresh adjournment for another possible reconciliation of which was granted by the court. On the returned date, the parties told the court that the reconciliation had been proved abortive, the appellant later consented to the prayer of the Respondent for divorce with a rider that all his properties with the Respondent should be returned back to him, the trial court there and then terminated the marriage and awarded the custody of the 3 children of the marriage to the respondent and that ₦3 000. be given to the 3 children monthly for feeding allowance.

Dissatisfied with the decision of the trial Area Court the appellant appealed to this court and filed one omnibus ground of appeal and one general ground of appeal they are:-

1. *That the decision of trial Area Court 1 Share is unreasonable, unwarranted and cannot be supported due to the weight of evidence adduced before it (sic).*
2. *That the trial Area Court hastily granted the divorce to the Respondent without satisfactory peer (sic).*

On 13/02/2012, when the two parties appeared before us. the appellant who was the defendant at trial court told us that the Respondent sued him at Area court share for dissolution of marriage between them on the ground of lack of love and lack of trust he said although the court granted his request for adjournment for reconciliation, when the reconciliation was not possible, it was the court who advised him to give consent to the Respondent's request for divorce and that was why he allowed her divorce reluctantly. The appellant told the court further that he was not happy with the Judgment of the court granting the Respondent divorce he also complained that the Respondent was not asked whether she had any witness or whether she desires to call witnesses in support of her allegations, he finally urged us to strikeout the case.

In his response, the Respondent denied all what the appellant told the court and urged us not to listen to him in the sense that she was the one who has been responsible for the feeding and other expenses in the house, apart from that, the appellant used to beat her, she said further that although the trial court did not ask her to produce any witness but It was the appellant himself who pronounced divorce when the reconciliation failed, she finally urged

the court to uphold the Judgement of the lower court and not to strikeout the case.

Having read through all the grounds of appeal and painstakingly studied the record of proceedings of the trial court, and having also listened to the submission of both parties, we are of the view that this matter raises two issues. And the issue is (1) "the dissolution of marriage which the Respondent sought before the trial court by the Respondent (2)" effect of consent given by the appellant when the reconciliation failed.

Issue No1, As far as the issue number 1 is concerned we are of the view that, the honorable trial judge ought to have looked and studied the statement of the Respondent herein to the effect that once a claimant complains of an allegation such an allegation must be investigated by the trial court the trial court can only do this through the evidence of witnesses who must come forward before the court to say what he or she knows about the allegation brought to the court by the complainant. It is our candid opinion that the issue at stake centers on al- darar **الضر ر** "cruelty/ maltreatment "rather than the way trial court looked at it to be Khul **خلع** what the trial Judge is expected to do is to call upon the Respondent/plaintiff to prove her allegation. *Through the evidence of witness because under Islamic law a Judge relies on evidence of witness before he passes his Judgment:* **(يتعمد القاضي في حكمه على الشهادة)**

This view is of supreme importance in the administration of justice and it is also in view of the saying of the Prophet Muohammad (SAW) That " if people's claim were to be accepted on their face value some persons would claim other people's blood and property.

...But proof is upon he who asserts and oath is upon he who denies	**البينة على المدعي واليمين على من أنكر**

.To buttresses this view the Holy Quran chapter 2 verse 282 says:

And get two witnesses out of your own men and if there are not up to two men witnesses, then a man and two women such as you chose for witnesses

"...واستشهدوا شهيدين من رجالكم فإن لم يكونا رجلين فرجل وامراتان ممن ترضون من الشهداء..."

So In essence, the evidence of a witness does not become proof until it is rendered by a witness A-I Shahid and received by a Judge in court see the Book of Islamic law The practice and procedure in Nigeria court by Adamu Abubakar ESQ.

In this instance case, It is our view of the fact that once the trial court discovered that the complaint of the Respondent (wife) relates to Darar ضرر is thus, suffering of some maltreatment in the hands of the Appellant/Husband, the Judge ought to have called upon the wife to prove her allegation against the appellant failure to do that has contracted the golden rule of Islamic procedural law and as such we have no alternative than to hold that this appeal is a good case for retrial and we so hold.

Having decided as such, we also hold that whatever claims made by the wife/cross appellant is a none issue yet despite the fact because we have ordered for the trial of the case that the honorable trial Judge erroneously decided the case by way of khul'. See Jawahirul Ikhlil Vol 1 p 334 which reads thus:

No (money) compensation accrued where cruelty is proved or to be proved

بشهادة ورد المال على الضرر

Finally, we order that this case be retried by Upper Area Court.1 Ilorin, we also hold that the sister's appeal NO KWS/SCA/CV/AP/SH/01/2012 cannot be decided now since the appeal succeeds.

Appeal Succeeds.

SGD	**SGD**	**SGD**
A.A OWOLABI	**A.A IDRS**	**M.O ABDULKADIR**
HON. KADI	HON. KADI	HON. KADI
02/04/2012	02/04/2012	02/04/2012

(12) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF SHARE JUDICIAL DIVISION
HOLDEN AT SHARE ON MONDAY, 2ND DAY OF APRIL, 2012.
YAOMAL-ITNAIN 11TH JUMMADAL AWWAL 1433 A.H

BEFORE THEIR LORDSHIPS:

A. A. IDRIS - HON.KADI

M. O. ABDULKADIR - HON.KADI

A .A OWOLABI - HON.KADI

APPEAL NO: KWS/SCA/CV/AP/SH/04/2011.

BETWEEN

RUKAYAT MURITALA - APPELLANT

VS

MURITALA YAKUBU - RESPONDENT

principles:

5. The judge relies on evidence of witnesses before he passes his judgment.
6. Barden of proof is on he who asserts and oath is on he who denies.
7. An get two male witnesses out of your own men and if there are not up to two men, then man and two women.
8. Cruelty is to be proved.

BOOKS/STATUTES REFERRED TO:

3. Holy Quran chapter 2 verse 282.
4. Jawahirul Ikhlil Vol. 1, P 334.

JUDGEMENT: WRITTEEN AND DELIVERED BY M.O. ABDULKADIR

This appeal is against the Judgment of Grade one Area court share delivered on 15th June 2011, It was appealed out of time, this was brought about as a result of failure of the appellant to file the appeal within the limited period prescribed by the Law. we had earlier granted application of the applicant/appellant for an extension of time within which to file this appeal and as a result of which this appeal dated 13/2/20/12 was filed on the same date 13/2/2012 respectively by the Defendant/Appellant **Muritala Yakubu** against the Respondent/Plaintiff **Rukayat Muritala**. Paragraph The fact of the case is that the plaintiff/Respondent petitioned the Defendant/Appellant at Area court Grade 1 Share for dissolution of her marriage with the appellant on the ground of lack of love and trust. At the trial court the appellant denied the complaint but applied for an adjournment to enable the two parties enter into amicable settlement or reconciliation .The request of the appellant for an adjournment was granted by the trial court.

When the matter came up on the adjourned date, the Respondent reiterated her previous prayer for divorce in the sense that the reconciliation bid was not possible, yet the appellant begged the trial court for a fresh adjournment for another possible reconciliation of which was granted by the court. On the returned date, the parties told the court that the reconciliation had been proved abortive, the appellant later consented to the prayer of the Respondent for divorce with a rider that all his properties with the Respondent should be returned back to him, the trial court there and then terminated the marriage and awarded the custody of the 3 children of the marriage to the respondent and that ₦3 000. be given to the 3 children monthly for feeding allowance.

Dissatisfied with the decision of the trial Area Court the appellant appealed to this court and filed one omnibus ground of appeal and one general ground of appeal they are:

3. *That the decision of trial Area Court 1 Share is unreasonable, unwarranted and cannot be supported due to the weight of evidence adduced before it (sic) .*
4. *That the trial Area Court hastily granted the divorce to the Respondent without satisfactory peer (sic).*

On 13/02/2012, when the two parties appeared before us. the appellant who was the defendant at trial court told us that the Respondent sued him at Area court share for dissolution of marriage between them on the ground of lack of love and lack of trust he said although the court granted his request for adjournment for reconciliation, when the reconciliation was not possible, it was the court who advised him to give consent to the Respondent's request for divorce and that was why he allowed her divorce reluctantly. The appellant told the court further that he was not happy with the Judgment of the court granting the Respondent divorce he also complained that the Respondent was not asked whether she had any witness or whether she desires to call witnesses in support of her allegations, he finally urged us to strikeout the case.

In his response, the Respondent denied all what the appellant told the court and urged us not to listen to him in the sense that she was the one who has been responsible for the feeding and other expenses in the house, apart from that, the appellant used to beat her, she said further that although the trial court did not ask her to produce any witness but It was the appellant himself who pronounced divorce when the reconciliation failed, she finally urged the court to uphold the Judgement of the lower court and not to strikeout the case.

Having read through all the grounds of appeal and painstakingly studied the record of proceedings of the trial court, and having also listened to the submission of both parties, we are of the view that this matter raises two issues. And the issue is (1) "the

dissolution of marriage which the Respondent sought before the trial court by the Respondent (2)" effect of consent given by the appellant when the reconciliation failed.

Issue No1, As far as the issue number 1 is concerned we are of the view that, the honorable trial judge ought to have looked and studied the statement of the Respondent herein to the effect that once a claimant complains of an allegation such an allegation must be investigated by the trial court the trial court can only do this through the evidence of witnesses who must come forward before the court to say what he or she knows about the allegation brought to the court by the complainant. It is our candid opinion that the issue at stake centers on al- darar **الضر ر** "cruelty/ maltreatment "rather than the way trial court looked at it to be Khul **خلع** what the trial Judge is expected to do is to call upon the Respondent/plaintiff to prove her allegation.

Through the evidence of witness because under Islamic law a Judge relies on evidence of witness before he passes his Judgment: **"**

"يتعمد القاضي فى حكمه على الشهادة"

This view is of supreme importance in the administration of justice and it is also in view of the saying of the Prophet Muohammad (SAW) That " if people's claim were to be accepted on their face value some persons would claim other people's blood and property.

But proof is upon he who asserts and oath is upon he who denies

البينة على المدى واليمين على من أنكر.

.To buttresses this view the Holy Quran chapter 2 verse 282 says:

”...واستشهدوا شهيدين من رجالكم فان لم يكونا رجلين فرجل وامراتان ممن ترضون من الشهداء...”

And get two witnesses out of your own men and if there are not up to two men witnesses, then a man and two women such as you chose for witnesses

So In essence, the evidence of a witness does not become proof until it is rendered by a witness A-I Shahid and received by a Judge in court see the Book of Islamic law The practice and procedure in Nigeria court by Adamu Abubakar ESQ.

In this instance case, It is our view of the fact that once the trial court discovered that the complaint of the Respondent (wife) relates to Darar **ضرر** is thus, suffering of some maltreatment in the hands of the Appellant/Husband, the Judge ought to have called upon the wife to prove her allegation against the appellant failure to do that has contracted the golden rule of Islamic procedural law and as such we have no alternative than to hold that this appeal is a good case for retrial and we so hold.

Having decided as such, we also hold that whatever claims made by the wife/cross appellant is a none issue yet despite the fact because we have ordered for the trial of the case that the honorable trial Judge erroneously decided the case by way of khul'. See Jawahirul Ikhlil Vol 1 p 334 which reads thus:

بشهادة ورد المال على الضرر.

No (money) compensation accrued where cruelty is proved or to be proved

Finally, we order that this case be retried by Upper Area Court 1 Ilorin, we also hold that the sister's appeal **NO. KWS/SCA/CV/AR/SH/012012** cannot be decided now since the appeal succeeds.

Appeal Succeeds.

SGD	**SGD**	**SGD**
A.A.OWOLABI	**A.A.IDRIS**	**M.O.ABDULKADIR**
HON. KADI	HON. KADI	HON.KADI
02/04/2012	02/04/2012	02/04/2012

(13) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF LAFIAGI JUDICIAL DIVISION
HOLDEN AT LAFIAGI ON TUESDAY 2ND APRIL, 2012
YAOMUL- ITHNAINI 11TH JUMADAL- ULA, 1433 AH

HEIR LORDSHIPS:

ADAM A. IDRIS - HON. KADI

MOHAMMED O. ABDULKADIR - HON. KADI

ABDULWAHAB A. OWOLABI - HON. KADI

APPEAL NO: KWS/SCA/CV/AP/LF/15/2011

BETWEEN:

NDACHE ALHAJI NDAGI YANMA - APPELLANT

VS.

FATI NDACHE - RESPONDENT

Principles:

1. Payment of dowry is one of the pillars of Islamic marriage.
2. Divorced wife should not be frustrated by her husband to vomit or cough out all or part of dowry.
3. A Judge in Islamic case should allow all parties before him to ventilate their grievances.

BOOKS/STATUTES REFERRED TO:

1. **Thamaru Dani FI Taqribul Ma'ani,** short commentary on **Risalat** Page 505.
2. Quran : *4 Verse:4*
3. Quran :4 *Verse*:19
4. ***Ihkamul Ahkam*** *by (Shaykh Muhammad Ibn Yusuf Al-Kafi) page 9.*

5. **Ashalul Madarik commentary on Irishadu shalik Volume** III, page 199.
6. ***Nizamul Qada' Fi Shari'til Islamiyyah*** *by Dr. Abdulkareem Zaydani page 136.*
7. Section 36 of the 1999 constitution of Nigeria as amended.
8. Fiqiu As- Sunna, by : As-sayid Saabk V 3, Page 323.
9. **Bahjah, commentary on Tuhfatul Hukkam** page 39.

JUDGMENT: WRITTEN AND DELIVERED BY A.A. OWOLABI

This is an appeal filed by Ndache Alhaji Ndagi Yanma referred to before us as appellant against the judgment of the Area Court Grade I Tsaragi which was delivered on 16/9/2011. The respondent, Fati Ndache initiated an action against the appellant requesting the trial court to allow her to refund the sum of N10, 000.00. In her words "I sue to refund his marriage and pre-marriage expenses to him which is N10, 000.00 that is all."

The appellant contested the respondent's claim of the sum of N10, 000.00. He said that his claim was the sum of N82, 000.00.

The appellant called three (3) witnesses;

1. Ndako Usman
2. Mamma Mohammed
3. Aliyu Mohammed

PW1, Ndako Usman stated that he was the intermediary for the marriage between the appellant and the respondent. He added that he knew of the sum of N20,000.00 as bride price and 60 measures **(mudu)** of guinea corn in 7 places at the sum of N100.00 each all amounting to the sum of N42,000.00

The respondent did not cross- examine this witness despite the opportunity given to her.

PW2,Mamma Mohammed stated that he knew of the sum of N20,000.00 for buying materials for the respondent and the sum of N20,000.00 to her father. The appellant was not given opportunity to cross-examine this witness.

PW3, Aliyu Mohammed denied receiving any money from anybody. When he was examined by the appellant he further confirmed that he did not receive money from the appellant and that nobody told him about any money. He then concluded that he was not the guardian of the appellant but her uncle. The appellant was not given the opportunity to cross-examine this witness.

The trial court in his ruling felt that the claim of the sum of N20, 000.00 was not disputed by the parties and that the respondent did not deny the issue of the guinea corn which he concluded that it was given for the purpose of marriage ceremony and that since it was not for decoration but for consumption by both parties, therefore same be shared by both parties. The trial court ordered the refund of the sum of N20, 000.00 and further assessed and awarded the sum of N15, 000.00 as the share of the respondent from the guinea corn totaling the sum of N35, 000.00.

The appellant was not satisfied with the judgment of the trial court hence he filed an appeal by leave of this court dated 8/12/2011. The notice of appeal was dated and filed on 16/12/2012 respectively and it contains three grounds of appeal which are;

1. That decision of trial court I Tsaragi is unreasonable, unwarranted and cannot be supported due to the weight of evidence adduced before it.

2. That, the court awarded me the sum of N35, 000.00 only instead of N82, 000.00 as my marriage and pre-marriage expenses.
3. That, I pray this honorable court to collect all my marriage and pre-marriage expenses for me.

When the appeal was first mentioned on 31/01/2012, this court discovered that a case of divorce was heard and determined before the respondent instituted the case on appeal for refund of the sum of N10, 000.00. For better clarity and not to duplicate decisions of courts, we requested for the record of proceedings of the divorce case to ascertain the type of divorce; either divorce by husband **Talaq,** separation by the wife, **Khu'l** or whether the issue of refund of dowry was decided or not. On the 20th March, 2012 when the appeal further came up for hearing, it was ascertained from the record of proceedings of the court that conducted the divorce case, that the court only granted an order of divorce without recourse to the issue of refund of dowry.

At the hearing of this appeal, the appellant stated that as the tradition of Sanchitagi he produced 60 measures **(mudu)** of guinea corn for 7 times making 420 measures **(mudu)** of guinea corn before the marriage thereafter he paid the sum of N20,000.00. He further stated that the cost of the 420 measures **(mudu)** of guinea corn was the sum of N42, 000.00. He also alleged that he paid the sum of N20,000.00 to the parents of the respondent and another sum of N20,000.00 to bail out the respondent when she was involved in allegation of theft, totaling the sum of N82,000.00 and concluded that he called the following three (3) witnesses;

1. Ndako Usman (the intermediary who is also the appellant uncle)
2. Mamma Mohammed (the respondent uncle)
3. Aliyu Mohammed (the respondent father.)

In reply, the respondent denied all what the appellant stated and she further added that gift of guinea corn is not part of their custom and that nobody collected the sum of N20,000.00 from the appellant or the second sum of N20,000.00 on her behalf. She said that truly, she did not know what was paid as her dowry, but she said she only witnessed the exchange of two big basins of guinea corn between the appellant and her mother which the cost was the sum of N50.00 per measure **(mudu)** of guinea corn She said that her mother told her that the appellant paid the sum of N10, 000.00 as expenses. She concluded that the two big basins of guinea corn should be 45 measures **(mudu)** of guinea corn at the cost of N50.00 per measure **(mudu)** of guinea corn totaling the sum of N2, 250.00.

In conclusion, the appellant disagreed with what the respondent stated and said that the respondent's uncle; Mamma Mohammed, PW2 had testified to the collection of the guinea corn.

Going through the records of the trial court, the record relating to separation, the grounds of appeal and the submission of both parties before this court, we found the main issue for determination in this appeal is whether there was fair trial as regard to what is refundable in Islamic Law in case of separation by a wife.

The appellant listed 60 measures **(mudu)** of guinea corn at seven (7) times at the cost of N42,000.00 and cash in the sum of N20,000.00 as expenses and another sum of N20,000.00 as payment to police on behalf of the respondent totaling the sum of N82,000.00. The appellant wanted a refund of same. While the respondent said that she knew of the sum of N10,000.00 as expenses and 2 big basins of guinea corn costing the sum of N2,250 to her mother, all totaling the sum of N12.250.00.

None of the parties stated what the actual amount of dowry is or what constituted dowry in their locality. PWI only stated that he knew of the sum of N20, 000.00 as bride price while PW2 said that

the sum of N20, 000.00 was for marriage expenses. Payment of dowry is one of the pillars of Islamic marriage. We refer to principle of the law in **Thamaru Dani FI Taqribul Ma'ani,** short commentary on **Risalat** Page 505 which says:

There is no legal marriage except through marriage guardian, payment of dower and two unimpeachable witnesses.

" لانكاح إلا بولي وصداق وشاهدي عدل" (راجع الثمر الداني في تقريب المعاني شرح الرسالـة, ص 505)

It is our observation that there was no evidence that the respondent was given the sum of N20,000.00 or any amount or certain items as dowry, while collection of dowry is in favour of a wife, we refer also to the Holy Quran Chapter 4:4

And give the women (on marriage) their dower as a free gift. Q4:4

" وآتـوا النساء صدقاتهن نحلة " .

سورة النساء آيـة 4

Also in case of separation, husband is advised not to frustrate his wife just to make the woman to vomit or cough out all or part of dowry. Q4:19

Nor should you treat them with harshness, that you may take away part of dower you have given them except where they have been guilty of open lewdness: Q4:19

"ولاتعضُلُوهنَّ لتذهبوا ببعض مآءاتيتموهن إلا أن يأتين بفاحشةٍ مبيِّنةٍ ".

سورة النساء آيـة 19.

The appellant did not at the trial court precisely and in detail expatiate how he arrived at the sum of N82, 000.00 which he claimed. The conditions for a good claim under Islamic Law are that the claim must be precise and in detail. We refer to **Ihkamul Ahkam**

والمدعي فيـه شـرطان **

تحقيق الدعوى مع البيان

(راجع: إحكام الأحكام للشيخ محمد بن يوسف الكافي ص **9**)

The claim has two conditions. Precision and details.

(See page 9 of ***Ihkamul Ahkam*** *by Shaykh Muhammad Ibn Yusuf Al-Kafi)*

Since there is no evidence of the actual dowry or what amounted to dowry in their locality and to whom the alleged dowry was paid or given the trial court was wrong to have ordered for the payment of sum of N35, 000.00. It is also observed that the respondent was not given opportunity to admit or deny the appellant's claim of sum of N82, 000.00 or requested to impeach, challenge or cross-examine the appellant's witnesses. The court did not give the respondent opportunity to produce her witnesses or to establish her claim of the sum of N10, 000.00. These acts violate basic principle of fair hearing. We refer to **Ashalul Madarik commentary on Irishadu shalik Volume** III, page 199 reads:

ولا يحكم حتى يسمع تمام الدعوى والبينة ويسأل المدعي عليه هل لك مدفع . (راجع أسهل المدارك شرح إرشاد السالك ج**3** ص **199**

The judge (court) shall not decide a matter until he listens to all claims and proof. He; then ask the defendant if he has any defence.

It is the duty of court adjudicating on Islamic matters to allow all parties before it to ventilate their grievances.

Prophet Muhammad (P.B.O.H) was reported to have advised Sayyidina 'Ali' (R.T.A.) when he was appointed as a Judge to hear and listen to all the aggrieved parties before him, he said:

فإذا جلس بين يديك الخصمان فلا

If two parties have a matter before you, you should not

تقض حتى تسمع من الآخر كما سمعت من الأول.

(راجع نظام القضاء في شريعة الإسلامية لدكتور عبد الكريم زيدان ص **136**)

*decide it until you have listened to the other party as you have listened to the first party (See **Nizamul Qada' Fi Shari'til Islamiyyah** by Dr. Abdulkareem Zaydani page 136*

This is in consonance with Section 36 of the 1999 constitution of Nigeria as amended.

The prophet, peace be on him further told Sayyidina 'Aliy B. Abutalib:

يا علي إذا جلس إليك الخصمان فلا تقض بينهما حتى تسمع من الآخر كما سمعت من الأول فإنك إذا فعلت ذلك تبين لك القضاء. (راجع فقه السنة للسيد سابق ج **3** ص **323**)

Oh 'Ali, when two parties appear before you, do not conclude the dispute and judge between them until you hear from the second party as you have heard from the first party. If you do that, the issue at stake will be clear to you.

The Court of Appeal in **Sulaiman vs. Isyaku 1961 – 1989 Sharia Law Report 150 at 154** succinctly laid down the principle to be followed as follows

It is a mandatory principle of Islamic Law that no one shall be condemned without being afforded the opportunity of being heard. At the end of the parties' case, the court shall ask them whether they have anything more to say before the court pronounces its judgment. This is what is called **Al Izar**, something having similarity with **alcutos**. Where a judgment is pronounced without it, it will be set

aside on appeal. See page 39 **Bahjah, commentary on Tuhfatul Hukkam** where it is stated that the majority view of the jurists is that judgment pronounced without it (**Al Izar**) is a nullity.''

In view of the above, we found that the trial court was wrong to have decided the case when the appellant did not state precisely his claim as to how he arrived at the sum of N82, 000.00. The trial court did not allow the respondent to defend the claim against her and was not allowed to proffer evidence in support of her claim. We hereby hold that the trial court did not precisely ascertain what the actual dowry is payable in that locality and what was paid to the respondent.

We hereby order a retrial of this case by following all the listed above issues by Upper Area Court 2 Oloje, Ilorin

The appeal succeeds.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**A. A. IDRIS**	**M. O. ABDULKADIR**
HON. KADI	**HON. KADI**	**HON. KADI**
02 /04/2012	**02 /04/2012**	**02 /04/2012**

(14) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL IN THE LAFIAGI JUDICIAL DIVISION
HOLDEN AT LAFIAGI ON (MONDAY) 02/04/2012

BEFORE THEIR LORDSHIPS:

A.A. IDIRS - HON. KADI SCA

M.A. ABDULKADIR - HON. KADI SCA

A.A. OWOLABI - HON. KADI SCA

APPEAL NO: KWS/SCA/CV/AP/LF/14/2011

BETWEEN:

ADIJAT IDRIS - APPLICANT

VS

ABUBAKAR NDAMA - RESPONDENT

Principle:

An appellate court can strike out the appeal for lack of diligent prosecution.

BOOKS/STATUTES REFERRED TO:

1. Order VII Rule I (2) of Sharia Court of Appeal.

RULING: WRITTEN AND DELIVERED BY A.A. IDRIS

The Appellant, Adijat Idris was sued by the respondent, Abubakar Ndama at Area Court I Bacita in case No: 115/2011 to claim marriage expenses and custody of his male child. The appellant herein was aggrieved by the decision of the lower court and filed appeal No: KWS/SCA/AP/LF/14/2012 to challenge the decision of the trial court.

When the case came up on 20/3/2012 for hearing, the appellant was absent but the respondent was present and the record of service

showed that the appellant was duly served. The respondent demanded for the commencement of the case but the court adjourned till 17/04/2012 for the benefit of doubt.

When the court reconvened on the adjourned date, none of the parties was in the court and when the Registrars were asked whether they had served the appellant or not, they maintained that all their efforts to trace where about the appellant proved abortive. They went further to say that they even tried to trace her to her last address which is Batakpan.

In line with order VII rule I (2) of Sharia Court of Appeal which stipulates thus:

> *If both parties or their representatives fail to appear on the day fix for the hearing, the court may, of its motion, strike out the case.*

We strike out the appeal for lack of diligent prosecution and she is at liberty to re-enlist the case.

Appeal fails.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**A.A. IDIRS**	**M. A. ABDULKADIR**
HON. KADI	**HON KADI**	**HON. KADI**
02/04/2012	**02/04/2012**	**02/04/2012**

(15) IN THE SHARIAH COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIAH COURT OF APPEAL IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON 5TH APRIL, 2012

BEFORE THEIR LORDSHIPS:

S.O. MUHAMMAD - HON. KADI

ADAM A. IDRIS - HON. KADI

A. A. OWOLABI - HON. KADI

MOTION NO: KWS/SCA/CV/M/IL/01A/2012

BETWEEN:

KASALI BABA MUJIDAT - APPLICANT

AND

LIMOTA KASALI - RESPONDENT

Principle:

An Adjournment and enlargement of time is within the discretionary power of a judge.

BOOKS/STATUTES REFERRED TO:

1. Order 4 Rules 3 and 4 of the Sharia Court of Appeal rules 2006.
2. Ihkamul Ahkam by (Shaykh Muhammad Ibn Yusuf Al-Kafi) page 19.

RULING: WRITTEN AND DELIVERED BY A.A. IDRIS

The application which was brought by way of motion on notice dated 17th February, 2012 came up for hearing before us on 29th March, 2012 M.A. Lawal (Mrs.) appeared for the applicant while Abdul Yekinni Ahmed Esq appeared for the respondent. The learned counsel for the applicant prayed for an order for enlargement of time within which to appeal against the judgment of Area Court Grade I, No. 2 Centre Igboro Ilorin and for further order which the court may

deem fit to make in the circumstance. The motion was supported by twenty three paragraph affidavit deposed to by one Ogundele Bukola, litigation clerk of the legal aid council.

In moving the motion, the learned counsel for the applicant placed reliance and emphasis on paragraphs 3 sub 16 – 19 of the affidavit in support. She further submitted that four exhibits marked A - E were annexed and for the clarity, the following paragraphs explained the reasons which caused their delay:-

(i) that the notice and grounds of appeal was prepared and same was handed over to one Mrs. Saratu Haruna, a corp. member to file at the Registry of the Sharia Court of Appeal.

a. that it was when Barrister AbdulSalam Lawal was sent to inquire why their application was not attended to that they discovered that aforementioned corp member did not file the anticipated filed notice of appeal.

(ii) that the reason for their prayer for enlargement of time within which to appeal was due to the fact that the appellant was not served with hearing notice at the trial court when the matter was adjourned to the 10th August, 2011.

(iii) that their delay was not negligence or disrespect fo the court and to crown it all, they mentioned that if the instant application is allowed they were desirous of pursuing it to the logical conclusion.

The learned counsel for the applicant M.A. Lawal (Mrs.) finally submitted that the grounds of appeal are *prima facie* arguable.

In his brief response, the counsel for the respondent submitted that the grant or otherwise of the application is conferred in the court's discretion and prayed the court to exercise the power in conformity with the rules of court.

We have painstakingly examined the application before us. In the same vein, we took cognizance of the reasons which led to the delay in filing the notice of appeal and we have also considered the submissions of the learned counsel for the applicant and the response of the respondent's counsel respectively. The issue for consideration in this application is whether the applicant has adduced good and substantial reasons for the grant of his prayer for enlargement of time within which to appeal in respect of the materials placed before us.

In determining this, we have to recourse to Order 4 Rules 3 (1) (a) and (b) of the Sharia Court of Appeal, Laws of Kwara State 2006 which was relied upon by the applicant. Order 4 Rule 3 sub-rule (1) (a) and (b) stipulates thus:-

(1) every application for enlargement of time shall be supported by:-

(a) an affidavit or affirmation or declaration having in Law, the effect of an Oath setting forth good and substantial reasons for the application; and

(b) grounds of appeal which prima facie shall give cause for leave to be granted.

After a careful examination of the submissions of the counsel for both parties and the materials before us, we hold that paragraphs 3 sub viii, xix, xxii and xxiv are germane and reasonable enough upon which we can base the consideration of this application.

In line with the foregoing, coupled with an application of the principle of law to the instant application, we opined that the application has merit and has satisfied the conditions provided under

order 4 rule3 sub (1) (a) and (b) of Sharia Court of Appeal rules. And based on the power vested on this court, as entrenched under procedural principles of Islamic Law which stipulates thus:-

The judge is required to use his discretionary power, where it is required in the case of adjournment and enlargement of time.

والاجتهاد الحاكم الاجـال *

موكولة حيث لها استعمال

راجع إحكام الاحكام شرح على تحفة الحكام ,
ص 19.

In view of the above, the prayer of the applicant is hereby granted. Time within which the applicant is allowed to appeal is hereby extended/ enlarged to two weeks from today the 5th April, 2012.

It is pertinent to note that in conformity with Order 4 rule 3 (2) of the Sharia Court of Appeal Rules, a copy of our enrolled order as made herein, granting enlargement of time within which to appeal shall be annexed to the notice and grounds of appeal whenever it is filed.

The application succeeds.

SGD	**SGD**	**SGD**
A A.OWOLABI	**S.O. MUHAMMAD**	**A.A. IDRIS**
HON. KADI	HON. KADI	HON. KADI
5th April, 2012	5th April, 201	25th April, 2012

(16) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON WEDNESDAY 11th DAY OF APRIL, 2012.
YAOMUL-KHAMIS 20TH JUMADAL-ULA 1433 A. H.

BEFORE THEIR LORDSHIPS:

S. O. MUHAMMAD - HON. KADI.

A. A. ADAM - HON. KADI.

A. A OWOLABI - HON. KADI.

APPEAL NO. KWS/SCA/CV/AP/IL/23/2010.

ABDULKAREEM ONDOKO - APPELLANT

VS.

(1) MEMUNAT ABDULKAREEM
(2) ALH. ISSA ISHOLA } - RESPONDENTS

Principle:

An appellate court can order the trial court for the retrial denovo if it did not follow the laid down rule and procedure under Islamic law.

JUDGEMENT: WRITTEN AND DEVLIVERED BY S. O. MUHAMMAD

This is a transferred case from Akerebiata Upper Area Court Ilorin to the Area Court Grade I No. 2 centre Igboro, Ilorin. At the latter court, the case was numbered S/No. 390/2010 dated 25/6/2010. The plaintiff/appellant was Abdulkareem Ondoko while the defendant/respondent was Memunat Kareem. The 2nd

defendant/respondent Alhaji Issa Ishola was later joined. The appellant's **Da'awah**, claim, at the trial Area Court was to divorce the 1st respondent and also to claim the pregnancy she was carrying then. In addition, the appellant wanted the court to order for the return of "the wears" claimed to have been "illegally" removed from his house.

The 1st respondent denied the claim and told the court that:

I am married woman with husband. The allege (sic)

Pregnancy of which I have delivered twins is for my

husband Alhaji Issa Ishola (See P.1 of the record of

proceedings)

The appellant called three female witnesses to establish his claim while both the 1st and the 2nd respondents called no witness (es). The trial Area Court judge reviewed the case before him and ruled as follows:

....the claim of the plaintiff fail and all his claim on

Divorce claim of twins and claim of properties like

Slippers Bante (Pant) and cap had nothing to stand

On and accordingly dismissed and the twins delivered

by the 1st Defendant is awarded to the 2nd defendant

who was able to establish marriage (sic).

The appellant felt aggrieved with this judgment and appealed against it in his appeal No. KWS/SCA/CV/AP/IL/23/2010 dated 22/12/2010. His grounds of appeal are:

1. That the decision of Trial Area Court Grade I No. 2, Ilorin is unreasonable, unwarranted and cannot be supported due to the weight of evidence adduced before it.

2. That the trial Area Court Judge erred in law by awarding the children (twins) in dispute to the new husband.
3. That the Trial Court was wrong for dismissing all my claims.
4. That more grounds of appeal may be filed later.

Meanwhile, the appeal could not be heard in good time because our Registry could not serve the 1st respondent inspite of all efforts made with the assistance of the appellant. However, the efforts became successful through the substituted service culminating into hearing of the appeal on 29th March, 2012.

During hearing of the appeal, the appellant simply said that he adopted all his grounds of appeal adding that the trial Area Court "cheated him" and that was why he filed his appeal.

While responding, the 1st respondent told us that she knew the appellant through one Lanihun, her friend, who introduced him to her for the purpose of marriage. She added that she packed to his house and stayed together as husband and wife until when both of them quarreled which prompted her packing out. According to her, she left the appellant's house pregnant and went to stay in a rented house at Eruda where she met the 2nd respondent as a good neighbor who took care of her welfare until she delivered twin babies both of whom were male. She added that it was the 2nd respondent who named both twins as Musa (Kehinde) and Issa (Taiye).

Answering some questions from us, the 1st respondent stated that she did not contract any marriage with either the appellant or the 2nd respondent adding that the pregnancy she delivered as twins belonged to the appellant. She also added that one of the twins is now dead i.e. Issa (Taiye). She layed emphasis on the fact that the twin babies belonged to the appellant for whom she was carrying another advanced pregnancy as at the time of hearing of this appeal. Finally, the 1st respondent told us that she initially refused to concede

the pregnancy to the appellant because of his attitude of refusing to know where she packed to after their quarrel.

In his own response, the 2nd respondent told us that he knew the 1st respondent but denied knowing the appellant. According to him, he married the 1st respondent in line with the provisions of Islamic Law. It was her uncle, one Alfa Ambali who served as guardian while one Shafi' and one Alhaja Hajara went to conduct the **Nikah** on his behalf at Ile Baale, Itamerin.

The appellant, in his 2nd chance, told us that the 1st respondent had returned to his house and confirmed that presently, she was carrying another pregnancy for him which was at advanced stage. He therefore urged us to declare the paternity of the twin babies to him and set aside the decision of the trial Area Court.

On our part, we carefully read the record of proceedings and patiently listened to both parties. The first issue that came to our mind was to confirm who among the appellant and the 2nd respondent was the husband of the 1st respondent known to Islamic Law. At P.1 line 27 and P.8 lines 29 - 30, the 1st respondent told the court that the 2nd respondent was her husband having being married together in line with the provisions of Islamic Law. But before us and more than once, she said that neither the appellant nor the 2nd respondent conducted any **Nikah** on her. This statement was not controverted by either the appellant or the 2nd respondent.

Secondly, at P.1 lines 29 – 30 the 1st respondent was recorded as saying that the pregnancy of the twin babies belonged to her "husband Alhaji Issa Ishola", the 2nd respondent. But before us she said that the appellant was the owner of the pregnancy born as twins adding that she was even carrying another pregnancy for him at this time of the pending appeal. She also told us that the reason why she said initially that the appellant was not responsible for the pregnancy

was because of the appellant's attitude who refused to know where she was after their quarrel.

In view of the confusion emanating from the 1st respondent's statements before us and in view of the need to get to the root and fact of the matter, we concluded that this case ought to be retried **de-novo** by another court of competent jurisdiction. And we so hold.

Consequently, we hereby order Upper Area Court No. 1, Ilorin to rehear this case **de novo** with the following guidelines:

1. The court shall establish who, among both the appellant and the 2nd respondent, was the husband of the 1st respondent known to Islamic Law. This shall be done by following necessary guidelines stipulated by **Shari'ah**, the Islamic Law.
2. Thereafter, the issue of the pregnancy/paternity shall be looked into using the yardstick of the Islamic law to determine such issue.
3. The hearing and determination of the case shall be accelerated in view of the age of the litigation.

Appeal Succeeds.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**S. O. MUHAMMAD**	**A. A. ADAM**
HON. KADI,	HON. KADI,	HON. KADI,
11/4/2012	11/4/2012	11/4/2012

(18) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY, 15TH DAY OF MAY 2012
(24TH JUMADA ATH-THANI, 1433 A.H)

BEFORE THEIR LORDSHIPS:

I.A. HAROON	**-**	**HON. GRAND KADI**
S.O. MUHAMMAD	**-**	**HON. KADI**
M.O. ABDULKADIR	**-**	**HON. KADI**

MOTION NO: KWS/SCA/CV/M/IL/08/2012

BETWEEN

RASAQ ADI	**-**	**APPLICANT**
AND		
ALHAJA AWAWU JAJI	**-**	**RESPONDENT**

Principle:

An adjournment and enlargement of time in within the discretionary power of a judge.

RULING: WRITTEN AND DELIVERED BY I.A. HAROON

Rasaq Adi was the applicant in this motion while Alhaja Awawu Jaji was the respondent; the applicant was represented by A.H. Sulu-Gambari, *Esq.* while the respondent was represented by Dauda Ganiyu, *Esq*. The Motion on Notice was dated and filed on 26th April, 2012 pursuant to Section 36 of the Constitution of the Federal Republic of Nigeria (as amended) and Order IV (1) of the Sharia Court of Appeal Civil Procedure Rules and under the inherent jurisdiction of this honourable Court. The applicant was seeking for the following reliefs:

1. *Leave of this honourable Court permitting the applicant to appeal out of time against the ruling of the Area Court 1, No. 3 sitting at Adewole Area, Ilorin delivered on the 5th March 2012.*
2. *An Order of this honourable Court granting leave to the applicant to file his Notice of Appeal Out of Time against the ruling of the trial Area Court 1, No. 3, Adewole, Ilorin.*
3. *An Order of this honourable Court extending the time for the applicant to file his Notice of Appeal against the ruling of the Area Court 1, No. 3 sitting at Adewole Area, Ilorin.*
4. *An Order of this honourable Court deeming as properly filed and served the Notice of Appeal marked as Exhibit "A" having paid the fees.*
5. *An Order of this honourable Court staying execution of the ruling of the Area Court 1, No. 3, Ilorin pending the determination of the appeal before this Court.*

The application was supported by an 11-paragraph affidavit and one annexure marked ***Exhibit "A"***; the attached ***Exhibit "A"*** was the proposed Notice and Grounds of Appeal.

On the 15th day of May 2012 when this matter came up for hearing, A.H. Sulu-Gambari, Esq. appeared for the applicant while both the respondent and her counsel were absent. However, the respondent's counsel had written the Court that he had no objection to the motion. In view of this development, the applicant's counsel urged the Court to allow him move the motion which was granted. He submitted that the application was brought pursuant to Section 36 of the Constitution of the Federal Republic of Nigeria (as amended) and Order IV (1) of the Sharia Court of Appeal Civil Procedure Rules and under the inherent jurisdiction of this honourable Court.

Having considered the court processes and listened to the applicant's counsel and having also read the letter written by the respondent's counsel dated 15th May 2012 on the subject matter, it is our candid opinion that since the respondent's counsel has no objection to the motion; it was moved by the applicant's counsel. Going by paragraphs 5 and 6 of the supporting affidavit, the applicant had shown a reasonable ground why he could not file his application within 30 days after the trial court judgment as stipulated by law.

In view of the foregone, we therefore opined that the application merit our favourable consideration and it is hereby granted for an extension of time within two weeks from today 15th May 2012 to file his Notice of Appeal while we refused to grant paragraphs 4 and 5 respectively.

Application succeeds in part and fails in part.

SGD	**SGD**	**SGD**
M.O. ABDULKADIR	**I.A. HAROON**	**S.O. MUHAMMAD**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
15/05/2012	**15/05/2012**	**15/05/2012**

(19) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT SHARE ON WEDNESDAY 16TH DAY OF MAY, 2012
YAOMUL ARBI'A 25TH JUMADAL-THANI 1433 A.H.

BEFORE THEIR LORDSHIPS:

A. A. IDRIS - HON. KADI

M. O. ABUBAKADIR - HON. KADI

A. A. OWOLABI - HON. KADI

APPEAL NO:KWS/SCA/CV/AP/SH/03/2011

BETWEEN:

RASHEEDAT JIMOH - APPELLANT

VS

GARUBA ALIYU - RESPONDENT

Principle:

Decision of a court with a requisite jurisdiction will be enforced and where it lacks it will not be enforced.

BOOKS/STATUTES REFERRED TO:

1. Nizam Al- Qada'a by Dr. AbdulKarim Zaidani page 46 and 47.
2. *Tabsirat al-Hukam by Ibin Farhoon vol.I page 19).*
3. Kwara State of Nigeria Gazette. (Land use Act designated on certain areas placed as Urban Area 2009) No 17 Vol. 43 precisely at page B. 32.
4. Section 14 (1) Cap H2 Law of Kwara State 2006.

JUDGEMENT: WRITTEN AND DELIVERED BY A.A. IDRIS

Rasheedat Jimoh, the appellant, sued her husband Garuba Aliu the respondent, for divorce at the Area Court Grade I Share in case No/64/2011 with suit No 69/2011, dated 14th September, 2011. She filed the suit to seek the order of the trial court to dissolve their marriage. She maintained thus:-

> *I sue my husband the defendant before the court for Divorce on the ground that he charm me in order to marry me and now that the charm hard spoil, I could see what is good for me. (sic)*

She went further to state thus:-

> *I do not have rest of mind in his house for this I use to have frequent miscarriage in his house. (Sic)*

In his response the respondent said that he had no grudge about her divorce but the piece of land on which he erected two shops belonged to him and requested the court to hold so.

In her response the appellant said that the land did not belong to the respondent. She further maintained that the land belonged to her family.

The trial court heard both parties and dissolved the marriage that was not contested for by the husband. On the contested land by the parties, the trial court gave the following judgment:-

> *This 2 shops be giving to the only child of the relationship of the husband and wife i.e. the female child. But since child is still a minor the 2 shop be share among the father and the mother of the child who have divorce now in trust for the child till she attain the age of 18 years .(sic)*

The appellant was not satisfied with the above decision and filed notice of appeal dated 28-11-2011 with the following grounds of appeal:-

GROUNDS OF APPEAL

GROUND ONE

The Lower Trial Area Court Share erred in Law when it gave decision in respect of a shop at Olupako Street opposite Ile Oluoyo Share.

PARTICUALRS

a. The claim of the Plaintiff (now Appellant) at the Lower Trial Court was the Court assistant to dissolve her marriage with the Defendant (now Respondent)

b. The Lower Trial Court having heard evidence from parties dissolve the marriage between the Plaintiff (now Appellant) and the Defendant (now Respondent) on 16/9/2011.

c. On 31/10/2011 the Lower Trial Court again summoned the parties and ordered both the Plaintiff (now Appellant) and the Defendant (now Respondent) share a shop at Olupako Street opposite Ile Oluoyo Share.

d. There was no claim of ownership or sharing of the said shop before the Lower Trial Court and evidence relating thereto was not given by either of the parties.

e. The case of the Plaintiff (now appellant) before the Lower Trial Area Court was matrimonial matter **simpliciter** and nothing more:-

f. There was no Counter Claim in whatever way from the Defendant (now Respondent) and no evidence relating to sharing or ownership of shop or house.

g. The decision of the Lower Trial Area Court Share delivered on 31/10/2011 was given without jurisdiction and has occasioned a great miscarriage of justice against the Appellant.

GROUND TWO

The decision of the Trial Area Court Share delivered on 31/10/2011 is against the weight of evidence.

4. RELIEF SOUGHT FROM THE SHARIA COURT OF APPEAL

(a) AN ORDER of this Honourable Court allowing the appeal in its entirety.

(b) AN ORDER of this Honourable Court setting aside the orders of the Area Court Share made on 31/10/2011

(c) AND FOR SUCH FURTHER ODER(S) as this Honourable Court may deem fit to make in the circumstances of this appeal.

Thereafter the appellant filed additional ground of appeal dated 17-02-2011.

ADDITIONAL GROUND OF APPEAL

GROUND THREE

The Lower Trial Judge erred in law when he gave judgment / Verdict in respect of a landed property without jurisdiction.

PARTICULARS

1. The lower Court is an Area Court Grade 1.
2. The jurisdiction of an Area Court in respect of ownership, possession or occupation Land and / or landed property is restricted and limited.

3. By virtue of the Area Court Laws, part II of the schedule an Area court Grade I has no jurisdiction to adjudicate on matters concerning the ownership, possession or occupation of land which valued exceeded ₦100,000.00

4. The decision of the lower trial Court Grade I Share made on 31st October, 2011 bothering on the ownership and/or sharing of a shop was given without requisite jurisdiction.

When the case came up for hearing both parties were present in court but our registrar in charge of Share tendered a letter written by the counsel to the appellant which was given to the court by the appellant to inform the court that he would like the court to adjourn the instant appeal to enable him appear in the case for the appellant. The content of the same letter was read to the hearing of the respondent and his reaction to this letter was positive. As a result we adjourned the case till 20/2/2012.

When the case re-opened on the adjourned date, the learned counsel S.A. Shogo Esq. appeared for the appellant who also sought for another adjournment to enable his principal counsel to handle the case personally. The learned counsel further submitted that his principal wanted to appear in person on the adjourned date but he had to appear before the court of Appeal Ilorin Division on the case of Alhaji Musa Ola-Iya Vs Bonny Face. He then assured the court that his principal would appear unfailingly on the next adjourned date. In his reaction, the respondent vehemently objected to the request of the learned counsel to the appellant.

He asserted that it had become the habit of the counsel to the appellant to seek for frivolous adjournment. It was at this juncture that we used our discretion and granted the request sought by the counsel to the appellant and adjourned for definite hearing.

On the adjourned date Joseph Oboite who is the counsel for the appellant submitted that the appeal was against the judgment of Area

Court Share which was delivered on the 31st day of October, 2011. He further submitted that in the said judgment, the trial court dissolved the marriage between the appellant and the respondent and thereafter, the trial court went ahead to assume jurisdiction over a landed property by sharing some shops erected upon the parcel of land under discussion between the parties. The appellant was dissatisfied with the second leg of the judgment which brought about the filing of the instant appeal on the 28th November 2011.

In his explanation, he submitted that the appellant had filed notice of appeal which contained two grounds of appeal and that additional ground was later filed. He further submitted that in the notice of appeal two issues were raised for the determination of the appeal and they are as follows:-

(1) Whether the case or cause of action of the plaintiff/appellant at lower court included title of landed property.

(2) Assuming without conceding, the case of the appellant, include title to landed property at the lower court. Whether the lower court has the jurisdiction to hear and determine matters relating to ownership of landed property in Share town.

In his submission, he stated that in arguing issue one they humbly submit that the appellant's claim before the lower court Share had bearing on divorce **simpliciter**, nothing more and nothing less. He therefore, referred the court to page 1 of the record of proceedings of the trial court. Line 10, after the course of action on paragraphs 1-3 the appellant informed the trial court reasons for her action, where she stated thus:-

> *I sue my husband the defendant before the court for divorce on the ground that he charm me in other to marry me and now that the charm had spoil, I could see what is good for me (sic)*

In conformity with the foregone, the learned counsel submitted that it was clear from line 23 paragraphs I of the record of proceedings that what the appellant took to the lower court was the divorce **simpliciter** and he urged the court to so hold.

In his argument on issue No2, the learned counsel contended that assuming without conceding that even if the claims of the appellant included issue of landed property before the trial court, whether the trial court had pre-requisite power / jurisdiction to hear and determine same. He further submitted that it was their strong submission that the trial court had erred in law to entertain the instant subject matter. To him the word property in question had exceeded the jurisdiction of Area Court Grade I. He then referred the court to part II of the schedule of Area Court Law Cap A9 Laws of Kwara State 2006 at page A9/25.

He further submitted that the evaluation of property was not made at the lower court and this court was empowered to ascertain the value of the said property by virtue of Order 3 Rule 7 (1) and (2) of the Sharia Court of Appeal Rules Cap S4. Furthermore, he submitted that the Area Court had no jurisdiction to entertain a case of landed property situated at Share.

In his explanation, he submitted that apart from the issue of value of the property which rubbed out the jurisdiction of the trial court, the property is located at Share in Ifelodun Local Government which has been designated as urban area by virtue of Kwara State of Nigeria Gazette (Land use Act designated on certain areas placed as Urban Area 2009) No 17Vol. 43 precisely at page B.32. He cited and relied on the case of Gwangwan Vs Gargare (2003) FWLR Part 164 Page 255 at Page 262 to show that the trial court had no jurisdiction to entertain the matter talkless of determining matters relating to landed property situated in an Urban Area.

The learned counsel submitted that sharing of shops on pages 1,2,3, and 4 showed that issue at hand was clearly based on ownership of a piece of land and shops erected on it, He therefore, urged the court to hold that the Area Court lacked the pre requisite jurisdiction to entertain the issue aforesaid.

Finally, he submitted that the order of custody, and mentainance made by the trial court that the child of the dissolved marriage be given to the appellant by the respondent be complied with by the respondent. He asserted that the respondent constantly flouted that order. He prayed this Honourable Court to allow their appeal in its entirety, set aside the decision of the trial court and order the respondent to return the only child of the marriage to the appellant.

In his response, the respondent asserted that he had assimilated the whole submissions of the appellant's counsel and denied the writing of any letter requesting for the shop from the appellant. He then alleged that the said letter was written by the appellant herself. After a lot of deliberations the court requested the counsel to show the court the letter alleged to have been written by the respondent, as a proof of the allegation but since he said that the letter was not with him, we adjourned the case till 30/4/2012 to enable the counsel produce the said letter.

On the adjourned date however, the counsel produced the said letter, which was read to the hearing of the respondent who later confirmed that he was the person who wrote the letter dated 14/11/2011 to the lower court in which he set the appellant free and among other things what he said in the letter under discussion, was that the two shops in dispute are owned by him and that the appellant should leave these shops for him.

In his brief, response the counsel to the appellant urged the court to take judicial notice of the Kwara State of Nigeria Gazzette he referred to.

On our part we diligently perused the records of proceedings of the trial court. In the same vein, we equally listened to both parties for and against and went through the authorities cited by the learned counsel for the appellant, and we are of the view that the main issue for determination is centered around the jurisdiction of the trial court. Our issue of determination is as follows:-

Whether the trial Area Court Grade I Share, Ifelodun Local Government possessed jurisdiction to entertain and determine the land dispute before it?

In dealing with the first issue raised by the learned counsel to the appellant, we are of the strong view that the issue of landed property which later became the issue of contention was a product of chain of events which was inevitable in circumstance like the suit litigated upon by the trial court, i.e. the issue of divorce which was brought before the trial court by the appellant. The issue of landed property was a silent issue between the two parties when things were moving well but with the hatred that later cropped in, each party tried to struggle to recover his/her asset. That was what prompted the respondent to mention the issue of landed property.

We therefore opined that if any person finds him / herself in his shoes, he or she will act the same way. This led to the present action in which the trial court misled itself and assumed jurisdiction of a matter which it was not supposed to entertain. On the part of the trial court it should have tried to verify whether it has jurisdiction to entertain such a case or not. This issue is resolved in favour of the appellant.

We want to say without mincing words that it is wrong for any court to entertain any case or suit which is out of its jurisdiction like the course of action in the instant appeal.

On the second issue the learned counsel to the appellant formulated one issue that borders on jurisdiction of the trial court on whether the lower court has the jurisdiction to hear and determine matters relating to ownership of landed property at Share town.

To do justice to the above, we are of the view that the most important aspect that is required to dwell on and needs more attention than any other issues herein is the above formulated issue by the appellant.

For clarity we have decided to deal with the point which revolves on the power of a court to determine a case. However, we want to examine the position of jurisdiction generally, with regards to a court governed by Islamic Law. This is more so because the parties before the trial court are Muslims, the trial court applied principles of Islamic Law and we are also governed by Islamic Law in addition to constitutional and statutory provisions.

In resolving this matter we take recourse to the Islamic principle and procedure which stipulates thus:-

It is meant for limitation of the judge's jurisdiction which covers specified places, to the extent that the judge lacks jurisdiction outside such places.

ويقصد به تحديد صلاحية القاضي بمكان معين بحيث لايمكن القاضي ولاية القضاء خارج هذا مكان . (راجع نظام القضاء في الشريعة الإسلامية , ص **46**) .

And on page 47 of the same book Dr. AbdulKarim Zaidani mentions thus:

Decision of the judge in legal proceedings which are outside

حتى إنه لو حكم في قضايا غير هولاء, فإن

the specified scope, will not be enforced.

حكمه لا ينفذ. (راجع نظام القضاء في الشريعة الإسلامية , ص **47**).

Also to show the implication of lack of jurisdiction in adjudication Ibn Farkhun stipulates thus:-

This constitutes another arm of jurisdiction of courts. Decision of a court with a requisite jurisdiction will be enforced and where it lacks it will not be enforced…..

(see Tabsirat al-Hukam vol.I page 19)

... فهذه الولاية شعبة من ولاية القضاء فينفذ حكمه فيما فوض إليه , فلا ينفذ له الحكم فيما عدا ذلك . (راجع تبصرة الحكام لابن فرحون ج**1**, ص**19**) .

The foregoing principles of Islamic Law portray that jurisdiction is the life wire, blood and foundation of adjudication. Thus the issue of jurisdiction is so fundamental that it forms the foundation or pivot of adjudication. If a court lacks jurisdiction, it also lacks the competence to try the case as well. A defect in competence is fatal to the proceedings and will render them null and void **abinitio**. See Ojololobo Vs Alanamu (1987) 3NWLR (Pt61) 377 at page. 391 and Odi Vs Osafile (1985) 1 NWLR (Pt I) 17. This is because if the court is shown to have no jurisdiction, the proceedings, however well conducted are a nullity and an exercise in futility.

The appellant in this case is challenging the competence of the trial court to adjudicate because of the location of the land in dispute. It is common ground that the land in dispute is situated in Share, Ifelodun Local Government which has been designated as Urban Area by virtue of Kwara State of Nigeria Gazette. (Land use Act designated on certain areas placed as Urban Area 2009) No 17 Vol.

43 precisely at page B. 32. He cited and relied on the case of Gwangwan Vs Gargare (2003) FWL R Part 164 Page 255 at 262.

It is on the basis of this fact that the learned counsel to the appellant submitted that by virtue of land use Act of 2009, the Share Area Court Grade I is not empowered to adjudicate on the subject matter. We therefore, hold that the proceedings in Share Area Court Grade I are a nullity because it has no jurisdiction to entertain the matter under discussion.

Also going by the virtue of Part II of the Schedule of Area Court Law Cap A9 Laws of Kwara State 2006 at page A9 – 25 column one deals with causes and matters concerning ownership, possession or occupation of land under a customary right of occupancy in which the value of the subject matter does not exceed the amounts specified in the respective columns thereof. The value of property of trial court on the subject matter is pegged at one hundred thousand Naira only. And in this instance the land and the shops erected upon it are pre-summed to be more than the value which it can entertain. Above all, the jurisdiction of this court has been ousted by the Kwara State land use act 2009. We therefore agree entirely with the submission of the learned counsel to the appellant that the trial court lacks competence to try the matter.

The trial court has exceeded the power conferred on it in the circumstance of this case by dividing the shops between the appellant and respondent despite the fact that the judge is aware that his court was not clad with jurisdiction to entertain such case. The whole exercise therefore is a nullity.

There are numerous well settled and decided cases in support of the preposition that one of the pre-requisites of any court, in the exercise of the power conferred on it, is that the subject matter of the action must be within its jurisdiction and there should be no element

in the case which hinders the court from observing the power conferred on it. It is therefore trite that where the subject matter is not within the jurisdiction of the court in adjudication there is nothing to adjudicate, and decision so reached when court lacks jurisdiction is a nullity. Similarly, all subsequent proceedings are a nullity. In consequence the judgment of the trial court on the second leg of the case is null and void. It is accordingly set aside. This issue is resolved in favour of the appellant.

On the issue of custody of the child of the dissolved marriage raised by the learned counsel to the appellant, we have gone through the record of proceedings and there is no where it was pleaded for. We opined that no court has the power to award that which was not claimed or pleaded by either party. The mere writing of the judgment relating to the issues of custody on the receipt by the trial judge was not an issue because once a court has delivered its decision on a matter, it ceases to have further authority to give additional order having written and read his judgment to the parties before him in the court. His action therefore becomes **functus officio**, which is non justifiability.

On the whole, in order to do justice to both parties on the instant appeal, we invoked order 9 rule 1 which stipulate thus:-

> *The court may in its discretion make any order within its powers and jurisdiction which it considers necessary for doing justice whether such order has been asked for by any party or not.*

In view of the above provision, we opined that the proper court to exercise jurisdiction over this case is the State High Court of

Justice, Ilorin. We accordingly allowed the appeal, set aside the second leg of the judgment of the trial court in its entirety and ordered for the transfer of the case to the State High Court of Justice, Ilorin, in conformity with section 14 (1) Cap H2 Law of Kwara State 2006.

Appeal succeeds in part and failed in part.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**A.A. IDRIS**	**M. A.ABDULKADIR**
HON. KADI	**HON. KADI**	**HON. KADI**
16th May, 2012	16th May, 2012	16th May, 2012

(20) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON THURSDAY 17th OF MAY, 2012.
YAOMUL-KHAMIS 26THJUMMADAL THANI 1433 A.H

BEFORE THEIR LORDSHIPS*:*

S.M. ABDULBAKI - HON.KADI

M.O. ABDULKADIR - HON.KADI

A .A OWOLABI - HON.KADI

APPEAL NO: KWS/SCA/CV/AP/IL/10/2011.

BETWEEN

ABDULKADIR LANRE ABUBAKAR - APPELLANT

VS

MRS SHERIFAT TITILAYO ABDULKADIR - RESPONDENT

Principle:

If any of the essential constituents of an adjudication is missing it renders the decision incomplete and whatever renders and obligatory duty incomplete without it, it becomes obligatory.

BOOKS/STATUTES REFERRED TO:

1. The practice and procedure in Nigeria courts by Adamu Abubakar Esq.
2. Tuhfatul- Hukam pg 31- 35.
3. Fiqh sunnah Vol III pg 323.1
4. Order 3 Rule 2 of the Area Court Civil Procedure Rule Cap A9.
5. Ihkamul-Ahkam ala Tuhfatul Hukam at page 12.
6. Order 5 Rule 2 of the Area Court Civil Procedure Rule Cap A9.
7. Ihkamul-Ahkam ala Tuhfatul Hukam at page10-11.

JUDGEMENT: WRITTEEN AND DELIVERED BY M.O. ABDULKADIR

At the Area Court Grade 1 No2 centre Igboro Mrs. **Sherifat Titilayo Abdulkadir** (the respondent herein) sued **Abdulkadir Lanre Abubakar** otherwise known in this appeal as (Appellant) in suit No. 179/2011 of 14/6/2011. the course of her suit was petition for divorce on the ground of lack of love and lack of procreation of child.

On the 30th June 2011 when the two parties were to appear before the trial court it was only the respondent that appeared, the appellant was absent.

While answering the question from the Hon trial Judge as to whether or not the Appellant has been served with the summons, the clerk of the court responded that the respondent was not seen for service (sic) and in addition to this, the bailiff of the court also said that "we did not see the defendant, and his siblings refused to be served". The Respondent therefore requested from the trial court for an order for substituted service because, the appellant stays in Abuja. Based on this assertion from the plaintiff, the trial court went ahead to grant an order for substituted service against the appellant by ordering that the civil summons and other court processes be pasted at the entrance door of his abode at No 1 Itakure, Ilorin Kwara State.

On the next adjourned date, precisely on 7th July 2011, the trial court assumed the hearing of the case after being confirmed from the respondent that the order of the court for substituted service had been complied with.

The trial court listened to the complaint of the respondent and her prayer for dissolution of marriage between her and the appellant and without any hesitation, the trial court came to a conclusion that since the appellant was nowhere to be found or seen and nobody cared from the family of the appellant to respond to the substituted service, that showed that they had no interest in pursuing the case

any longer. Therefore, the Hon trial judge proceeded in dissolving the marriage between the two parties. See page 3 line 1-10 of the lower court record of proceedings.

Dissatisfied with the said decision of the trial court, the appellant through his counsel **A. I. AYINLA** Esq has brought this appeal to this court vide a notice of appeal dated and filed on the 4/8/2011 and 5/8/2011 respectively and upon 3 grounds of appeal. Their particulars of error are as hereunder reproduced:

GROUNDS 1:-

The trial Judge erred in law and misdirected himself when he proceeded with hearing of the Plaintiff/ Respondent case without satisfying himself that the Defendant/appellant was properly served. (sic)

Particulars of error:-

(a) The plaintiff/Respondent Cleary told the court that the Appellant lives in Abuja. (sic)

(b) The trial Judge should have satisfied himself on the efforts Made by the Respondent in serving the Appellant with Summons since the Respondent knows where the Appellant resides before ordered for substituted service (sic)

GROUD 2 :-

The trial Judge erred in law when he granted substituted service to the Respondent to paste summons and court process on the door of the Appellant at his last known address of abode in Ilorin (sic).

Particulars of errors:

(a) It is clear to the court that the Appellant is not residing at Ile-kure Ilorin (sic) `

(b) Both the Appellant and the Respondent were living in Bwari town in Abuja until July 2011 when Respondent instituted this suit (sic) (c

(c)) It is not possible for the Appellant to have notice of pending suit

against him in Ilorin

(d) The Appellant only became aware of this Suit when the Respondent went to Bwari Town Abuja to serve the Appellant with Certificate of

Divorce and to pack her properties out of the Appellant's house in

Bwari Abuja (sic)

Grounds 3:-

The trial Judge erred in law and misdirected when he entered Judgments for the Plaintiff/Respondent on the 7th of July 2011 dissolving the marriage between her and Defendant/Appellant where there was no service of court process on the Defendant/ Appellant (sic

Particulars of error

The court did not inquire on whether the Appellant heard notice of pending suit against him.

The court entered Judgment for the Respondent on the adjourned date which follows the date when the order of substituted service was made by the court (sic).

ISSUES

Two Issues for determination were formulated by the appellant counsel while arguing this appeal they are:

1. *Whether having regard to the circumstances of this case, it is proper for the lower trial court to grant issuance and service of summons and other court processes on the appellant by way of substituted means.*

2. *Whether the appellant was given fair hearing in the lower court.*

ON ISSUE NO 1:

The appellant counsel submitted that granting leave to any party by way of substituted means would only be allowed where the other party cannot be traced, seen or shown to be evading services; there must also be a material fact before that court to satisfy itself of those two factors mentioned above.

Appellant counsel submitted further that the Appellant in this case was served by way of substituted means in the lower court on the order of the court when there was no material evidence to justify granting of that substituted service. The counsel referred us to line 30 of page 1-2 of the record of proceedings of the lower court particularly line 35 of page 1.

He added to his submission that the respondent knows where she could get the Appellant served with the summons. The counsel referred us to line 29 of page 1 of the record of proceedings of the lower court, where the respondent said that the appellant lived in Abuja, The counsel submitted that having known where the appellant lived she did not even make any attempt to trace him there. She did not also furnish the court with the details of attempt she has made so far to serve him personally.

The counsel referred to the case of Mallam Adama Madu Vs Madam Fatima Adama (1997) Sharia Court Annual Report page 27 at 29. The counsel submitted that having failed to serve the appellant

personally, he could not be aware of the pending suit against him. Therefore, the lower court cannot assume jurisdiction over him. The counsel therefore urged us to solve this issue one in favour of the appellant.

ISSUE No 2:

The appellant counsel submitted that fair hearing is a right guaranteed by the constitution of the Federal Republic of Nigeria 1999 as amended under S.36(1). he said that the appellant at the lower court was not given fair hearing. This is because he had no knowledge/notice of the whole proceedings before the lower court, neither notice of hearing of the case nor notice of judgment. Thereof, the appellant became aware of the proceedings and the judgment on the day the respondent went to pack her properties at the house of the Defendant/Respondent in Abuja after the judgment. The appellant's counsel finally urged us to allow this appeal and set aside the judgment of the lower court.

We have perused the record of proceedings of the trial Area Court, we gave critical perusal to the 3 legs of grounds of appeal and their particulars of error. We also considered the arguments of the learned counsel to the appellant vis – a-vis the 2 issues raised and the prevailing law and procedure. In our view from the fact of the entire proceedings before the lower court and what was placed before us in this appeal, center on whether or not the defendant was served personally as required by the law i.e Order 3 Rule 2 of the ACPR cap A9. Supposed defendant before the trial court and the appellant before us had the notice or knowledge of being invited to come and defend the cause of action (Divorce) filed by his wife (respondent) before the trial Area Court, and whether or not the trial Area court was satisfied with cogent/substantial reasons through affidavit means before it granted the application of the respondent for substituted service on the applicant. Upon aforesaid, it is our humble view that

under Islamic Law in a case in court having a person or persons suing and being sued (parties) who must be aware of a particular dispute before the commencement of hearing, is a fundamental requirement for proper adjudication of that dispute.

Maliki school is of the view that entry of judgment in a case in absence of the other litigant (defendant) is a deprivation of right as he shall be heard and his arguments taken even if such should lead to set aside the Judgment. see the Book of Islamic law, the practice and procedure in Nigeria courts by Adamu Abubakar Esq. Also see Tuhfatul- Hukam pg 31- 35 and fiqh sunnah Vol III pg 323 where it is quoted that:

> **"The** ***Judge shall not proceed to Judgment on an absent of Litigant except he is present or has his proxy, guardian in attendance as he may have an argument with him which.***
>
> ***May refute the claim of the claimant and because the messenger of Allah Prophet Mohammed (SAW) said to Ali in the Hadith,***
>
> ***"Oh Ali, if two of the litigants are before you do not give Judgment***
>
> ***Between them untill you hear of the other, as you hear of the first.***
>
> ***That If you do that Judgment shall be manifestly clear to you".***

In the light of these two authorities, it is necessary to examine the issues raised above.

1- Method of service of process of court**:** It is firmly established under all legal system that personal service is the best method of bringing a defendant to the knowledge of a suit against him or her see order 3 Rule 2 of the Area court (civil procedure Rule) cap. A9 where it said that:-

> *"Save as hereafter provided service shall be affected*
> *By handling duplicate copy of the document to the person to be served "*

The above is a clear statutory provision for the service of a write of summon on the Defendant personally. Especially in Area court

As reiterated **supra**, the respondent at the trial area court sued the appellant for dissolution of their marriage, the poser raised here is whether the appellant was served with writ of summons of this suit personally, the answer to this can be seen on page 2 Lines 20-25 of the record of the proceedings of the trial court where it is said:

> ***"Ct - plaintiff - where is Defendant? (sic)***
> ***Plaintiff- ct - He is not in court. (sic)***
> ***Ct –ct's clerk- was he served? (sic)***
> ***Ct's- clerk ct – He is not seen to be served (sic)***
> ***Bailiff- ct – We did not see the defendant and***
> ***HIs siblings refused to be served (sic)***

From the above responses by the plaintiff court's clerk and even by the bailiff of the court, it has undoubtedly shown clearly that the appellant was not even seen to be served talkless of serving him personally.

Be that as it may, the legislative body of this law and all other enabling laws to that effect had envisaged that if such a thing happened i.e. lack of seeing the defendant or respondent for personal service another method was equally brought about and that is what we call substituted service.

Now, what is the position of this method of service under the Islamic law and even common law.

As earlier stated, it is firmly stated that a writ of summons and all other originating court's processes must be served personally on the defendant or respondent as the case may be, unless it is impracticable to serve the processes personally, in that case, substituted service may be ordered by the court, this is effected by serving the document on some persons likely to bring it to the knowledge of the party or by pasting it on the conspicuous part of abode or last known address of the party concerned.

The above position was supported by Islamic Law See **Ihkamul-Ahkam ala Tuhfatul Hukam** page12 it says:

"For any person who summoned by the Judge (court) to appear in court and evaded and went into hiding in his/her house or any other place, the judge or his representative shall commit the summons to be served on him or her at where he/she is ordinarily residing such a house, place of business e.t.c. by pasting

يعني: إن من طلبه القاضي أو الأمثل بالمرسل إليه لحضور محل القضاء فأمتنع من الحضور واختفى في بيته أو غيرها فإن القاضي أو من تنزل منزلته يحجز على أهل محل له من دار أو حانوت بأن يجعل على الباب شهعا والحكمة في ذلك كي يحضر أو غيره ويطبع عليه بطابع والحكمة في ذالك كي يحضر جلس القضاء.

such summons on her door in order to compel him/her to appear in court"

In the same vein, order 5 of the Area court civil procedure Rule cap. A9 states that:-

"Where it appears to the court either with or without an attempt at service in accordance with the provision of Rule 2 hereof that for any reason such service can not conveniently be effected, the court after being satisfied by affidavit that it is necessary so to do may order that service be effected''

(a) By delivery to the agent.
(b) By advertisement.
(c) By notice.
(d) By affixing summons to premise.

It is clear from the contents of this provision that where personal service could not be effected the court may after being satisfied by affidavit evidence to be deposed to by the applicant that it is necessary to give such order by the court order that substituted service should be effected.

It is assumed that the trial Judge in this case on appeal has placed reliance on the above authorities to give the order for substituted service. See page 2 lines 26-34 of the record of proceedings where the trial Judge recorded thus:-

Ct – plaintiff – what do you want the court to do now (sic)

Plaintiff – ct urge the court to please help me with

Substituted service. This is because he stays in Abuja (sic)

Then without any further enquiry the trial court granted the request of the respondent for substituted service even after the court was made to understand that the appellant was living in Abuja. In his ruling, the trial court said:

> *In view of the fact that the Defendant is not see served, I hereby ordered for substituted service on the Defendant by pasting the civil summons and other court's processes at the entrance door of his last abode at No1 Itakure, Ilorin Kwara State".(sic)*

On the7th July 2011 the case was reopened for hearing, the trial judge asked the respondent whether he has complied with the order of the substituted service being given pervious day by the trial court, the respondent replied in affirmative to the effect that they have complied by pasting the summons, and that the appellant was still not in court, the trial court without any hesitation or further investigation as to where, how, and when the pasting of the summons was executed, went ahead to hear the statement of the respondent, it was on the basis of the statement of the respondent alone without more or further proof that the trial judge gave his decision on that very day and dissolved the marriage between the parties See page1 lines 26-34 and page 3 lines 1-15 of the record of proceedings of the trial court.

It is pertinent at this point to note that it is because of all these inordinate steps taken by the trial judge that made the appellant enraged When the respondent went to Bwari town in Abuja to serve the appellant with Certificate of divorce and to pack her properties out of the Appellant's house in Bwari, Abuja, this shows that she knew that Bwari, Abuja is the last known place of abode of the appellant but was hiding that fact from the court at the commencement of her action before the court. If not, why did she not furnish the court with all necessary information required, so as to get

the appellant served personally or even through the substituted means at Bwari, Abuja his last known of abode.

We on our part, have drawn necessary inferences from the antecedents' of this case as placed before us through the record of proceedings of the lower court, the grounds of appeal, and the submission of the appellant's counsel and resolved that the trial court ought not to have issued and ordered for the substituted service against the appellant when there was no enough or cogent reasons to satisfy the court through affidavit before it embarked upon giving that order. We therefore resolved this issue in favour of the appellant.

Assuming without conceding that the order of the court was proper and the defendant was served properly. we are of the view that the appellant was not given fair hearing because he was not allowed to defend himself before the trial Judge passed its Judgment. It is trite that a hearing can only be fair when all the parties to the dispute are given a hearing or an opportunity of hearing.

In the instant case the trial court heard the statement of respondent and her reasons for seeking divorce against the appellant. It did not give the respondent opportunity of proving her complaint neither did it call upon the appellant to defend the action against him, it is our humble view therefore that the decision of the trial court as well as granting the divorce in this matter is highly irregular, more so, when it was arrived at in the absence of the appellant who was not afforded any opportunity at all to defend the action of the plaintiff.

The effect of this therefore is that once we have found that the appellant who is entitled to be heard before the trial court was not given the opportunity of being heard, the order/judgment already entered is bound to be set aside and we so hold. We equally resolve this issue of fair hearing in favour of the appellant.

It follows from what we have been saying in this appeal that, the issue of a writ of summons and services of that writ of summons on the appellant in this case are conditions precedent required before the trial court can have jurisdiction, and as we have concluded that the appellant herein was not brought to the knowledge of the action of the respondent at the trial court, it is our opinion that the trial court has no jurisdiction to try this case because one of the essentials constituents of adjudication i.e. the Deft is missing i.e. the Deft See Ihkamul-Ahkam ala **Tuhfatul Hukam** at page 10-11. It says:

That essential constituents of adjudication that renders the decision incomplete and defective if any of them is missing are six: the judge, the plaintiff, the defendant, cause of action, the applicable law, and procedural law" page10-11

ان اجزاء حقيقة التى يتم الحكم الا يجميعها ويختل بفقد واحد منها وهى ستة: القاضى,والمدعى عليه,والمدعى فيه, والمقتضى به وسادسها كيفية القضاء(راجع احكام الاحكام على تحفة الحكام (ص 10–11).

See also the case of **Madukolu Vs Nkemdilim** (1962) 2 SCNL 341 where it was held that any non compliance or defect that goes to competence or jurisdiction of a court is fatal, it renders the proceedings a nullity however well conducted and decided.

Also, Islamic principles have it that:

Whatever renders an obligatory duty incomplete without it, it becomes obligatory".

كل وسيلة إلى الواجب واجب

In the light of the above authorities, it is our conclusion that the appeal herein is meritorious upon the 3 grounds of appeal and upon the 2 issues raised and argued by the appellant's counsel herein.

Accordingly the appeal is allowed and the decision of Area court Grade 1 No2 centre Igboro Ilorin in suit No179/2011 of 14/6/2011 contained in the judgment delivered on 7th day of July 2011 is therefore set aside and quashed.

Consequently, we order that the case be retried by Upper Area Court 1 Ilorin and it should be given accelerated hearing.

SGD	SGD	SGD
A .A. OWOLABI	**S.M. ABDULBAKI**	**M. O. ABDULKADIR**
HON.KADI	**HON.KADI**	**HON. KADI**
17/5/2012	**17/5/2012**	**17/5/2012**

(21) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF PATIGI JUDICIAL DIVISION
HOLDEN AT PATIGI ON THURSDAY, 31ST MAY 2012 (10TH RAJAB, 1433 A.H)

BEFORE THEIR LORDSHIPS:

I.A. HAROON - HON. GRAND KADI
A.A. IDRIS - HON. KADI
S.M. ABDULBAKI - HON. KADI

APPEAL NO: KWS/SCA/CV/AP/PG/05/2011

BETWEEN:

KHADIJATU JIBRIL - APPELLANT
VS.
MOHAMMED JIBRIL - RESPONDENT

Principles:

1. In Islamic law any form of clothes or ornaments given to a proposed wife as a gift shall not be retrieved after the dissolution of marriage except if the marriage terminates before consummation.
2. All Jurists agreed that termination of marriage by way of "khul" becomes legitimate by refunding the main dowry (either in cash or kind it may be more or less).

BOOKS/STATUTES REFERRED TO:

1. Kitab az-Zawaj, p.234
2. Ihkam al-Ahkam, p.84 by Sheikh Muhammad bn. Yusuf Al-Kafi.
3. At-Talaq, by Ibrahim al-Khafawi, p.229.

4. Al-Kafi in Ihkam al-Ahkam, p.84 by : Ash-Shaykh Muhammad bn. Yusuf .

JUDGMENT; WRITTEN AND DELIVERED BY: I.A. HAROON

The appellant in this appeal; Khadijatu Jibril was the plaintiff at the trial Area Court 1 Patigi. She sued her former husband who was the defendant at the trial court for divorce on the ground of lack of love in Suit/Case No 163/2011.

The respondent sought for reconciliation but this was instantly rejected by the appellant. The respondent then consented to the divorce by way of *khul*^{c}. He later made a claim for the dowry and related marriage expenses totaling #55,700.00 out of which the appellant admitted #7,500.00. The defendant called two (2) male witnesses to establish his claim. The DW1; Jibril D. Issa gave evidence to a sum of #124,100.00 out of which the plaintiff admitted #5,000.00 while the DW2; Muhammed Ndaman Yissah gave evidence of #133,100.00 and the appellant admitted #5,000.00.

The appellant on her side called two witnesses; a male and a female. PW1; Mohammed Gana gave an evidence of #142,000.00 which the appellant denied in entirety as she said it was given to her parent without her knowledge. The PW2; Fatima Mohammed gave evidence that the defendant rendered a service and labour in the farm of the appellant's father for three (3) years but she did not know the cost; that *sadaqi* and rice were paid for but no sum of money was given. The appellant agreed on the evidence. The appellant complained to the trial court that the respondent collected two handsets from her which she wanted to retrieve from him.

The court having listened to the parties involved assessed the matter based on the evidence adduced before it, decided the matter by granting the divorce *khul*^{c} and ordered the plaintiff to refund a sum of #142,000.00 to the respondent.

The appellant having been aggrieved with the verdict of the trial Area Court appealed to our court for a redress.

This appeal was based on four (4) grounds; that the decision of the trial court was unreasonable, unwarranted and cannot be supported for lack of fair hearing; that the trial court misdirected itself when it awarded #142,000.00 to the defendant against the #10,000.00 dowry and that she was not given the opportunity to defend herself.

The two parties involved in the matter appeared before us on 17th April, 2012 (25th Jumadal-'ula, 1433 A.H). The appellant told the court that both of them were husband and wife and that their marriage lasted for 14 days only. The appellant told the court that her main grievance and complaints are based on the decision of the trial Area Court on the claims and the decided sum of #142,000.00 to be refunded by her to the respondent. She told the court that the respondent only paid #10,000.00 as a dowry on her in accordance with the custom of their village. She stated that the money calculated by the respondent was more than #142,000.00 but it was reduced by the court. She said that the respondent collected her two (2) handsets which were worth #10,000.00.

She prayed the court to set aside the decision of the trial Area Court, reduce the money to be refunded to the respondent and replace the order on claim to #30,000.00. She said that whatever was transacted between the respondent and her father was never known to her and she should not be held responsible.

The respondent in his statements prayed the court to discountenance with all what the appellant had said. He stated that it was only #7,500.00 admitted by the appellant that he gave directly to her and that the rest of the money expended by him while betrothing the appellant was transacted through his brother to the father of appellant. He further told us that in line with the existing tradition of

their village, he employed labourers to work for the father of his betrothed wife between 2008 and 2010 (no cost was given).

He said that he spent the total sum of #55,900 on the appellant. He told us that he called two male witnesses and that the PW1 testified to a sum of #142,000.00 while the PW2 testified to #133,000.00

He prayed the court to help him retrieve all the money he expended and that the court should discountenance with the prayer of the appellant that the claim be reduced to #30,000.00. He concluded his statement by praying the court to grant his prayer for the claim of all his expenses since their marriage was not consummated.

The appellant in her reaction confirmed that the marriage was not consummated because she did not love the respondent.

Having carefully listened to the two parties involved in this matter and patiently perused the record of proceedings of the trial court, it is our well considered view that the main issue in the instant appeal for consideration is whether or not the respondent is entitled to claim back all what he expended on the appellant during the betrothal period and after, before their marriage was dissolved by the trial court at the instance of the appellant.

Before we go to the issue of claim, we want to quickly address the issue of whether the marriage was consummated or not. On the issue of consummation of their marriage which the parties stated that it lasted for 14 days only, the assumption of law is that the marriage is consummated. The law is that where a couple stayed together in seclusion without hindrance for a day or more, that is enough ground to serve as a proof for consummation. See ***Kitab az-Zawaj, p.234***

However, the parties in the instant appeal will be given the benefit of the doubt and thus adjudged by their statements that their marriage was not consummated and we so hold.

Going by the Islamic golden procedural rules, claims such as in the instant appeal are categorized into two thus; claimable and un-claimable. These in technical terms are what were given to the wife as gifts, money or materials which were meant to strengthen the cordial relationship between the proposed wife and husband. The second class is what is given to the wife strictly as dowry and the related materials.

We took judicial notice that the respondent in this appeal gave a list of twenty-one (21) items of claim (see p.3-4 of the Record of Proceedings) which are mainly cash given to the appellant at different occasions. These items were totaled #55,700.00. The appellant disagreed with the respondent on all the items except items (12) #1,500.00 (for Egbe cloth) and (19&20) #4,000.00 and #5,000.00 (for small and big sallah respectively); which she said were #2,000.00 and #3,000.00 (for small and big sallah) and item (21) #1,000.00 (given to her when she was sick). The appellant by this admitted that she collected #7,500.00 only from the respondent out of the #55,700.00 claimed by him.

We equally took judicial notice of the statement made by the respondent before this court during the hearing of this appeal that the appellant only collected the sum of #7,500.00 directly from him and that the remaining sum of money was transacted through his brother to the father of the appellant.

The position of law in a situation such as in the instant appeal where the marriage was not consummated, even though the gifts are not claimable, is that the husband herein the respondent has the *locus standi* to claim the refunds of all the expenses and items so given to the appellant. The relevant law is highlighted in the work of ***Ash-Shaykh Muhammad bn. Yusuf Al-Kafi*** in ***Ihkam al-Ahkam,*** **p.84** which goes thus:

وكل مـــا يرسل الزوج إلى *** زوجته مـن الثياب والحلى
فإن يكن هديـــة سماها *** فلا يسوغ أخذه إيـــاها
إلا بفســـخ قبل أن يبتنيا *** فإنه مستخلص مـــا بقيا

What a man gives to his wife, in the form of clothes or ornaments (consumable or perishable) which are meant for gift shall not be retrieved except where the marriage is terminated before consummation then the claimant shall retrieve what remains.

However, before the above law could be applied, claims must be properly established by two unimpeachable male witnesses or two females and a male particularly where the claim is monetary such as in the instant appeal. Each item must be established as required by law. The respondent upon whom the onus of proof rested in this appeal had failed to establish his claims as demanded by law. This was so because none of the two witnesses called by him; DW1 and DW2 gave evidence relating to the items enlisted by the respondent as reflected in the record of proceedings (pp.3-6). The evidence of the two witnesses is not only contradictory but also not corroborative with the claims of the respondent. Thus the evidence is bound to fail and we so hold.

The second class of the claim is the *mahr* (dowry) and related materials; by the content of the record of proceedings and the statements of the two parties before us, the dowry paid to the appellant by the respondent was #10,000.00. What could be added to the dowry in the claims of the respondent was the money expended while serving as labourer on the farm of the appellant's father in accordance with the tradition of their village. This was testified to by DW2 who put the cost at #60,000.00 (p.6 ROP) and PW2 who only said that the service was carried out three (3) times in within years, no cost was given. Thus, this aspect of the claim had not been properly proved and it cannot be claimed.

By our law, the respondent is entitled to claim the whole of the dowry as it may also be less or more based on the fact that the dissolution of their marriage was at the instance of the wife, herein the appellant by way of *khul^{c}*, *khul^{c}*, dissolution of marriage by a wife as a result of lack of love should be on payment of compensation to the husband, herein the respondent. This is entrenched in the book of ***At-Talaq by Ibrahim al-Khafawi, p.229:***

ذهب جمهور الفقهاء إلى صحة الخلع بالمهر المسمى وبأقل منه وبأكثر.

It is the consensus of the Jurists that dissolution of marriage by way of Khul^{c} becomes legitimate by refunding the main dowry (anything), or below it or above it.

In the circumstance of this appeal where the husband, herein the respondent did not opt for compensation before consenting to the prayer of his wife for *Khul^{c}* before the marriage was terminated, and could not establish his claim, the only chance he has is to claim the main dowry "المهر المسمى" and we so hold.

In the light of the above, the only refundable claim in the instant appeal is the main dowry of #10,000.00 which was not disputed by the two parties, and we so hold.

This appeal is therefore resolved in favour of the appellant. We cannot just arbitrarily award the sum #30,000.00 which the appellant prayed for without legal base particularly when the respondent said that the only sum of money given from him directly to the appellant was the sum of #7,500.00

The decision of the trial Court in its judgment dated 14/12/2011 on the refund of #142,000.00 by the appellant to the respondent is legally baseless, arbitrary and cannot therefore withstand the test of law. It is hereby set aside. We order in its replacement that the

appellant is to refund a sum of #10,000.00 dowry and also the sum of #7,500.00 admitted by her totaling #17,500.00.

Appeal Succeeds.

SGD	**SGD**	**SGD**
S.M. ABDULBAKI	**I.A. HAROON**	**A. A. IDRIS**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
31/05/2012	**31/05/2012**	**31/05/2012**

(22) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON THURSDAY, THE 21ST OF JUNE, 2012
YOMUL KHAMIS 2ND SHABAN 1433 A.H

BEFORE THEIR LORDSHIPS:

S .M. ABDULBAKI - HON. KADI
M .O. ABDULKADIR - HON. KADI
A .A. OWOLABI - HON. KADI

MOTION NO. KWS/SCA/CV/AP/IL/15A/2011

BETWEEN:

LATIFATU ADUKE AHMED - APPELLANT/APPLICANT
AND
JIMOH FATAI - RESPONDENT
AND
AHMED SALIMAN - APPLICANT/PARTY INTERESTED

Principles:

1. In Islamic law, the record of proceedings of any trial court is presumed to be correct in the absence of any allegation of in correctness because it is on equal footing as equivalent to the testimony of a competent witness.
2. Under Islamic law, Judge has the discretionary power to revisit his previous decision if additional evidence of value is apparent after his decision.

3. In Islamic law, any person who alleges an interest in any matter is in aggrieved party and he should be allowed to ventilate his grievances.
4. It is duty bound on a judge in Islamic law to listen to all claims and evidence before giving his verdict.

BOOKS/STATUTES REFERRED TO:

1. Section 277, Paragraph (2) (b) 1999 Constitution as amended states..
2. Section 54 Area Court Law Cap.A9 Laws of Kwara State 2006.
3. Section II (a) Sharia Court of Appeal Laws Cap. S4 Laws of Kwara State 2006.
4. Order II Part I Area Court (Civil Procedure) Rules Cap.A9 Laws of Kwara State 2006.
5. Section 13 of Sharia Court of Appeal Laws Cap. S4 Laws of Kwara State 2006.
6. Imam Az-zarganiy page 22 commentary on Muwatta Imam Malik Vol. IV.
7. Order 3 Rule 7 (2) (a) –(f) Sharia Court of Appeal Rules Cap. S4 Laws of Kwara State 2006.
8. Tabsiratul Hukkam by Ibn Farhum Volume 1 page 25.
9. Jawahirul Ikhlil Vol.11 page 228 – 229.
10. *Sunanu abi Daud, p. 166, vol. 2, printed- Dar-l- fikr."*
11. *Irshad Assalik vol. 3 page 199.*

JUDGMENT WRITTEN AND DELIVERED BY A.A. OWOLABI (KADI)

The applicants were represented by Ahmad Saka Esq. with Ayinla I.A. Edun Esq while I.O. Abdulsalam Esq represented the respondent. The applicants filed a Motion on Notice dated and filed on 5/4/2012.

The hearing of both the application and the substantive appeal was adjourned severally for an attempt by the parties to resolve the matter extra judicial at the instance of the applicants.

On 7/6/2012, when the matter was mentioned for report of settlement and or hearing, Ahmad Saka Esq. informed the court that the matter could not be resolved amicably by the parties thereby the matter ought to be heard and the matter could proceed. Abdulsalam Esq. responded that he had no information about the outcome of attempt to settle the matter as he was not involved but concluded that the matter could go on for hearing.

As a result of this, in moving the application, Saka Esq. submitted that the application is brought pursuant to Section 36 (1) of the Constitution (as amended) and Order III Rule 7 (2) (2) (a) & (b) of Sharia Court of Appeal Rules and Sections 10 (2) and 13 C & D of Sharia Court of Appeal Law Cap 145 and under the inherent jurisdiction of the court.

The applicant is seeking for the following orders

1. ORDER granting leave to the Applicant to be joined in this appeal as interested party.
2. Order granting leave to the applicant to be heard on the evidence of marriage between him and the appellant before the institution of this suit in the lower court.

The application is supported by a 21 paragraphs affidavit deposed to by Ahmed Saliman; the applicant personally, attached to the supporting affidavit is Exhibit A. He placed reliance on all the

depositions. By paragraphs 3 – 12 of the supporting affidavit, the application deposed therein to the grounds for bringing this application. He submitted that the grounds deposed to therein were not controverterd by the respondent. He urged the court to hold that those paragraphs 3- 12 have established the fact as contain therein.

By Order 3 Rule 7 of the Sharia Court of Appeal Rules, he submitted that this court which is empowered by the rule to hear any appeal, any person can be called as a witness to give evidence. The same order empowers this court to do what the lower court had left undone.

He urged the court to invoke its power to grant his prayers for the purpose of doing substantial justice and to appreciate all the facts surrounding the substantive matter.

The brief fact of the matter, is that the respondent instituted a claim against the appellant at Upper Area Court II Oloje claiming the responsibility of the pregnancy being carried by the appellant as it appeared in Exhibit A to the motion.

In respect of the counter affidavit, he prayed the court to take cognizance of paragraph 5 of the counter affidavit which lends weight to the fact that the applicant is the husband of the respondent. He submitted that the record of proceedings of the lower court was not attached to this motion because the applicant was not a party to the case at the lower court, however, he sought the leave of this court to look at record of proceedings of the substantive appeal and to grant his application.

He submitted that paragraph 8 of the counter affidavit is a conclusion and urged us to strike out same. He concluded that since there is no serious challenge in the counter affidavit against his motion and in the interest of substantial justice he urged that the application be granted.

Abdulsalam Esq. learned counsel to the respondent stated in opposition to the application that the respondent filed a Counter Affidavit of 14 paragraphs sworn to on 19/4/2012 and deposed to by the respondent. He relied on all the paragraphs.

The learned counsel sought the leave of this court to refer to the proceedings before this court of 3/4/2012. He submitted that in this court when the appeal was called upon for hearing the appellant was eager to go on, by then there was no application for joinder. This application to be moved came in on 5/4/2012 only after an adjournment to 14/4/2012 was granted on the principle of fair hearing.

He submitted that the main issue therein is whether the applicant can be joined on appeal when he was not a party at the lower court. The learned counsel adopted all the contents of the counter affidavit. He submitted that the applicant cannot be joined because the court can only determine an appeal by an aggrieved party from Upper Area Court.

He further submitted that the name of the parties at the lower court are Jimoh Fatai Vs. Latifatu Aduke and not Latifatu Aduke Ahmed. He submitted that the name as contained in the Notice of Appeal and the Motion is motivated to misdirect the court to presume that the applicant is an interested party. He referred to Afusat Arike & Another Vs. Alh. Saadu Alao 1996 Annual Report of Kwara State Sharia Court of Appeal Law Page 10 @ 11.

He finally submitted that most of paragraphs of the Counter Affidavit were not controverted by the applicant. He urged this court to hold that the fact therein have been duly established. He referred to Yarduat Vs. Ajomole 1991 5 SCNJ 178, 179, 180. He submitted that paragraph 5 of the Counter Affidavit has posed a serious challenge to the affidavit in support. He further referred to Section 3 (a) & (b) of illiterate Protection Law Cap.I1 and submitted that the

affidavit are not proper before this court for failure of the deponent to add an illiterate jurat, failure of same has nullified the affidavit. He urged this court to hold that the applicant who was not a party at the lower court could not be joined at this stage. He urged that the application be dismissed.

Saka Esq. further urged the court to discountenance the authorities cited by the respondent as the principle in Yarduat was based on English law therefore not binding on this court. On Illiterate Protection Law he submitted that it is also based on English Law. The alleged proceedings referred to in the counter affidavit at paragraph 5 is not before this court. It is therefore speculative.

He further submitted that the case of Afusat is not apposite to the matter before this court. He urged the court to hold in respect of the name of parties, that the point is not a substantial ground to defeat this application. If there is any error this court can correct same on appeal. He agreed that the name of the appellant as it appeared on the motion paper and on the Notice of Appeal is not the same as in the proceedings of the lower court. He finally urged this court to grant his prayer.

This court adjourned its decision to 21/6/2012.

The respondent filed a plaint dated 9/9/2011 claiming the pregnancy being carried by the appellant, he stated thus, "I want to claim my pregnancy from her"

After the summons was issued and served, the complain plaint was read to the appellant. On hearing the claim, the appellant admitted the respondent's claim by saying "It is true, plaintiff is responsible for the pregnancy in me". Based on her admission, the trial Judge gave judgment in favour of the respondent and awarded the pregnancy to him.

The appellant later filed an appeal against the judgment with Notice of Appeal dated and filed on 6/10/2011 and 21/10/2011 respectively with 3 original grounds of appeals. The grounds of appeal devoid of particulars are as follows;

1. The trial judge erred in law when he delivered judgment for the plaintiff without following the procedure laid down under Islamic Law.
2. The trial judge erred in law when he fail to give the parties fair hearing.(sic)
3. The trial judge erred in law and misdirected when he entered judgment for the plaintiff/Respondent on the 21st of September, 2011 concluded that the pregnant is owned by the Plaintiff Respondent.

On 10/4/2012 when the appeal was to be heard before us it was discovered that one Ahmed Sulaiman had filed an application dated 5/4/2010 with two prayers as follows.

1. ORDER granting leave to the Applicant to be joined in this appeal as interested party.
2. Order granting leave to the applicant to be heard on the evidence of marriage between him and the appellant before the institution of this suit in the lower court.

The motion was attached with an affidavit of 21 paragraphs sworn to by the applicant personally. The respondent filed a counter-affidavit of 14 paragraphs.

The main fact in the affidavit in support are as contained in paragraphs 2 – 19, but with particular reference to paragraphs 2- 5 which are as follows.

2. That I know the Appellant in this case very well, she is my legal wife.

3. That I legally married to the appellant on the 17th day of March, 2011 at Elebue Olanrewaju in Asa Local Government at the house of the appellant's father after I had paid all necessary materials to her family.
4. That I know as a fact that the marriage was conducted in accordance with Islamic law hence I paid sum of N2,000 two thousand naira only as dowry and 40 Kola nuts to the father of the appellant.
5. That the marriage was conducted and administered by the Chief of Imam of Elebue Alhaji Amuda Imam assisted by other scholars. The marriage was equally witnessed by my father Mal. Saliman and other people from my family.(sic)

The learned counsel to the applicant submitted that paragraphs 5 and 8 of the Counter Affidavit are supportive of their prayers and a conclusion respectively. He urged the court to grant his prayer.

In opposing the prayers, the learned counsel to the respondent filed 14 paragraphs counter affidavit and submitted that the discrepancy in the name in the proceedings of the lower court, the Notice of Appeal and the motion is not substantial enough to affect the prayer before this court as this court can correct same. He referred to Afusat Arike & Another Vs. Alh. Saadu Alao (supra). He further submitted that most of the paragraphs of the counter affidavit were not controvertered by the applicant. He cited Yarduat Vs. Ajomole (supra) and referred us to paragraph 5 of the counter affidavit. He finally submitted that failure of the applicant to add an Illiterate jurat to the affidavit in support has nullified the affidavit and cited Section 3 (a) & (b) of Illiterate Protection Law (supra). He finally urged us to dismiss the application.

The applicant in response submitted that the Yarduat case and Illiterate Protection Law were all based on English Law and

therefore are not applicable in this court. He concluded that the case of Afusat is not relevant while the issue of name is not substantial.

The respondent denial in paragraph 5 of the counter affidavit in our view is not a complete denial of the fact in the paragraphs referred to therein, he disposed as follows.

2. That I am not in position to say anything regarding paragraphs 2,3,4,5,6 and 7 of the affidavit in support because I never before this incident came across the applicant nor heard about his purported marriage to the appellant.

The power of this court to hear an appeal from Area Court and Upper Area Court is statutory. See Section 277 (2) (b) 1999 Constitution as amended and Section 54 Area Court Law Cap. A9 Laws of Kwara State 2006 and Section II (a) the Sharia Court of Appeal Laws Cap. S4 Laws of Kwara State 2006. These Laws and rule state thus.

Section 277 paragraph 2 (b) of 1999 Constitution as amended states;

For the purpose of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide.

b) where all the parties to the proceedings are Muslims, 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;

Section 54 Area Court Law Cap.A9 Laws of Kwara State 2006 states;

1. Any party aggrieved by a decision or order of an Upper Area Court or any Area Court Grade I or II in an Islamic Personal Law matter may appeal there from the Sharia Court of Appeal.

Section II (a) Sharia Court of Appeal Laws Cap. S4 Laws of Kwara State 2006 also states;

The Court shall be competent to decide-

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

In compliance with the above provisions this court is guided to apply the following Laws and rules as enumerated therein under.

Order II Part I Area Court (Civil Procedure) Rules Cap.A9 Laws of Kwara State 2006 provides as follows:

After the provisions of Order 10 have been complied with, then, if the case is one in which Moslem Law is to be administered or applied, the court shall continue the hearing in accordance with Moslem practice and procedure.

Section 13 of Sharia Court of Appeal Laws Cap. S4 Laws of Kwara State 2006 also provides.

13. The court, in the exercise of the jurisdiction vested in it by this Law as regards both substantive law and practice and procedure, shall administer, observe and enforce the observance of, the principles and provisions of –

(a) Islamic law of the Malik School;

(b) this Law;

(c) the Area Courts Law and any other law affecting area courts

In so far as it appertains to a cause or matter within section 11 of this Law, and

(d) natural justice, equity and good conscience according to Islamic law.

We hold that the record of proceedings of a court of the trial court is presumed to be correct as it is equivalent to the testimony of a competent witness but once any person alleges incorrectness in the record of proceedings notwithstanding the presumption same to be looked into.

The main application is for joinder and for leave to be heard in this court on the evidence of marriage between the interested party and the respondent which the applicant alleged that he raised before the lower court. This fact is not embodied in the record of proceedings of the trial court presented before the court.

The claim in the case at the trial relates to paternity and until a legal father or a biological father is established by a recognized marriage before a child or a pregnancy would be determined. We refer to Imam Az-zarganiy page 22 commentary on muwatta Imam Malik Vol. IV

It is our considered view that since there is an allegation of marriage and claim by the applicant to the pregnancy which the appellant was carrying, the applicant is deemed an aggrieved party within Sec. 54 of the Area Court Law. His right is being a constitutional one on a matter of Islamic personal law as his claim relates to paternity under Section 277 (2) (b) of the Constitution.

The power of this court to hear additional evidence is provided under Order 3 Rule 7 (2) (a) –(f) Sharia Court of Appeal Rules Cap. S4 Laws of Kwara State 2006. The rule states as follows:

(1) The court shall not normally re-hear or re-try the case but if it shall be necessary for the purpose of elucidating or amplifying the record of the court below and arriving at the true facts of the

case the court may re-hear or re-try the case in whole or in part and may –

(a) Allow, or require, witnesses to be called, whether or not they gave evidence before the court below;

(b) ……

This Court by virtue of Order 3 Rule 7 (2) (a) has the power to hear further or additional evidence which is at the discretion of the court .

This is in consonance with the view of Al-Qasim in Al-mudawanah where he held that if additional evidence of value is apparent after judgment or defence that he did not know the fact before judgment, the evidence should be looked into. See Tabsiratul Hukkam by Ibn Farhum Volume 1 page 25. It says ‘’Don’t allow a decision you made in the past and you had cause to revisit and you are guided to returning to the truth, to return to the truth is better than persisting in error.”

Since the matter involves issue of claim of pregnancy cum paternity the matter could be reopened. See Jawahirul Ikhlil Vol.11 page 228 – 229 where it is stated.

The court shall then close the case against him except in

(i) the charges of murder

(ii) claims of Habs (i.e.) endowment

(iii) claim of a slave that he/she had been set free

(iv) claim of Nisab (i.e) consanguinity and

(v) claim of a wife that her husband had set her free.

That obligations in each case the gate is always open to the person that makes such allegation to come forward and establish their claims.

We are fortified to come to this conclusion because Area Court, Upper Area Court or Sharia Court of Appeal are not restricted to grounds or issues raised by parties.

"Under the Islamic law both the trial and appellate courts are not restricted to the grounds or issues raised by a party before it. The judge is required to apply which ever is the relevant law applicable to the case before him." See Ahmadu Sidi Vs. Abdullahi Sha'aban CA/K/81/S/91 of 13/2/1992 (unreported).

In Islamic law, any person who alleges an interest in any matter is an aggrieved party, and on a principle of fair hearing such person must be heard and be allowed to ventilate his grievances.

This is in line with the prophetic hadith which says.

(... إذا جلس بين يديك الخصمان فلا تقضين حتى تسمع من الآخر كما سمعت من الأول...) سنن أبي داود, ص **166**, ج **2**, طبع دار الفكر".

Meaning: When two disputants are standing before you (as a Judge) you should not give your judgment until you hear from the other person as you hear from the first person. "Sunanu abi Daud, p. 166, vol. 2, printed- Dar-l- fikr."

Also Ibn Rusid opined as follows:-

"ولايحكم (القاضي) حتى يسمع تمام الدعوى والبينة ". انظر "إرشاد السالك, ج **3**, صفحة **199**.

Meaning: A judge shall not give vedict until he listen to all claims and evidence. See Irshad assalik vol. 3 page 199.

We hereby grant the applicant's leave to be joined as an aggrieved party and for all parties to be allowed to state their side of the story as regards the relationship between all the parties. We so hold.

Even if this court has the powers to entertain additional evidence, it is our view that such application will over strength the discretionary power of this court whereby the whole trial would be heard in this appellate court. We hereby refuse the second leg of the application to entertain the evidence of marriage between any of the parties inclusive of the applicant. This is our order and we so hold.

From this, there is need for another court to investigate the existence of a valid marriage despite admission. The content of the complaint did not show marriage and no detail fact was laid before the trial court to support the admission of the appellant.

It is our decision that all the parties; the respondent; JIMOH FATAI, the appellant; LATIFATU ADUKE and the applicant; AHMED SALIMAN be allowed to state their position in accordance with Islamic law at Upper Area Court No.1, Ilorin.

SGD	**SGD**	**SGD**
A.A. OWOLABI	S.M. ABDULBAKI	M.O. ABDULKADIR
KADI	KADI	KADI
21/6/2012	21/6/2012	21/6/2012

(23) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY 21ST DAY OF JUNE, 2012.

BEFORE THEIR LORDSHIPS:-

S.M. ABDUBAKI - HON. KADI
M.O. ABDULKADIR - HON. KADI.
A.A. OWOLABI - HON. KADI.

MOTION NO: KWS/SCA/CV/AP/IL/15/2011.

BETWEEN

1. MRS. LATIFAT ADUKE AHMED
2. AHMED SALMAN } **- APPLICANT**

AND

JIMOH FATAI - RESPONDENT

Principle:

If the withdrawal of an application is sought by the applicant himself, it puts an ends to his case.

BOOKS/STATUTES REFERRED TO:

Al- fawakhu Ad- dawaniy vol.2.p.220.

RULING: WRITTEN AND DELIVERED BY HON. KADI S.M. ABDULBAKI

The parties are present Ayinla I.A. Edun Esq. for the appellant, L.O.AbdulSalami, Esq. for the respondent, Ayinla I.A. Edun, Esq. informed the court that the matter is slated for hearing of the main appeal but however in view of the ruling of this court in the sister case whereby another party was joined in the case and this court ordered that the said sister case be retired together with the party just joined

before the lower trial court, he is seeking leave of the court to withdraw the appeal. The learned counsel to the respondent did not raise objection to the application made by the appellant's counsel to withdraw the appeal. This court views that a party who initiates a proceeding is at liberty to withdraw same. So the application to withdraw this appeal is hereby granted. The appeal is hereby struck out.

SGD	**SGD**	**SGD**
(A.A. OWOLABI)	**(S.M. ABDULBAKI)**	**(M.O. ABDULKADIR)**
KADI,	**KADI,**	**KADI,**
21/06/2012	**21/06/2012**	**21/06/2012.**

(24) **IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA**
IN THE SHARIA COURT OF APPEAL OF KOSUBOSU JUDICIAL DIVISION
HOLDEN AT KOSUBOSU ON TUESDAY 26th JUNE, 2012
YAOMUL THULATHA 6TH SHA'ABAN 1433 A.H

BEFORE THEIR LORDSHIPS:

ADAM A. IDRIS - HON. KADI
MOHAMMED O. ABDULKADIR - HON. KADI
ABDULWAHAB A. OWOLABI - HON. KADI.

MOTION NO: KWS/SCA/CV/M/KB/01/2012

BETWEEN:

ADAMA MOHAMMED - APPLICANT

AND

MOHAMMED SABI JIMOH - RESPONDENT.

Principle:

Granting of an extension of time or an adjournment is within the discretionary power of a judge.

BOOKS/STATUTES REFERRED TO:

1. Order 4 Rule 3 (1) (a) & (b) and 2 of Sharia Court of Appeal Rules CAP. S4 Laws of Kwara State 2006.

(2) Tuhfatul Hukkam paragraph 19.

(3) Order 3 Rule 2 of Sharia Court of Appeal Rules Cap.S4 2006 Law of Kwara State.

RULING: WRITTEN AND DELIVERED BY HON. JUSTICE A.A. OWOLABI

This is an application on Notice dated and filed on 9/5/2012 praying this court for the following reliefs:-

1. Extension of time within which the applicant/appellant to file appeal against the decision of Area Court Grade I Ilesha Baruba delivered on 23rd February, 2012.
2. Allowing the applicant/appellant file appeal out of time.(sic)
3. Deeming the notice and grounds of appeal here in annexed as Exhibit (A).
4. And such further order (S) as his Honourable Court may deem fit to take in the circumstance of this action.

Adama Mohammed, the applicant appeared in person while the respondent who also appeared in person engaged a counsel by name Iliasu Saka Esq. The counsel wrote a letter excusing his personal attendance at the court but conceded to the hearing of the application in his absence.

The motion on notice and the affidavit in support which was of 13 paragraphs deposed to by the applicant personally were read to the hearing of the applicant and she adopted same as the fact she relied upon in bringing this application.

The fact of the case at the trial court was that the applicant filed a divorce suit which the respondent in response wrote a letter dated 22/06/2012 conceded that the divorce be granted the applicant, he further requested that the trial court should restrain the applicant from conducting marriage with one Mallam Isiaq Dodo Umar.

Before us, when the applicant was moving the court she referred the court to her motion, the supportive affidavit and the proposed Notice and Grounds of Appeal; Exhibit A. She placed reliance on paragraphs 2 – 13 of the affidavit in support. For the purpose of emphasis she referred us to paragraphs 2-10 which contain the reason for her delay and urged us to grant the prayer. Paragraphs 2 -10 of the affidavit in support are as following:

2. That I filed a divorce suit against Mohammed Sabi Jimoh at Grade I Area Court, Ilesha Baruba.
3. That on the day of hearing the case the Judge said my husband is not in court but wrote a letter that he release me free divorce.
4. That the court granted me free divorce on 23/2/2012.
5. That the court also told me to observe 3 month Iddah and that I should not go anywhere until the expiration of Iddah.
6. That I was not told that there was a restriction on the divorce granted to me.
7. That because I was not literate the court told me to thumb print a paper and go.
8. That I thought the paper is just a divorce paper, I don't know that I was restricted from marrying Mallam Isiaq Dodo Umar.
9. That on 3rd of May, 2012 when my brother came from Abuja, I then show the court papers to him, and I was made to understand that I was restricted from marrying Mallam Isiaq Dodo Umar.
10. That it was my brother who made me to understand that I can appeal to Sharia Court of Appeal if I am aggrieved.

The learned counsel to the respondent had written a letter dated 26/06/2012 to the court and conceded to prayers 1 and 2 above, the content of the letter is as follows;

'' I am the counsel to the respondent in the above mentioned appeal which is slated for the hearing of Motion on Notice (i.e. for extension of time within which the applicant/appellant can file her Notice of Appeal out of time, today 26/6/2012."

" I, (On behalf of the respondent) have no objection to prayers 1 & 2 respectively.''

We have gone through the fact in the affidavit, perused same after reading same to the applicant who adopted same and going through the content of the letter written by the respondent's counsel who in turn conceded to the granting of prayers 1 and 2. We also considered the relevant rules applicable to this type of application.

The relevant rules to this application is Order 4 Rule 3 (1) (a) & (b) and 2 of Sharia Court of Appeal Rules CAP. S4 Laws of Kwara State 2006 which reads as follows:

(3) (1) Every application for enlargement of time shall be supported by-

(a) An affidavit or affirmation or declaration having in law the effect of an oath setting forth good and substantial reasons for the application; and

(b) Grounds of appeal which prima facie shall give cause for leave to be granted.

(2) Any application for enlargement of time may be made to the Court and, when time is enlarged, a copy of the order granting such enlargement shall be annexed to the notice of appeal.

We have also considered paragraphs 2- 3 of the affidavit in support and concluded that the paragraphs of the affidavit referred to has shown reasonable ground excusing the delay, in addition thereto Exhibit A attached to the motion on notice also contain substantial grounds of appeal which prima facie show cause for leave to be granted.

We have also considered the provision of Islamic Law guiding Area Court/ Sharia courts in considering an application for extension of time within which to file an appeal as in this type of application. An application for enlargement of time within which to file Notice of appeal is only granted at the discretion of the court.

We refer to Tuhfatul Hukkam paragraph 19 which states as follows;

والإجتهاد الحاكم الآجل * موكوله حيث لها استعمال

راجع تحفة الأحكام ص **19**.

Meaning:''Granting extension or adjournment depend at the discretion of the judge"

It is our considered view that prayers 1 and 2 have merit and same are granted while prayers 3 and 4 are refused and struck out. Time within which to file appeal is hereby enlarged.

We hereby order the applicant to file Notice of Appeal within 14 days of granting this order by which an enrolled order of this court will be annexed thereto. This is in conformity with Order 3 Rule 2 of Sharia Court of Appeal Rules Cap.S4 2006 Law of Kwara State (supra). This is the order of this court.

Application succeeds in part.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**ADAM A.IDRIS**	**M. O. ABDULKADIR**
KADI	**KADI**	**KADI**
26/06/2012	26/06/2012	26/06/2012

(25) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT SHARE ON TEUSDAY 10TH DAY OF JULY, 2012/
SHABBAN 20TH 1433 A.H.

BEFORE THEIR LORDSHIPS:-

S.M. ABDULBAKI	**-**	**KADI, S.C.A.**
M.O. ABDULKADIR	**-**	**KADI, S.C.A.**
A.A. ABDULWAHAB OWOLABI	**-**	**KADI, S.C.A.**

APPEAL NO. KWS/SCA/CV/AP/SH/02/2012.

BETWEEN

ADIJAT SARAFA	**-**	**APPELLANT**
VS.		
SARAFA ALH. SAKAI	**-**	**RESPONDENT**

Principle:

The court may in it's discretionary power make any order necessary for doing justice.

BOOKS/STATUTES REFERRED TO:

1. Sunan Abi Dawood Hadith No.(2276)
2. Order IX Rule I of the Sharia Court of Appeal Procedure Rules.

RULING: WRITTEN AND DELIVERED BY S.M. ABDULBAKI.

The case leading to this appeal started from Grade One Area Court, Share with Suit/Case. No. 34/2012. It was the appellant herein who went to the lower court on 30th March, 2012 and sued the Respondent for divorce on the ground that the respondent used to accused her of things

she did not do and also that he did not have respect for her parent. She told the court that they had three children namely; Rukayat Saka 12 years old, Sibiatu Saka 2½ years old and Abibu Saka 1 year old the respondent having listened to the appellant's complaint, replied that he released her but wanted the custody of the children.

The appellant too claimed custody of the children.

On the same 30th March, 2012 the court granted the divorce sought and further held that anybody who want to claim custody of the children to sue before the court.

The appellant did not satisfy with the judgment of the lower trial court and on 27th April, 2012 filed two (2) grounds of appeal before this court. The two grounds are reproduced herein;

1. "That decision of Trial Area Court 1 Share was unreasonable unwarranted and cannot be supported due to the weight of evidence adduced before it.

1. That the Trial Court 1 Share granted divorce, but silent on the maintenance allowance of my three children."

On 20th day of June, 2012 when this appeal was hear by this court, the parties were present but had no legal representation. One to the fact that the parties were without legal representation, this honourable court read and interpreted the two grounds of appeal to the appellant who confirmed that the grounds as read to her were the only grounds of appeal she filed. Then, this court asked her to argue the appeal. But the appellant was asked whether the question of maintenance was raised at the lower court. The appellant replied that she did. The court asked this question because there was no where the trial court mentioned anything about the maintenance issue.

However, since the appellant answered that she raised the issue of maintenance before the lower court, and also made it a grant of appeal, we asked her to argue her appeal.

In arguing the appeal , the appellant said that the purpose of filing this appeal is on the issue of maintenance of the children. She informed this honourable court that she made claim of the sum of ten thousand Naira (₦10,000.00) as maintenance allowance of the children. She said that at the same lower court, the respondent said that he had nothing to offer as maintenance money.

The appellant said that the respondent made a claim for the custody of the children but that she too did not accept the respondent's claim for custody of the children and there and then claimed for custody of the children. She informed this honourable court further that the court urged any of the party to file separate claim for the custody of the children.

The appellant finally asked for the maintenance allowance for the children. She claimed ten thousand naira (₦10,000.00) as monthly allowance for the children.

The Respondent in reply to the applicant submission told this court that when the appellant went to seek divorce against him at the lower court he accepted the divorce. He denied that the appellant mentioned or raised the issue of maintenance at the lower court. He however offered to pay onethousand Naira on each child per month. He told this court that the eldest child is staying with him while the remaining two children are presently staying with the appellant.

This court in order to arrive at the reasonable amount of maintenance put the questions to the respondent as to ascertain his income. He told this court that he is a bread baker under one Mr. Olarewaju and was being paid five thousand Naira (₦5,,000.00 weekly and also use to get some loaf of bread in addition. But said that he had other wife with four (4) children for him to cater for. That the other wife is staying with him and reiterated that he claimed for the custody of the children from the appellant so that all the children would be living together under his roof.

Both the appellant and the respondent informed this court that they have nothing or any other thing to say or claim from this court.

On our own part, we perused the trial court record of proceedings.

We also reflected on the submission of the parties.

To start with, we notice that the issues of maintenance and custody of the children have been raised in this court even though, not clearly shown in the lower court's record. We hold the view that this court can attend to the two issues. We do not agree that the parties need to file separate suit as demanded by the lower court before the court attend to the issues particularly the issue of custody of the children. We say that this court will attend to the issues not withstanding that they were partially or never raised at the lower court. This we are doing by involving Order IX Rule I of the Sharia Court of Appeal Procedure Rules. The invocation of this Order seem to us that it will serve the interes of justice in the circumstances of this appeal as we do not want the issues to be unnecessarily prolonged.

As regards the issue of maintenance, we have ascertained the income of the respondent *vis – vis* the claim of the appellant for ten thousand Naira (₦10,000.00) as maintenance of the children and the offer made by the respondent for four thousand Naira (₦4,000.00) per month. The respondent has made this court to believe that he has other wife with four children to carter for. Viewing all the circumstances surrounding the issue of maintenance, the court feels that payment of two thousand Naira (₦2,000.00) per month on each child is reasonable in the circumstances and we so hold.

On the issue of custody of children, we say that the established law is that the custody of children of marriage is always given to the mother unless there is evidence against her why she

could not properly takes care of the children. Even if she remarries another strange husband, the custody of the children shits to the mother of the divorced wife we therefore hold that the children of the parties shall be with the appellant herein and we so hold. The Prophetic *Hadith* on this goes thus:-

An *Hadith* which was narrated by Abdullahi bn Umar that a woman once came to Prophet (SAW) complaining that her husband had divorced her and demanded that their son be kept by him.

" أن امرأة قالت : يا رسول الله إن ابني هذا كان بطني له وعاء وثديي له سقاء وحجري له حواء وإن أباه طلقني وأراد أن ينتزعه مني فقال لها رسول الله صلى الله عليه وسلم: أنت أحق به ما لم تنكحي", رواه عبدالله بن عمرو بن العاص. راجع: سنن أبي داود الحديث رقم: 2276

"Truly my belly served as container for my son here and my breast served as a skin bag (from which he sucked milk) and my lap a safe haven for him. It so happened now that his father has divorced me and desires to take him away from me. The Prophet (SAW) replied: You have a prior right to bring him up as long as long as you not marry again"

Following the present decision we made on the issue of custody, the respondent shall be responsible for maintenance of all the children at the rate of two thousand naira (~~₦~~2,000.00) per children per month and we so hold.

Appeal succeeds.

SGD	**SGD**	**SGD**
A.A. OWOLABI	**S.M. ABDULBAKI**	**M.O. ABDUULKADIR**
KADI	**KADI**	**KADI**
10/07/2012	**10/07/2012**	**10/07/2012**

(26) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF OFFA JUDICIAL DIVISION
HOLDEN AT OFFA ON TUESDAY, 17TH JULY 2012 (28TH SHA'BAN, 1433 A.H)

BEFORE THEIR LORDSHIPS:

I.A. HAROON - HON. GRAND KADI

S.M. ABDULBAKI - HON. KADI

M.O. ABDULKADIR - HON. KADI

APPEAL NO: KWS/SCA/CV/AP/OF/01/2012

BETWEEN:

MONSURA IBRAHIM - APPELLANT

AND

IBRAHIM SOLIHU - RESPONDENT

Principles:

1. The mother is the most qualified to the custody of her child after divorce or death if she has not remarried.
2. An appellate court may rehear or retry the case in whole or in part if necessary for the purpose of elucidate the record of the court below to arrive at the true facts of the case.
3. Mother is the most rightful person for custody (of a child) whether married to the father or divorced; then the maternal grandmother.

BOOKS/STATUTES REFERRED TO:

1. Sharia Court of Appeal Law, CAP. S4, Order 3 Rule 7.
2. *Minhaj Al-Muslim, p.361* by: Abubakre Jabir Al-Jazahiriy.
3. *Malik Law by F.H. Ruxon, section III, p.155*

4. *Ashal al-Madarik, Vol. II, p.204.*
5. *Al-Fiqh 'Alal-Madhaib al-Arba'ah, Vol. 4, p.594.*
6. *Fiqh al-Islamiyy wa Adillatuhu by Prof. Whabat Az-Zuwayhiliy, Vol. 10, p.7306.*
7. Al-*Fiqh Al-Islamiyy, ibid, p.7310.*

JUDGMENT WRITTEN AND DELIVERED BY: I.A. HAROON

The appellant in this appeal; Monsurat Ibrahim was the plaintiff who sued the respondent; Ibrahim Solihu her former husband for dissolution of their marriage at the Ibolo Area Court Grade I, No. 1, Offa in Case No. 42/2012. The case was heard and decided on 3/4/2012 while both parties were self represented.

The appellant in her statements told the trial court that she wanted their marriage to be terminated on the ground of lack of care and maintenance. She also prayed the trial court to grant her the custody of the four issues of the marriage and for the retrieve of the sum of twenty thousand naira (#20,000.00) owed her by the respondent.

The respondent did not raise objection to the divorce sought by appellant but denied the allegation of owing her the sum of twenty thousand naira (#20,000.00). The trial court was silent on the issue of custody of the four children of the marriage. Based on the prayer of the appellant, the court dissolved the marriage between the two parties.

The appellant, being aggrieved by this decision sought a redress by filing an appeal in our court in the appeal number **KWS/SCA/CV/AP/OF/01/2012** on 17/4/2012 on the ground that the decision of the trial court was unwarranted and unreasonable for its failure to address the custody and maintenance of the four children of the marriage.

On the 14th day of June, 2012 (24th Rajab, 1433 A.H) when the matter came before us, the two parties were self represented. The appellant stated that she wanted the custody of the four children of their already dissolved marriage. She gave their names as follows: (1) Sulaiman Ibrahim (10yrs); (2) Solihu Ibrahim (8yrs); (3) AbdulWaris Ibrahim (4yrs and 6mths); and (4) AbdulMalik Ibrahim (1yr and 6mths). She told us that the four children were living with her until when the respondent came one day on pretence that he was on a visit but he surprisingly lured the children into his vehicle and drove away. She stated that she later traced the children to where the respondent lives in Ilorin; that on getting there she was molested and handed over to the police. The matter was later resolved and the youngest of the four children was released to her while the other three children remain with the respondent. She prayed us to grant her the custody of the four children because the respondent travels a lot and as such he cannot keep the custody of the children in question nor can he cater for them properly. She said that she has not remarried and that she will attend to the welfare of the children in question if granted the custody.

Our attention was drawn to her statement that she had completed the two months *'iddah* period on this she was told that *'iddah* is observed for three months and not two months. She prayed us to compel the respondent to refund the sum of #20,000.00 she loaned him.

The respondent in his response prayed us to grant him the custody of the children. He told us that three out of the four children in question are now under his custody. That they are living with his sister in Ilorin while one is still in a Qur'anic school at Offa. He told us that it was the appellant and her mother who released the children in question to him. He stated further that the appellant is proposing to remarry to a Christian and he would not like his children to be placed under her custody for that. He said the children would

continue to live with his sister who is a trader if they are under his custody. The respondent denied owing the appellant a sum of #20,000.00 and described the allegation as unfounded.

The appellant in her response told us that she went to Ilorin and discovered that the children in question are not in the school. She said that her mother is a trader and that she is competent to take care of the children in question. She prayed us to allow her mother to address us on her preparedness for the custody of the children in question. This was allowed and the mother told us that she is ready to render whatever assistance required of her including keeping the custody of the children in question. The appellant told us that the children in question were released to the respondent out of the fear that she and her mother might be arrested by the police as the custody was not legally granted to them. That she and her mother are ready to keep the custody once it is granted to them by the court.

On our part, after careful perusal of the record of proceedings from the trial Area Court and having listened to both parties involved in this instant appeal, it is our candid opinion that the main conflicting issue in this appeal is the determination of the rightful person between the appellant and the respondent to whom the custody of the children of the dissolved marriage be awarded. It had been established from the statements of both the appellant and the respondent that their marriage before the dissolution was blessed with four children namely: (1) Sulaiman Ibrahim (10yrs); (2) Solihu Ibrahim (8yrs); (3) AbdulWaris Ibrahim ($4^{1/2}$yrs); and (4) AbdulMalik Ibrahim ($1^{1/2}$yrs).

We took judicial notice that the trial Ibolo Area Court I, No.I in the Offa judicial Division was silent over the issue of custody of the products of the marriage after the dissolution. This in our view was a serious derailment from the path of justice. Once a claim or complaint is made before the court, a judge should not turn a deaf ear

rather he is duty bound to patiently listen to the complaints of the parties and attend to them in the interest of justice.

However, we shall hear and decide the claim of custody in the instant appeal by placing reliance on the provision of the Sharia Court of Appeal Law, CAP. S4, Order 3 Rule 7 which goes thus:

> *The Court shall not normally rehear or retry the case but if it shall be necessary for the purpose of elucidating or amplifying the record of the court below and arriving at the true facts of the case, the Court may rehear or retry the case in whole or in part.....*

The issue of the sum of #20,000.00 alleged by the appellant to have been loaned to the respondent was also not attended to by the trial court. On our part, we will not be able to order the respondent to pay the appellant as it was neither proved by her nor admitted by the respondent.

The custody of an infant up to the stipulated age is an obligation in Islamic law. It is a responsibility that must be shouldered by the parents who shall see to the welfare, protection and general upbringing in all spheres of life (physical, mental, social and religious etc.). In a situation where an infant has none of the parents alive, the custody will shift to the relatives or the government or religious organization. However, the Sharia in all situations gives priority to the women folk over men. This is because women are more associated and effective in the welfare and upbringing of children by their soft and enduring nature.

In a situation such as in the instant appeal where the matrimony between the two parties collapsed, the mother is considered to be the most appropriate person to be awarded the custody of the child. Abubakre Jabir Al-Jazahiriy in his book ***Minhaj Al-Muslim, p.361*** highlighted this fact thus:

If separation occurs between the parents of a child through divorce or death, the most appropriate person to take over the custody is the mother if she has not remarried. This is based on the saying (decision) of the Prophet (S.A.W) when a woman complained of an attempt to snatch her child from her (by her husband) The Prophet said: "you are the most rightfull person to the custody if you have not remarried".

إذا حصلت الفرقة بين أبوى الطفل بطلاق أو وفاة كان الأحق بحضانته أمه ما لم تتزوج لقوله صلى الله عليه وسلم لمن شكت اليه انتزاع ولدها: أنت أحق به ما لم تنكحى (راجع منهاج المسلم لأبى بكر جابر الجزائرى , ص 361)

See also ***Malik Law by F.H. Ruxon, section III, p.155***:

The mother has the right of custody of her male child until the age of puberty and of female child until the consummation of marriage.

Another source is ***Ashal al-Madarik, Vol. II, p.204:***

The mother is the most qualified to the custody of her child after divorce or death (of her husband) if she has not remarried.

الأم أحق بحضانة ولدها بعد الطلاق أو الموت ما لم تتزوج (أسهل المدارك ج 2 , ص204)

See also ***Al-Fiqh 'Alal-Madhaib al-Arba'ah, Vol. 4, p.594*** which reads thus:

Mother is the most rightful

فأحق الناس بالحضانة الأم سواء كانت

person for custody (of a child) whether married to the father or divorced; then the maternal grandmother.

متزوجة بالأب أو مطلقة ثم بعدها أمها (راجع كتاب الفقه على المذاهب الأربعة جـ 4، ص 594)

The above quotation implies that even where the mother is disqualified the next qualified person is the mother of the mother.

The above quoted sources of law when fully applied on the instant appeal leave no doubt in the fact that the appellant in this appeal is most qualified to be awarded the custody of the four children of the dissolved marriage and we so hold.

The argument of the respondent that the appellant is proposing to remarry to a Christian will not hold water because it has neither taken place nor established. More so that Islamic law particularly the Maliki School does not see religion as a barrier for disqualification of the mother in matter of custody. See ***Al-Fiqh al-Islamiyy wa Adillatuhu by Prof. Whabat Az-Zuwayhiliy, Vol. 10, p.7306:***

The two Schools of Hanafi and Maliki do not put (religion of) Islam as a condition for being a custodian (whether she is the mother or not), she could be an adherent of other religions (of the revealed books) other than Islam. This is premised on the fact that the Prophet (S.A.W) gave an option to a child to choose between a Muslim father and a pagan

ولم يشترط الحنفية والمالكية إسلام الحاضنة فيصح كون الحاضنة كتابية أو غير كتابية، سواء كانت أما أم غيرها، لأنه صلى الله عليه وسلم خير غلاما بين أبيه المسلم وأمه المشركة فمال إلى الأم، فقال النبي صلى الله عليه وسلم: اللهم اهده، فعدل إلى أبيه

mother, the child then opted for the mother. Though the prophet prayed thereafter for the guidance of the child who later went to the father.

This is a clear indication that the religion of a party is immaterial in the determination of the custody of a child. However, there are defaulting conditions by which the right to custody can be forfeited such as insanity, infidelity, poor health, un-stable person (who always undertakes long journeys). See Al-***Fiqh Al-Islamiyy, ibid, p.7310.***

Since the appellant in the instant appeal does not fall in the category of those disqualified from having the custody due to any of the above stated defaulting conditions and in line with the traditions of the holy prophet earlier quoted, it is our considered view that the appellant merits the award of the custody of the children in question and we so declare.

In the light of the foregoing, the custody of the four children whose names are listed as follows: (1) Sulaiman Ibrahim (10yrs); (2) Solihu Ibrahim (8yrs); (3) AbdulWaris Ibrahim ($4^{1/2}$yrs); (4) AbdulMalik Ibrahim ($1^{1/2}$yrs) is hereby awarded to the appellant; Monsurat Ibrahim with effect from today, Tuesday, 17th July 2012 (28th Sha'ban, 1433 A.H). The maintenance and education of the said children remain the responsibility of the father herein the respondent who is hereby given free access to the children.

Appeal succeeds.

SGD	**SGD**	**SGD**
M.O. ABDULKADIR	**I.A. HAROON**	**S.M. ABDULBAKI**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
17/07/2012	**17/07/2012**	**17/07/2012**

(27) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON WEDNESDAY 18th DAY OF JULY, 2012.

BEFORE THEIR LORDSHIPS:

S. O. MUHAMMAD - HON. KADI.
A. A. ADAM - HON. KADI.
A. A OWOLABI - HON. KADI.

APPEAL NO. KWS/SCA/CV/AP/IL/04/2012.

KASALI BABA MUJIDAT - APPELLANT
VS.
LIMOTA KASALI - RESPONDENT

Principles:

1. Under Islamic Law, It is mandatory on a judge to listen to all issues before him with proof and inquires from the defendant if he has any defendant against the allegation leveled against him.
2. In Islamic Law, where there is an incessant absence in a court, the defendant who has been served with sermons but is absent should be treated as a party in court and later the decision of the court which will be bidding on him will communicated to him.

BOOKS/STATUTES REFERRED TO:

1. Ashalul Madarik Vol. 111, Page 199.
2. Jawahirul Ikleel Vol. 2 pages 231 – 232

JUDGEMENT: WRITTEN AND DELIVERED BY S.O. MUHAMMAD

This appeal is basically on the issue of fair hearing. Kasali Baba Mujidat is the appellant represented before us by **Shina Ibiyemi Esq.** with **Dolapo Asalu Esq.** of the Legal Aids Council, Ilorin. The respondent is Limota Kasali represented by **Ahmed Abdul-Yakeen Esq.** The appeal was heard on 28th June, 2012 with both parties in court.

The genesis of the case in brief is that both the appellant and the respondent used to be husband and wife until 18th July, 2011 when the latter sued the former for divorce at the Area Court Grade 1 No. 2, Centre Igboro, Ilorin. The claim of the plaintiff/respondent, according to page 1 lines 21 – 23 of the record of proceedings before us is as reproduced below:

> *Court to plaintiff: "Why are you in Court?*
> *Plaintiff: I come to divorce my husband because of lack of care for me and my child (sic)*

The defendant/appellant requested the court to give him another date to enable his Lawyer, **Shina Esq.**, appear on his behalf. The trial court granted the request and therefrom adjourned the case to 3rd August, 2011. On the adjourned date, the appellant was not in court and he was not represented. The trial court for the second time, **suo moto** adjourned the case to 10th August, 2011.

On this adjourned date, the appellant was not in court again neither was he represented. The trial judge then asked the respondent:

What do you want the court to do now.

Respondent:

I want the court to grant my prayer.

It was at this point that the trial judge decided as follows:

> ***"….. the marriage between the parties is hereby dissolved and the parties are to go their separate ways…"***

He also ordered that the respondent should observe **"<u>Iddah</u>** for a period of three months in accordance with Islamic Law". It was this decision of dissolution of marriage that did not go well with the appellant hence this appeal.

Meanwhile, the appellant had earlier on filed before us an application for enlargement of time within which to file this appeal in his motion **No. KWS/SCA/CV/M/IL/01/2012.**

The motion was successful on merit as decided on the 5th of April, 2012.

Consequent upon the success of the motion, the appellant filed this instant appeal on 18th April, 2012 with the following reproduced seven grounds of appeal.

GROUND ONE

The trial judge erred in law when he held that the appellant's right of Appeal is within 30 days

GROUND TWO

The trial judge misdirected himself when he failed to consider the letter of adjournment written by counsel to the appellant seeking for adjournment.

GROUND THREE

The trial judge erred in law by failing to give the appellant hearing notice for the next adjourned date.

GROUND FOUR

The appellant was not in court when this case was adjourned to 3rd August, 2011 and the court did not issue hearing notice.

GROUND FIVE

The trial judge erred in law by not giving the appellant opportunity to cross-examine the respondent.

GROUND SIX

The trial judge erred in law by shutting the appellant at the proceeding of the court of law.

GROUND SEVEN

The trial judge erred in law by failing to pronounce on the welfare and custody of a child which is a part of the respondent's claim in the trial court.

The reliefs being sought are also hereby reproduced for clarity of the matter before us. They are:

1. The appellant was not given fair hearing.
2. The decision of the Lower Court should be over ruled
3. The appeal should be allowed
4. This court should hear the case **de-novo.**

The appellant's counsel, Shina Esq. formulated and argued together two issues for our determination. They are:

1. Whether or not the appellant was given fair hearing by the trial court and
2. Whether or not a court of law is not bound to pronounce on all claims before it

The learned counsel submitted that parties before any court of law are to be heard before any decision can be reached or pronounced. He then made an oral application to admit a letter dated 2nd August, 2011 from **Sunkanmi Olorunisola & Co.** addressed to the Registrar of the trial court wherein reason for adjournment of the case was sought to 31st August, 2011. According to the learned counsel to the appellant, admission of this letter bordered on its relevance to this appeal. He argued further that the contents in the letter would assist us to arrive at the justice of the matter while the respondent would not be prejudiced because she had earlier on been served a photocopy of the letter through her counsel. The respondent counsel had no objection to this oral application. We then ruled in favour of the appellant's counsel and so admitted the letter under reference and marked same as **Exhibit1.**

The learned counsel to the appellant submitted further that inspite of Exhibit 1, the trial court adjourned the case to 10th August and decided the case same day without hearing notice served on the appellant. The learned counsel argued further that the respondent did not give any evidence at the trial court to earn her the favourable decision while the appellant was denied the opportunity of cross examination. The counsel also faulted the trial court's judgment when he submitted that there was no pronouncement on the custody and welfare of the child of the marriage even though no express claim was made by the respondent in this regard. The counsel also submitted that the respondent did not observe three months' **Iddah** as ordered by the trial judge. He therefore urged us to allow the appeal in the interest of justice and prayed that we should hear the case **de-novo** by exercising the power to do so as entrenched in 0.3 R.7 2(g) of the Sharia Court of Appeal Rules.

The respondent counsel submitted that he adopted **in-toto** the issues as formulated by the appellant's counsel adding that the

appellant was given fair hearing. He drew our attention to Page 1 lines 25 – 30 of the record of proceedings to buttress his point. He finally submitted that he agreed that the normal procedure was not followed by the trial judge in the hearing and determination of this case.

On his second chance, the learned counsel to the appellant submitted that he had nothing to add to his earlier submissions.

On our part, we carefully went through the 3 – Page record of proceedings including Exhibit 1. We also diligently listened to the arguments of the two learned counsel for both the appellant and the respondent. We therefore decided to address the following issues as emanating from the appeal and the argument for and against same.

1. Whether the trial Area Court judge in this case followed the laid down procedure of hearing and determining a case under Islamic Law.
2. The position of Exhibit 1 in this appeal **viz-a-viz** issuance of hearing notice for the next adjourned date
3. Whether the trial court was bound to make pronouncement on all matters before it.
4. The effect of non-observance of **Iddah** in divorce claim.
5. The appellant counsel's prayer that the matter be heard **de-novo** by us in view of 0.3 Rule 7 2(g) of the Sharia Court of Appeal Rules.

On issue 1: We held that the trial court judge started the case very well when he adjourned the case from 18/7/2011 to 3rd August, 2011 and from 3rd August to 10th August 2011 at the instance of the appellant who was absent on the two adjourned dates. This indeed was an effort at achieving fair hearing of the instant case before him. He however derailed from this path when, without hearing evidence

and proof from the respondent, and pronounced divorce by fiat. This attitude is repugnant to the Islamic Law procedure. It is trite under Islamic Law that whoever asserts must prove his claim – **Albayyina alal Mudda'i.** There is nowhere in the record of proceedings where the respondent had proved her case of divorce and lack of care by the appellant. We therefore agree with the appellant's counsel that the normal procedure was not followed.

The normal procedure is to allow the claimant make his/her claims and prove it. Thereafter, the defendant would be required to agree or disagree with the claim(s). The action of the trial Area Court judge therefore breached Islamic procedural rules

In **Ashalul Madarik** Vol. 111, Page 199, it is provided that:

The judge (court) shall

*Not decide a matter until he listens to all claims and **Proof**. He then asks the defendant if he has any defence.*

ولا يحكم حتى يسمع تمام الدعوى والبينة ويسأل المدعي عليه هل لك مدفع. (راجع: أسهل المدارك ج ٣ ص ١٩٩).

We are however aware that the appellant was not in court to defend the claims against him, never-theless, the procedure was to ask the respondent to prove her claim before judgment could be passed. In **Jawahirul Ikleel** Vol. 2 pages 231 – 232, it stipulates:

A nearby defendant (who is served summons but absent) shall be treated like a party who is in court. The claim against him as well as evidence in its support shall be entertained and decided upon in his absence.

(....كالحاضر) فى سماع ..... القريب (الدعوة عليه والبينة)

(راجع: جواهر الإكليل جزء ٢ صفحة ٢٣١ – ٢٣٢)

In addition to the above law, even the requirement of 0.9 Rule 3(1) of the Area Court Civil Procedure Rules, in an event of incessant absence in court of the defendant, is to "…. proceed to the hearing and determination of the cause on the part of the plaintiff only, and the judgment thereon shall be as valid as if both parties had appeared". In this instant case, the respondent was not asked to prove her claim before the judge passed his judgment. This attitude certainly amounted to lack of fair hearing as entrenched in S. 36 of the 1999 Constitution of the Federal Republic of Nigeria as amended. We uphold this issue in favour of the appellant.

On issue 2: We are of the opinion that Exhibit 1 cannot be an issue in this appeal because the Exhibit had been overtaken by the issue of lack of fair hearing and we so hold.

On issue 3: The trial Area Court is bound to make pronouncement on all matters before him on condition that such matter(s) had been clearly and adequately proved. In this appeal, there are two issues, namely: divorce and lack of care for the respondent and her child. Unfortunately none of the two issues were proved before the trial Area Court, hence, no pronouncement on either. None pronouncement on the two issues were therefore in order.

On issue 4: Non-observance of **Iddah** by the respondent as a ground of this appeal cannot hold water. This is because it is a claim on its own which need to be proved. It is not in the record of proceedings before us. Therefore, we decided to leave it at that.

On issue 5: which is the last issue for determination in this appeal, we quite agree with the learned counsel to the appellant to the effect that we have power under 0.3 R. 7(2) (g) to "do or order to be done anything which the court below has power to do or order;…." But we decided to send this case back to another Area Court to rehear the case **de-novo** following the guidelines already mentioned above.

In conclusion, we hereby order Area Court Grade 1 No.1, Ilorin to rehear this case **de-novo** following the necessary guidelines highlighted above. The case shall also be accorded accelerated hearing in view of its age spanning over **1½ years** now.

Appeal succeeds.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**S. O. MUHAMMAD**	**A. A. IDRIS**
HON. KADI,	HON. KADI,	HON. KADI,
18/7/2012	18/7/2012	18/7/2012

(28) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON (WEDNESDAY) 18TH JULY, 2012

BEFORE THEIR LORDSHIPS:

A.A. IDIRS - HON. KADI SCA

M.A. ABDULKADIR - HON. KADI SCA

A.A. OWOLABI - HON. KADI SCA

MOTION NO:KWS/SCA/CV/M/IL/05/2012

BETWEEN:

MASHOOD OLAYINKA - APPLICANT

VS

ALHAJA DUPE MASHOOD - RESPONDENT

Principle:

An enlargement of time or adjournment is within the discretionary power of a judge.

BOOKS/STATUTES REFERRED TO:

1. Order 4 Rules 3 (1) (a) and (b) of the Sharia Court of Appeal, Laws of Kwara State 2006.
2. Ihkamul Ahkam by (Shaykh Muhammad Ibn Yusuf Al-Kafi) page 19.

RULING: WRITTEN AND DELIVERED BY A.A. IDRIS

The parties were present and the counsel for both parties were also present in the court. The applicant Mashood Olayinka was represented by J.S. Muhammad Esquire while the respondent was represented by O.Y. Gobir Esq. the former filed a motion on notice seeking the leave of this honourable court to extend the time within

which to appeal against the decision of the Upper Area Court II, Ipata Oloje, Ilorin and for such further order or orders which the court may deem fit to make in the circumstance. The motion was supported by nine paragraph affidavit deposed to by the applicant.

In moving the motion, the counsel for the applicant submitted that he has a motion on notice dated 6th July, 2012 and filed the same date. The motion was brought under Order 4 Rules 3 and 4 of the Sharia Court of Appeal rules 2006. He further submitted that he placed reliance on all the affidavit as well as the exhibit A attached to his affidavit. He finally urged the court to grant their application.

When the court asked the Counsel to the respondent to respond, he maintained that he had no objection.

On our part, we perused the trial court's record of proceedings coupled with the submissions made by the Counsel for the applicant and the brief response of the Counsel to the Respondent regarding this application. In the same vain we have also put into consideration all these alongside the Applicable laws both under statutory provisions and Islamic Law Procedure. The issue for determination in a matter of this nature, among other things included whether or not the Applicant has adduced good and substantial reasons for the grant of his prayer for extension of time within which to appeal in respect of the materials cum the submission of the Counsel before us.

In determining this, we have to recourse to Order 4 Rules 3 (i) (a) and (b) of the Sharia Court of Appeal, Laws of Kwara State 2006 which was relied upon by the applicant which stipulates:

> *1. Every application for enlargement of time shall be supported by:-*
>
> *(a) An affidavit, affirmation or declaration having in Law, the effect of an Oath setting forth good and*

substantial reasons for the application; and

(b) *Grand of appeal which prima facie shall give cause for leave to be granted.*

After a careful perusal of the materials before this court, we hold that paragraphs 2,3 and 6 are germane and reasonable enough upon which the consideration of this application can be based.

In line with the above, we opined that the application has merit and has satisfied the conditions provided under Order 4 Rule 3 sub (1)(a) and (b) of Sharia Court of Appeal Rules. Additionally, based on the power conferred on this court, as entrenched under procedural principles of Islamic Law which stipulates:-

The judge is required to use his discretionary power, where it is required in the case of adjournment and enlargement of time.

والاجتهاد الحاكم الآجال

موكلة حيث لها استعمال

راجع إحكام الأحكام شرح على تحفة الحكام ص 19.

In view of the above, the prayer of the applicant is hereby granted, and the time within which the applicant is allowed to appeal is hereby extended to two weeks from today 18/7/2012.

It is important to note that in line with Order 4 Rule 3 (2) of the Sharia Court of Appeal Rule, a copy of our enrolled Order as made herein, granting enlargement of time within which to appeal shall be annexed to the notice and grounds of appeal whenever it is filed.

The application succeeds.

SGD	**SGD**	**SGD**
A.A. OWOLABI	**A.A. IDRIS**	**M.O. ABDULKADIR**
HON. KADI	**HON. KADI**	**HON. KADI**
18/07/2012	**18/07/2012**	**18/07/2012**

(29) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF LAFIAGI JUDICIAL DIVISION
HOLDEN AT SHARE ON THURSDAY 19TH DAY OF JULY, 2012.
YAOMUL – KHAMIS 29TH SHA'ABAN 1433 A.H.

BEFORE THEIR LORDSHIPS:-

S.M. ABDUBAKI - HON. KADI

M.O. ABDULKADIR - HON. KADI.

A.A. OWOLABI - HON. KADI.

MOTION. NO. KWS/SCA/CV/M/LF/05/2012.

BETWEEN

NDAFOGI B.B - APPLICANT

AND

AMINAT NDAFOGI - RESPONDENT

Principle:

An application for extension of time would be granted if it fulfilled the requirement for its validity under law.

RULING: WRITTEN AND DELIVERED BY HON. KADI S.M.BDULBAKI

Ndafogi B.B. the applicant filed a motion on Notice dated and filed 10thJuly, 2012 praying the court for extention of time within which to file Notice of Appeal against the decision of Area Court No. 1 Tsaragi delivered on 22nd May 2012; allowing the applicant to file appeal out of time; During the Notice and Ground of Appeal annexed as Eexhibit A. And for such further orders as this honourable court may deem fit to make in the circumstances of this motion.

When this matter came up for hearing on 19th day of July, 20 12 the parties were present. The applicant appeared personally without

legal representation. The Respondent sent a letter to the court praying the court to allow her brother to represent her in court. The said letter was read to the applicant who did not oppose to the representation. The court granted the prayer and allowed one Muhammad Gana to represented the respondent in this proceeding.

The appellant/moved his application for extention of time as contained in his motion paper. The said motion was attached with eleven (11) paragraphs affidavit. Also attached to the affidavit is three (3) grounds of Appeal. After the applicant has moved his motion this, court asked the representative of the respondent to respond. He said that he would not oppose the application now that he understands that the applicant failure to appeal within time was due to the fact that the applicant was not aware of the judgment of the lower court early enough.

This court, going through the motion paper together with the attached affidavit is convinced that the reason of the applicant given in the affidavit particularly in paragraphs 3, 4, 5 and 6 hereof is enough to grant this application. Consequently the applicant is hereby granted leave to appeal out of time. He is hereby given two weeks from today to file Notice of Appeal. Order as prayed.

Application succeeds.

(SGD)	**(SGD)**	**(SGD)**
(A.A. OWOLABI)	**(S.M. ABDULBAKI)**	**(M.O. ABDULKADIR)**
KADI,	**KADI,**	**KADI,**
19/07/2012	**19/07/2012**	**19/07/2012.**

(30) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF SHARE JUDICIAL DIVISION
HOLDEN AT SHARE, THURSDAY 20TH DAY OF SEPTEMBER, 2012
YAOMUL-KHAMIS 29TH SHA'ABAN 1433 A.H.

BEFORE THEIR LORDSHIPS

SHEHU .M. ABDULBAKI - HON. KADI

MOHAMMED .O. ABDULKADIR - HON. KADI

ABDULWAHAB .A. OWOLABI - HON. KADI

APPEAL NO.KWS/SCA/CV/AP/LF/03/2012

BETWEEN:

IBRAHIM ETSU SAIDU - APPELLANT

AND

AISHA JUMMAI OBA - RESPONDENT.

Principle:

No execution of judgment except after indemnification of the claims.

BOOKS/STATUTES REFERRED TO:

12. Ihkamul Ahkam Page 14 & 18, & 25.
13. *Ashalul Madarik, Volume III page 199.* By *Abubakar Hassan Alkatsinawiy.*
14. Nizam Al Qadai by Dr. Abdul Kareem Zaidan, p. 122

JUDGMENT WRITTEN AND DELIVERED BY HON. JUSTICE A. .A. OWOLABI

This is an appeal by the plaintiff/respondent against the ruling of Area Court Grade I, Lafiagi delivered on 16/5/2012 ordering the appellant/defendant to produce the child of the parties marriage to the court.

The claim of the respondent who was the plaintiff at the trial court as embodied in the one page record of proceedings at page 1 lines 19 - 21 is as follows:-

"I sue defendant to claim my son from him who is

a year old, and my properties from the defendant."

In response to the plaintiffs claim, the appellant/defendant responded to the claim at page 1 lines 22-24. as follows.

"Yes it is true the son is with me, but he is two years old."

Without much ado, the court ordered for production of the child before the court. In his honour's word, he ordered as follows:-

"The defendant is hereby ordered to produce the son

In question unfailingly on 22/5/2012"

The appellant being not satisfied with the ruling of the trial court filed a Notice of Appeal on the same day with two grounds of appeal dated 16th May, 2012 which devoid of particulars are as follows:

1. The trial area court grade 1 Lafiagi erred in law when it ordered that the appellant should produce his child to court without hearing parties involved.
2. The ruling/order of the lower trial court is against the weight of evidence.

On 10/7/2012, when the appeal was mentioned, one Saidu Usman Esq represented the appellant while the respondent appeared in person. Saidu Usman Esq. sought for adjournment to effect certain amendment in the Notice of Appeal. The application for adjournment was granted as same was not opposed by the respondent. The appeal and the proposal to amend the Notice of Appeal were simultaneously adjourned to 19/07/2012.

On 19th July 2012, when the matter was subsequently called for hearing, the appellant was present while the respondent was absent. S.A. Bamidele Esq appeared for the appellant with him were Joseph Oboete Esq. and Saidu Usman Esq. The Registrar forwarded a letter written by the respondent dated 13/07/2012 urging the court to allow one Umaru Bello to represent her.

The appellant did not oppose the request for representation.

When the matter was finally called for hearing the appellant apologized for inability to formally file application to amend the process and this court gratiously granted the appellant's leave to amend the name of applicant to read 'appellant'. In his submission, Bamidele Esq. submitted that the appeal is against the decision of Area Court I Lafiagi delivered on 16/05/2012 wherein an order was given directing the appellant to produce the only child of the marriage to the court without hearing all the parties involved.

Not satisfied with the decision/order of the lower court the appellant filed a notice of appeal dated 16/5/2012. The appellant sought and was granted leave to abandon ground two without objection.

The only issue formulated by the appellant is whether the lower court can order for the production of the child without hearing evidence after the plaintiff/respondent has presented the claims.

He submitted that the lower trial judge did not follow the normal procedure laid down by Area Court rules. He submitted that by the trial court giving its order for the production of the child without hearing the appellant was a breach of the appellants right to fair hearing, he cited Order II Rule II of the Area Court (Civil Procedure) Rules CAP A9 Laws of Kwara State 2006

He further added that the lower court did not follow the constitutional provision in Sec.36 of 1999 constitution as amended.

He submitted further that an Islamic Law is enjoined to hear all claims, proof and defence of parties before decision is made, he referred to Alh. Babatunde Kankan Vs. Risikat Anike and another 2006 Sharia Court of Appeal Annual Report 160 at 163. He concluded that failure of the lower court to listen to parties before given that order rendered such order null and void.

The appellant reiterated further that the claim at the trial court was the custody of the child and claim of property. He submitted that before the trial court could give order in such instance evidence should be heard by asking the respondent why the son has to be given to her or brought to court. The appellant equally was not given any opportunity to call evidence why the respondent should not be given the child.

He added that he was not unmindful that in Islamic Law preference is given to the mother of the child in an issue of custody but that right is not absolute. He referred to Mariamo Ayoka Vs. Alh. Ismaila Ajadi 1996 Sharia Court of Appeal Annual Report 264 at 270. He submitted that the order of the trial court directing that the child be brought to court when the matter has not reached stage of conclusion was premature. He then prayed that the appeal be allowed and to set aside the order of 16/5/2012.

Umaru Bello representing the respondent replied that he heard and understood the submission of the appellant, he concluded that the court was right to have ordered for the production of the child to the court. He finally prayed that the appeal be dismissed and to confirm the decision of the lower court.

At the end of the parties submission, both parties stated that they had nothing more to add to their submission.

Going through the process before the court inclusive of the submission of the parties we found that the issue for determination formulated by the appellant is apposite; that "whether the lower court

can order for the production of the child without hearing the evidence after the plaintiff/respondent has presented the claims.

In considering the issue, we decided to consider four (4) related matters.

a. Pillars of judgment **أركان القضاء**

b. Defence **الدفاعة**

c. Hastiness **الإستعجال**

d. Exhortation (Izar) . **الإعذار**

(a) **Pillars of judgment** **أ- أركان القضاء**

Before the ruling was delivered the respondent was heard while the appellant was not involved in the process that led to the making of the order

The position of Islamic Law is that for reason on record any decision made in the presence of all but without involving all concerned is voidable this is because parties are integral part of a valid judgment.

We refer to Ihkamul Ahkam Page 14.

"And the judgment is not complete except with combination of all the pillars and same will not be valid in the absence of one of it."

ولا يتم الحكم إلا بجميعها ويختل بفقد واحد منها: وهي ستة : (1) القاضي (2) المدعى (3)المدعى عليه (4) المدعى فيه (5)المقضي به (6) كيفية القضاء.

(انظر : إحكام الأحكام ص 14)

b. Defence **ب- الدفاعة**

In the Islamic Law procedure, under the etiquette of judge, is patience. The Judge must not be hasty before pronouncement of his ruling or judgment.

The Prophet peace be upon him said: "The Judge should not judge between two people when he is angry. (See Nizam Al Qadai by Dr. Abdul Kareem Zaidan, p. 122.)

قال رسول الله (ص) لايقضين حكم بين اثنين وهو غضبان) . انظر : نظام القضاء في الشريعة الإسلامية للدكتور/عبدالكريم زيدان ص 122.

c . Hastiness **جـ - الاستعجال**

On the issue of production of the only child of marriage to the court. We observed that, there was no request and reaction to the order being made . We hold that courts are not father Christmas, that will make an order which is not requested for.

It is not proper for a Judge to give his judgment between the warring and implement his order until he verifes the claim and understand the ratronale behind the claim and the defence.

ولا يجوز للقاضي أن يقضي بين الخصمين وينفذ حكمه إذا لم يتحقق الدعوى ولم يفهم من الخصمين مرادهما (إحكام الأحكام . ص 18)

It was further stated,

The court shall not give verdict on any matter until it hears all the statements of claims and evidence

ولا يحكم حتى يسمع تمام الدعوى والبينة ويسأل المدعى عليه هل لك

in their support, it then turns to the Respondent to put up his/her defence. See Abubakar Hassan Alkatsinawiy's Ashalul Madarik, Volume III page 199.

مدفع؟ (راجع: أسهل المدارك شرح إرشاد السالك لأبي بكر حسن الكشناوى ج3 ص 199)

d- Al-ihzar **د- الإعذر**

The trial Court before it gave the order did not exhaust the parties whether they or any have anything more to state before order is given, such decision without exhaustion (اعذار) is a nullify. See

Al-Izar is the statement of the judge before his judgment in which he will ask do you have any evidence and if he give his judgment before Izar, the judgment is not valid.

الإعدار: هو قول القاضي لمن توجه عليه موجب حكم بقوله: أبقيت لك حجة وإن حكم قبل الإعذار بطل حكمه. (إحكام الأحكام ص 25)

We also refer to Suleman Representative of Ibrahim Vs. Isiyaku & 6 Others. Appeal No. CA/K/142s/86 dated 5th day of February, 1986 where their Lordship stated.

"At the end of the parties case the court shall ask them whether they have anything more to say before the court pronounces its judgment. This is what is called Al-I'Izar something having similarity with 'alacutos'. Where a judgment is pronounced without it, it will be set aside on appeal. See page 39 Bahjah: Commentary on Tuhfatul- Hukkam where it is stated. Majority view of the jurists is that judgment pronounced without it (I-Izar) is a nullity. It has

been held that it is improper for a court to find its judgment on grounds not raised or canvassed before it."

It is an established Islamic Law that If for any reason courtwants to raise an issue suo motu, it shall invite the parties to address it on such issue and after which the normal procedure of I'Izar in Islamic Law shall follow before judgment is pronounced.

For this reason, we shall allow the appeal set aside the decision and order of the lower court with an order that the case be heard de novo by the same court.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**S. M. ABDULBAKI**	**M. O. ABDULKADIR**
KADI	**KADI**	**KADI**
20/9/2012	20/9/2012	20/9/2012

(31) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON (THURSDAY) 27TH SEPTEMBER, 2012

BEFORE THEIR LORDSHIPS:

A.A. IDIRS - HON. KADI SCA

S.A. ABDULBAKI - HON. KADI SCA

A.A. OWOLABI - HON. KADI SCA

MOTION NO: KWS/SCA/CV/M/IL/03/2012

BETWEEN:

KIRE LAWAL - APPLICANT

VS

HAJARA CHIROMA - RESPONDENT

Principle:

The plaintiff is one who cannot be forced to litigate if he refuses.

BOOKS/STATUTES REFERRED TO:

- Nizamul Qadai al Mussaygid P. 150).

RULING: WRITTEN AND DELIVERED BY A.A. IDRIS

The applicant Kire Lawal by way of motion on notice filed the instant application with Hajara Chiroma as the respondent on the 8th February, 2012. The applicant herein Hajara Chiroma sued Kire Lawal on the issue of inheritance of eight cows at Upper Area Court I, Ilorin. Both parties were heard at the trial Area Court which gave its decision. The applicant herein was aggrieved by the decision of the trial court and this consequently led to the file of his application

in this court in February, 2012 in motion No: KWS/SCA/CV/IL/08/2012.

When the case came up for hearing on the 27th September, 2012, both parties were absent but the counsel to the applicant sent a letter to our Registrars and going through the contents of the letter, we discovered that the counsel to the Applicant was requesting for the withdrawal of their application, because both parties had opted for settlement, which to us is better than adjudication.

In view of the above development, we decided to strike out this application in line with Islamic injunction which stipulates thus:-

The plaintiff is he who shall be left alone and shall not be coerced to prosecute his suit if he abandons his case (see Nizamul Qadai al Mussaygid P. 150).

المدعى هو من اذا ترك دعواه ترك فلا يجبر عليه .

Therefore, based on the above quoted Islamic Law combined with the request of the applicant, we ordered that the application be withdrawn and it is accordingly struck out.

Application struck out.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**A.A. IDIRS**	**S.A. ABDULBAKI**
HON. KADI	**HON KADI**	**HON. KADI**
27/09/2012	**27/09/2012**	**27/09/2012**

(32) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY 2ND OCTOBER, 2012.

BEFORE THEIR LORDSHIPS:

SALIHU O. MUHAMMAD - HON. KADI.

ADAM A. IDRIS - HON. KADI.

ABDULWAHAB A. OWOLABI - HON. KADI.

MOTION NO: KWS/SCA/CV/M/IL/07/2012.

BETWEEN:

SAFI ADISA - APPLICANT

VS.

BILIKISU KIKELOMO - RESPONDENT

Priciple:

1. The court closes the gate of litigation except in murder, detention, emancipation consanguinity or repudiation of marriage.
2. Enlargement of time or adjournment is within the discretionary power of a judge.

BOOKS/STATUTES REFERRED TO:

1. Mukhtasar Khaleel P. 261
2. Order 4 Rule 3 (1) (a) and (b) of the Sharia Court of appeal Rules.
3. Order 4 Rule 3(2) of the Sharia Court of Appeal Rules.

RULING: WRITTEN AND DEVLIVERED BY S.O. MUHAMMAD

This is a motion on notice filed by Safi Adisa as applicant. The respondent is Bilikisu Kikelomo. The motion was dated 19th July, 2012 and filed on the same day.

The prayers of the applicant are reproduced as follows:

1. Extension of time within which the Applicant/Appellant to file appeal against the decision of Upper Area Court II Oloje, Ilorin delivered on 8th day of June, 2012.
2. Allowing the Applicant/Appellant file the Appeal out of time.
3. Deeming the notice and grounds of Appeal have in annexed as Exhibit (A). (sic)
4. And such further order(s) as this honourable Court may deem fit to make in the circumstance of this action.

The motion was supported by 12 paragraph affidavit deposed to by the applicant himself. Paragraphs 2,3,4,5,6,7,8 and 9 gave the story of the need to file this application. We decided to reproduce these 8 paragraphs for the purpose of clarity and understanding.

2. That my wife BILIKISU KIKELOMO filed a divorce suit against me at Upper Area Court II Oloje Ilorin.

3. That my wife and I appeared on 1st day of June 2012 for the first time.
4. That the case was adjourned to 8th day of June, 2012 and the court asked us to bring along our witnesses.
5. That on the 8th day of June to my surprise the judge delivered the judgment without listening to me and ordered me to be paying N10,000 monthly for the maintenance of four (4) children.

6. That since I was not given free and fair hearing, I wrote to director of Area Court on 22/6/2012.
7. That on 3/7/2012 my letter replayed to with instruction to appeal to High Court. (sic)
8. That I was misdirected by Inspectorate Office (Judiciary) Ilorin to appeal to High Court via a letter dated 3/7/2012.

There were three exhibits attached to the motion.

Exhibit 'A' was titled Notice and Grounds of Appeal of Sharia Court of Appeal (sic). Paragraph I of the Exhibit complained of lack of "free and fair hearing" by the 2nd Upper Area Court Oloje

Exhibit 'B' was a letter written by the applicant to the Director of Area Courts (DAC) Judiciary Headquarters, Ilorin. The letter which was dated 22nd June, 2012 and copied to the Sole Judge of the trial Upper Area Court requested the DAC " to order for review of this case in the interest of Justice" because, according to him, the trial judge "failed to give….fair trial".

Exhibit 'C' was the reply of the Director of Area Courts to Exhibit 'B' above stated. Paragraph 2 of this exhibit reads as follows: "You are advice (sic) to appeal to the High Court if you are not satisfied with the decision of the Lower Court".

There was no counter-affidavit from the respondent and both parties were not represented by counsel.

Meanwhile, we sought for and received 4 page records of proceedings from the trial 2nd Upper Area court, Oloje, Ilorin in order for us to get the clearer picture of the case for more understanding of all the issues involved in it in the interest of justice and fair play.

Hearing of the motion first came up on Wednesday, 19th September, 2012. The applicant was present while the respondent

was absent inspite of the fact that she was duly served to appear on this date. We then had to adjourn to Thursday 27th September, 2012 in order to give her benefit of the doubt.

Hearing of the motion finally held on the 27th September, 2012 with both parties before us. The applicant while arguing his motion simply told us that the first action he took after the judgment by the trial 2nd Upper Area Court was to write to the DAC for review of his case for reasons already contained in Exhibit 'B' **supra**. He stated further that Exhibit 'B' was written within the time allowed by law to file his appeal at an appropriate court. He regretted the confusion caused by the DAC in Exhibit 'C' which "advice (sic)" him to file his appeal at the High Court instead of the Sharia Court of Appeal which had jurisdiction to hear his appeal. He added that that was why he came late to file this appeal before us. He finally urged us to allow him file his appeal out of time in view of the genuine reasons advanced.

The respondent had no objection to this prayer.

On our part, we read through the motion papers and also perused Exhibits 'A' 'B' and 'C'. In addition to these, we also attentively listened to both parties who were very brief in their statements before us.

Upon all these we decided to scrutinize all the motion papers and the exhibits. Our findings were as follows:

(i) This case for divorce was first heard at the 2nd Upper Area Court Oloje on 27th April, 2012. On this date it was only the respondent that appeared in court. The applicant was absent. The case was therefore adjourned to 11th may, 2012 for mention. For one reason or the other, the case could not hold on 11th may, 2012 as adjourned. Hearing re-opened on 1st June, 2012 and both parties appeared before the trial judge. The case was further adjourned to 8th June, 2012 when the judgment was given. The

respondent won the case. The defendant/applicant was ordered "to be paying the sum of N10,000 monthly (sic) to the court as the feeding and maintenance allowance of 4 children".

(ii) The trial judge also ordered that "…any aggrieved party have (sic) the right of appeal within 30 days to Sharia Court of Appeal Ilorin".

(iii) The applicant felt aggrieved. But instead of lodging his appeal at the Sharia Court of Appeal as rightly ordered by the Hon trial judge, he wrote Exhibit 'B' **supra** dated 22nd June, 2012 asking DAC to review the case.

(iv) Exhibit 'C' dated 3rd July, 2012 from the DAC compounded the applicant's efforts to seek redress when he was directed to appeal at the High Court.

(v) We noticed that this motion was dated and filed at our registry on 19th July, 2012.

(vi) The applicant's reason in the ground of appeal was that he was not given fair hearing.

However, on the other findings we observed that the applicant was to appeal against the judgment of the trial 2nd Upper Area Court, Oloje, Ilorin if he so wished between 8th June (the date of the judgment) and 7th July, 2012. But within this period of 30 days, we also observed that he had taken some steps to show his interest to appeal against the trial 2nd Upper area Court, Oloje, Ilorin. His effort was Exhibit 'B' if even he had taken the wrong step.

We also observed that between 7th July (when his right to appeal lapsed) and 19th July, 2012 when he at last filed his motion for enlargement within which he could appeal was mere 12 days. This period was not long enough to deny him right of appeal more especially in view of the importance of the claim, **da'awah,** which was divorce. And we so hold.

The issue of divorce is one of the five issues which doors should not be shut against the parties according to Islamic Law. We are guided by this Law:

ويعجزه إلا فى دم وحبس وعتق ونسب وطلاق. (راجع: مختصر خليل ص ٢٦١)

The court closes the gate of litigation except in allegations of murder, detention, emancipation, consanguinity or repudiation of marriage. (See P. 261 of **Mukhtasar Khaleel**)

Moreover, in our own opinion this applicant had advanced good and substantial reasons for the application to be granted. And we so hold. This opinion of ours is in tandem with Order 4 Rule 3 (1) (a) and (b) of the Sharia Court of appeal Rules:

3. (1) Every application for enlargement of the time shall be supported by:

(a) an affidavit or affirmation or declaration having in law the effect of

an oath setting forth **good and substantial reasons** for the

application; and

(b) grounds of appeal which **prima facie** shall give cause for leave to

be granted.

In view of the foregoing, we strongly felt that this motion be allowed. And we so order. We hereby enlarge the time within which this applicant can file his appeal out of time. We however refuse to grant the third prayer i.e. deeming Exhibit 'A' as properly filed before us. This is because we do not have any appeal before us for now.

Therefore and finally, we order as follows:

(1) The applicant is hereby allowed to file his appeal against the decision of the 2nd Upper Area Court Oloje, Ilorin in case No. CVFM/135/2012 decided on 8th June, 2012 between Bilikisu Kikelomo (respondent) and Safi Adisa (applicant)

(2) The Notice of Appeal shall be filed in our registry within 14 days from the date of this ruling.

(3) A copy of these orders shall be annexed to the notice of Appeal in compliance with Order 4 Rule 3(2) of the Sharia Court of Appeal Rules which stipulates as follows:

> ***Any application for enlargement of time may***
> ***Be made to the court and, when time is enlarged,***
> ***a copy of the order granting such enlargement***
> ***shall be annexed to the notice of appeal.***
> ***(Emphasis is ours)***

Motion succeeds.

SGD	**SGD**	**SGD**
A. A. OWOLABI	**S. O. MUHAMMAD**	**A. A. ADAM**
HON. KADI,	**HON. KADI,**	**HON. KADI,**
02/10/2012	**02/10/2012**	**02/10/2012**

(33) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON WEDNESDAY, 10TH DAY OF OCTOBER, 2012
(YAOMUL-ARBI'A' 24TH DHUL-QA'DAH, 1433 A.H)

BEFORE THEIR LORDSHIPS:

I.A. HAROON - HON. GRAND KADI
S.M. ABDULBAKI - HON. KADI
M.O. ABDULKADIR - HON. KADI

MOTION NO: KWS/SCA/CV/M/IL/11/2012

BETWEEN

RASAQ ADI - APPLICANT

AND

ALHAJA AWAWU JAJI - RESPONDENT

Principle:

An application for an extension of time is left for the discretion of a judge where it is required especially in the matter that falls under emancipation, divorce and consanguinity.

RULING: WRITTEN AND DELIVERED BY I.A. HAROON

Rasaq Adi was the applicant in this motion while Alhaja Awawu Jaji was the respondent. The applicant was represented by Lawyer A.H Sulu-Gambari and A.H. Abdulrahman while S.A. Akanbi with AbdulGaniyu Daudu represented the Respondent.

The applicant filed Motion on Notice on 31st May, 2012 and brought pursuant to Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended), Order IV of the Sharia Court of Appeal Rules and under the inherent jurisdiction this honourable Court.

The Motion was seeking for the following reliefs:-

1. *Leave of this honourable Court permitting the applicant to appeal out of time against the ruling of Area Court No. 3, Adewole Area, Ilorin delivered on the 18th September, 2009.*
2. *An order of this honourable Court extending the time within which the applicant can appeal against the ruling of Area Court 1 No. 3, Adewole Area, Ilorin delivered on the 18th September, 2009.*
3. *An order of this honourable Court allowing the applicant to file his Notice of Appeal against the ruling of 18th September, 2009.*
4. *And for such further order(s) as this court may deem fit to make in the circumstances*

The motion on Notice was supported by an 11-paragraph affidavit deposed to by the applicant marked as **Exhibits A, B & C** respectively. The exhibits are: **A- Certified True Copy of the trial court record of proceedings; B-the proposed Notice and Grounds of Appeal, and C-the revenue receipt for payment**.

When the hearing came up on Wednesday, 10th October 2012, the two parties are absent; however Lawyer A.H. Sulu Gambari with his learned friend A.B. AbdulRahman appeared for the applicant while Lawyer S.A. Akanbi with AbdulGaniyu Daudu appeared for the respondent. Counsel to the applicant prayed the court to allow him to move his motion that day, his prayer was however granted. In his submission, he referred the court to the prayers he sought for in his motion filed and urged the court to grant the prayers as prayed and the reasons for the lateness were stated in the affidavit deposed to by the applicant. He finally urged the court to look into it and grant him the reliefs being sought for because there was no counter

affidavit from the respondent. The respondent's counsel however raised no objection to the motion.

Having listened to the submission of the applicant's counsel with no objection raised by the respondent's counsel and considering the supporting 11-paragraph affidavit in which paragraphs 4, 5, 6 & 7 are the reasons why the appeal was not filed on time; i.e. that the applicant was not guided by his counsel cum the fact that this matter fall within the category of issues to which litigation cannot be closed (الطلاق والنسب والعتق). Thus, the application deserves our favorable consideration and we hereby granted the extension of time within which to file appeal out of time. The Notice of Appeal should be filed within two weeks from today the 10th October, 2012.

Motion Succeeds

SGD	**SGD**	**SGD**
M.O. ABDULKADIR	**I.A. HAROON**	**S.M. ABDULBAKI**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
10/10/2012	**10/10/2012**	**10/10/2012**

(34) IN THE SHARIA COURT OF APPEAL OF KWARA STATE
IN THE SHARIA COURT OF APPEAL OF SHARE JUDICIAY DIVISION
HOLDEN AT SHARE ON THUSDAY 11TH DAY OF OCTOBER 2012
YAOMAL – KHAMIS, 11 DULQAIDA 1433 A.H

BEFORE THEIR LORDSHIP

S.M. ABDULBAKI - HON. - KADI
M. O ABDULKADIR - HON. - KADI
A.A.OWOLABI - HON. - KADI

APPEAL NO:KWS/SCA/CV/AP/LF/06/2012

BETWEEN

NDAFOGI B.B. - APPELLANT
VS
AMINAT NDAFOGI - RESPONDENT

Principle:

An appellate court can set aside the decision of the trial court for lack of fair hearing.

BOOKS/STATUTES REFERRED TO:

1. lrshadul salik Vol 111 page 119-120.
2. lhkam Al-Ahkam p.8
3. Tuhfatulhukam p .31-35

JUDGEMENT: WRITTEN AND DELIVERED BY M. O ABDULKADIR

This appeal is against the decision of Area Court Tsaragi delivered on the 22nd day of 7May 2012 in case/suit No 50/2012.

The appellant herein **Ndafogi B.B** was the defendant at the lower court while **Aminat Ndafogi** the plaintiff therein is the Respondent in this Appeal.

His Honour the Trial Area Court Judge M. B Yusuf wherein on the 9th May 2012 gave Judgment in respect of the suit to the effect that

> *"Divorce is granted to the plaintiff as sought Under order 9 Rule 3 of the Area Court (civil) Procedure Rule sic. See page 2 of the record of proceeding of the trial court.*

In addition to the above, the trial Hon. Judge, Further Ordered that :

"Further order will be made on 21/05/2012 sic.

The said Judgment was signed and dated on the 9th day may 2012 by the trial Area court. This particular case in which Judgment has been delivered was further reopened on 22th of may 2012 by the same trial court Judge Therein he further gave the following order or orders;

1. The plaintiff shall observe 3 month, waiting period according to custom from 9/5/2012 sic
2. The plaintiff may obtain a certificate of divorce sic
3. Defendant may sue to make a claim if he has sic
4. Appeal is allowed within 30 days to the U.A.C i e Upper Area Court. sic

Being dissatisfied with the said Judgment the appellant **Ndafogi B.B** appealed to this court Vide his notice of Appeal dated 25/7/2012 on three grounds of Appeal contained on page 1 of the case file of this appeal. The three grounds of appeal filed are:

1. That the decision of the trial court, Area Court 1Tsaragi was unreasonable, unwarranted and cannot be supported because there was no fair hearing.
2. That the trial court hastely granted the divorce to my wife in my absence against my wish.
3. That the trial court did not give me opportunity to defend myself.

We commenced and heard this appeal on 20th September 2012. On that day, the appellant appeared in person, while the Respondent was absent but one Mohammed **Ganna** was mandated to represent her vide a letter of authority dated 20/9/2012 given to him by the Respondent which he tendered before the court, The appellant raised no objection to the letter and it was accepted by the court and marked Exhibit "A"

We wish to highlight briefly on the facts of this case as per the submission of the appellant / defendant and the response of the respondent/ plaintiff before us.

The plaintiff / Respondent filed a petition for divorce against the Defendant / Appellant before the Area court 1 Tsarsgi whereby a summons was prepared and issued to be served on the defendant / appellant and it was actually served on him personally, but before the appointed day for mention or hearing as the case may be, the family of the two parties had intervened between them and they were able to settle the dispute that led to the filling of divorce petition, and it was resolved amicably, that , none of them should attend the court at all, the plaintiff even asked the defendant not to go to the court, but The Respondent took the appellant by surprise when he attended the court on the appointed day against the joint resolution of their family, and got the Judgment against the defendant/Appellant whereby divorce was granted to the plaintiff/Respondent in his absence. The appellant came to the knowledge of the judgment.

when he went to attend a criminal proceedings for enticement which he filed against the man whom he alleged to have been enticing his wife, it was there and then, the lawyer to the enticer brought out a certificate of divorce issued by the Area court 1 **Tasragi** certifying that the plaintiff has been granted divorce and that was the reason why he came to this court to file an appeal against the decision of the lower court on three grounds as contained in this notice of appeal; The Appellant told the court that, after the 1st summons, the court did not send any other summons to him and he was not served with any other summons. He also told the court that presently, he and the Respondent are cohabitating together and she is carrying his pregnancy, he finally prayed us to nullify the judgment of the trial court.

In his response, the respondent submitted that he came to represent the respondent as well as her family. He said he agreed with the appellant that divorce was granted to his wife in her absence, he further said that actually the family of the two parties entered into an amicable settlement between them, and the family resolved that none of the parties should go to court and which they agreed upon. but it was the Respondent who snuck out of her house and went to the court to obtain judgment from the court in the absence of the appellant, and when she came back to tell the family of the step she took, the family annoyed with her, the respondent stated further that, it is a fact that the appellant sued one man before a magistrate court for enticing his wife, and that the appellant became aware of his wife being granted divorce, when the lawyer to the man showed him the certificate of divorce issued to his wife after the judgment, he further submitted that the respondent is currently carrying the appellant ‘s pregnancy and both parties are cohabitating together and it was the instruction of both parties’ family that the appellant should file this appeal against the said judgment so that

neither the enticer nor any other person could be able to use the judgment against them.

We have carefully examined the complaint of the appellant against the decision of the lower court and painstakingly read through the record of proceedings of the trial court we have equally considered the submission of the appellant made before us and the responses of representative of the respondent. There is no doubt that from the record of proceedings his appeal questions issues of fair hearing on the parties before the trial court.

Certainly, the law is fairly settled in both the statutory provision and our substantive law both in Islamic and common law where the issue of fair hearing is complained of and dictated by the peculiar fact and circumstances of the case as in this appeal.

Under Islamic Law the rule is that a judge shall not give verdict or judgment on any matter before him without listening to the entire claim and proof.

See **lrshadul salik Vol 111 page 119-120**

"ولا يحكم حتى يسمع تمام الدعوى والبينة"

It is necessary to point out at this stage that, the trial court in this case has decided to refuse to follow the ingredients which are indispensable and which a judge must ensure their availability before he passes a judgment, the absence of any one of them renders the Judgment invalid. These ingredients are six number

They are:

1. The Judge,
2. The Plaintiff,
3. The defendant,
4. The subject matter in dispute,

5. The applicable law leading to the judgment (Quran or sunnah texts or the consensus),

6. The procedure by which such Judgment attained see **lhkam Al-Ahkam p.8**

يعني أن أجزاء حقيقة التي لايتم الحكم إلا بجميعها ويختل بفقد واحد منها وهي كما قال ستة: (1) القاضي (2) والمدعي (3) والمدعي عليه (4) والمدعي فيه (5) والمقتضي به من كتاب أو سنة أو إجماع بالنسبة للمجتمع ..... وسادسها كيفة القضاء .

Studying this case properly we discovered that the trial court did not give the Appellant/defendant the opportunity of being heard, he did not even wait for his appearance before he granted the divorce to the respondent/plaintiff.

What he did was that after he was satisfied that the defendant/ appellant was served with summons he began to hear the claim of the respondent/plaintiff and on that basis alone he proceeded to granting the woman divorce without any hesitation and without even having any regard to the nature of the claim before it which is divorce. The prophet Muhammad (S.A.W) has frowned against Talaq/Divorce where he said

"أبغض الحلال عند الله الطلاق"

So under Islamic Law, Maliki school is of the opinion that passing of judgment in a case in absence of the other party (defendant) is a deprivation of right as he shall be heard and his argument even if such should lead to setting aside the Judgment

See **Tuhfatulhukam p .31-35**

The Judge shall not proceed to Judgment on an absent of litigant (the defendant) except he is present or has Proxy/ guardian in attendance as he may have an argument. with him

which may refuse the claim of the claimant because the messenger of Allah S.A.W said to Ali in Hadith, Oh Ali lf two:-

The litigants are before you do not give Judgment

Between them until you hear of the other, as you

Hear of the first, that if you do that, the Judgment

Shall be manifestly clear to you

See also the book of Islamic Law, the practice and procedure in Nigeria by Adamu Abubakar Esq.

On the whole, we are of firm believe that the contention of the appellant/defendant, In this case on appeal that the trial court did not give him, fair hearing is proper, and having regard to all the steps taken in this case by the trial court, we find it difficult to say that defendant had fair hearing In the circumstance, the trial court has therefore acted wrongly, arbitrarily, recklessly and injuriously It is therefore easy to say that the trial court made a hurried decision .and we so hold.

Appeal succeeds. We order that the certificate of divorce issued to the respondent by the trial court be nullified

SGD	SGD	SGD
A.A OWOLABI	**S.M. ABDULBAKI**	**M.O ABDUL KADIR**
HON. KADI	**HON. KADI**	**HON. KADI**
11/10/2012	**11/10/2012**	**11/10/2012**

(35) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF LAFIAGI JUDICIAL DIVISION
HOLDEN AT SHARE ON TUESDAY 23RD DAY OF OCTOBER, 2012.

BEFORE THEIR LORDSHIPS:

S. O. MUHAMMAD - HON. KADI.
A. A. IDRIS - HON. KADI.
M. O. ABDULKADIR - HON. KADI.

MOTION NO: KWS/SCA/CV/M/LF/08/2012.

BETWEEN

MANDOWU MADIU - APPLICANT

VS.

AWAWU MANDOW - RESPONDENT

Principle:

An application for an extension of time is left for the discretion of judge where it is required especially in the matter that falls under emancipation, divorce and consanguinity.

BOOKS/STATUTES REFERRED TO:

1. Mukhtasar Khaleel, P. 261.
2. Order 4 Rule 3(2) of the Sharia Court of Appeal Rules

RULING: WRITTEN AND DELIVERED BY S.O. MUHAMMAD

This motion on notice was filed by Mandowu Madiu as the applicant. The respondent was Awawu Mandowu both of Edati Village via Tsaragi in Edu Local Government Area of Kwara State. The motion was dated 26th September, 2012 and filed the same day seeking the following orders:

1. Extention of time within which the appellant/applicant (sic) is to appeal against the decision of Area Court 1 BACITA delivered on the 16th day of July 2012. In suit No. 81/2012.
2. Allowing the appellant/applicant (sic) to file appeal out of time.
3. Deeming the Notice and grounds of appeal here in annexed as exhibit "A".
4. AND SUCH further order as this Honourable court may deem fit to make in the circumstance of this motion. ,

The application was also supported by 9-paragraph affidavit deposed to by the applicant with one annexture referred to in paragraph 3 of his prayers as Exhibit 'A'. This exhibit was the proposed notice and grounds of appeal which contained 5 No. proposed grounds.

There was no counter affidavit from the respondent.

We heard this motion at Share on Tuesday 23rd, October, 2012 and both parties were present. Both parties were very brief in their statements before us. The applicant gave reason for his lateness to file appeal against the judgment of the Area Court, Bacita, in divorce Suit No. S/No. 81/2012; Case No. 73/2012 instituted by the respondent and which was decided on 16th July, 2012. The reason, according to him, was that he was sick and attended to, through traditional medicine. He pleaded for pardon and urged us to allow his application as filed.

The respondent told us that she had no objection to the application.

On our part, we read all the papers filed including exhibit 'A'.We also sought for and obtained the 3 – page record of proceedings of the trial court which we also digested.

Upon all these, we decided to view the application and prayers sought from the following perspective:

The applicant's right to file his appeal lapsed on 15th August, 2012 because the judgment took place on 16th July, 2012 which was a period of 30 days allowed by law. He filed this application on 26th September which was exactly 45 days lateness. These days, in our opinion, had been too long to consider in favour of the applicant. However, we discovered in the record of proceedings that the matter in contention before the trial court was the matter of divorce and there are five issues under Islamic Law which cannot be foreclosed in any litigation. Divorce is one of them. We are guided by **Mukhtasar Khaleel**, P. 261 which provides as follows:

*The court closes the gate of litigation except in allegations of murder, detention, emancipation, consanguinity or repudiation of marriage. (See P. 261 of **Mukhtasar Khaleel**)*

ويعجزه إلا فى دم وحبس وعتق ونسب وطلاق. (راجع: مختصر خليل ص ٢٦١).

Furthermore, Order 4 Rule 3(1) (b) of the Shariah Court of Appeal Rules provides that:

3 (1) Every application for enlargement of time shall be supported by:

(b) grounds of appeal which **prima facie** shall give cause for leave to

be granted.

In view of these, we resolved to grant this application and it is so granted.

We however refused to grant the 3rd prayer i.e. deeming Exhibit 'A' as properly filed and served. The reason is because the appeal is yet to be properly placed before us.

In conclusion, we order as follows:

1. The applicant is hereby allowed to file his appeal against the decision of the Area Court 1, Bacita, in Suit NO. S/NO. 81/2012; case No. 73/2012 decided on 16th July, 2012; a divorce suit between the applicant and the respondent
2. The Notice of Appeal shall be filed in our registry within 14 days from the date of this ruling.
3. A copy of these orders shall be annexed to the proposed notice of Appeal in compliance with Order 4 Rule 3(2) of the Sharia Court of Appeal Rules which stipulates as follows:

> ***Any application for enlargement of time may***
>
> ***Be made to the court and, when time is enlarged,***
>
> ***a copy of the order granting such enlargement***
>
> ***shall be annexed to the notice of appeal.***
>
> ***(Emphasis is ours)***

Motion succeeds.

SGD	**SGD**	**SGD**
M. O. ABDULKADIR	**S. O. MUHAMMAD**	**A. A. IDRIS**
HON. KADI,	**HON. KADI,**	**HON. KADI,**
23/10/2012	**23/10/2012**	**23/10/2012**

(36) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY, 6TH NOVEMBER 2012
(YAWM ATH-THULATHA', 21ST DHUL-HIJJA 1433 A.H)

BEFORE THEIR LORDSHIPS:

I.A. HAROON - HON. GRAND KADI

S.M. ABDULBAKI - HON. KADI

M.O. ABDULKADIR - HON. KADI

MOTION NO: KWS/SCA/CV/AP/IL/13/2012

BETWEEN:

MASHOOD OLAYINKA - APPELLANT

AND

ALHAJA DUPE MASHOOD - RESPONDENT

Principles:

1. An appellate court can uphold the decision of the trial court if it followed the laid down law and procedure under Islamic law.
2. The father is exceptionally charged to mandatorily maintain his offspring even when it is hard.

BOOKS/STATUTES REFERRED TO:

1. Order III, Rule 7(2) (c) of the Sharia Court of Appeal Rules, CAP. S4, Law of Kwara State, 2006
2. Kitab al-Mughni by Ibn al-Qudamat, Vol.8, pp. 169-170.

3. Kitab az-Zakat in Al-Mustadrik ala As-Sahihayn by Abu Abdullahi bn. Muhammad An-Naisaburiy, Vol. II, p.42).
4. *Quran : 2, V. 234*.
5. Al-Fiqh Al-Islamiy wa Adillatuhu, by Dr. Wahbat Az-Zuhayliy, Vol. X, p. 7353 and p.7359.

JUDGMENT WRITTEN AND DELIVERED BY: I.A. HAROON

This matter was originated from Upper Area Court II, Oloje, Ilorin, in **Case No. CVFM/306/2011**. It was instituted by Mashood Olayinka; the plaintiff/appellant against Alhaja Dupe Mashood; the defendant/respondent for the dissolution of their marriage.

Both parties were represented by learned counsel. The plaintiff/appellant, Alhaji Mashood Olayinka was represented by J.S. Mohammed, *Esq*., while the defendant/respondent; Alhaja Dupe Mashood was represented by AbdulGaniyu Bello, *Esq*. The matter was heard on the 6th day of January, 2012 by the trial Upper Area Court after series of adjournments.

The learned counsel to the plaintiff/appellant narrated the efforts made to settle the matter amicably between the parties by the elders and members of their family but did not yield any positive result.

The learned counsel to the defendant/respondent though claimed that he was not aware of any arrangement for reconciliation between the two parties yet he agreed that the marriage be terminated.

Two witnesses were called by the plaintiff/appellant, they both testified to the fact that the respondent was troublesome. The defendant/respondent who did not call any witness later stated her case personally before the trial court. She told the court that she had

tried all efforts to reconcile with the plaintiff/appellant but to no avail. She prayed the court to grant her the custody of the three products of the marriage whose names are: Mariam Mashood (12yrs); Mukhtar Mashood (8yrs) and Fatimat Mashood (5yrs). She told the Court that she was responsible for the school fees of the children in question, she thus asked for a claim of N57, 500. She went further that she was also responsible for the feeding of the three children. On this, she prayed the court to order the appellant to be paying her a sum of N20, 000 as monthly maintenance allowance for the said three children.

The trial court having listened to the parties took the decision and made the following orders:

a. ***Dissolved the marriage between the two parties***

b. ***Ordered the plaintiff to be paying N20, 000 as monthly feeding/maintenance allowance to the defendant***

c. ***Ordered the plaintiff to refund a sum of N57, 000 school fees to the defendant, and***

d. ***Finally ordered the plaintiff to pay N10, 000 compensation to the defendant***

The plaintiff/appellant, Alhaji Mashood Olayinka was aggrieved by this verdict of the trial Upper Area Court and therefore appealed to our court to seek for redress. The Notice of Appeal was dated and filed on 25th July, 2012 after being granted the leave for extension of time to appeal out of time in ***Motion No. KWS/SCA/CV/M/IL/05/2012*** dated 28th July 2012.

The only ground of appeal in this matter as reflected on the Notice of Appeal reads thus:

Ground of Appeal

> ***The trial court erred in law when it awarded N20, 000 monthly to be paid by the appellant to the respondent having regard to the appellant's means of income being a level 6 officer. (sic)***

On Tuesday 16th day of October, 2012 (corresponding to Ath-Thulatha' 30th Dhul-Qa'dah, 1433 A.H), when the matter came up for hearing before our court, the two parties were present. J.S. Muhammed, *Esq.*, appeared for the plaintiff/appellant; Alhaji Mashhod Olayinka, while the defendant/respondent; Alhaja Dupe Mashood was self-represented. The counsel to the plaintiff/appellant in his submission briefly gave the background of this case regarding the aborted reconciliatory efforts and the decision of the trial court. He submitted that there was only one ground of appeal which according to him will be determined by only one issue thus:

> ***Whether or not the court below was right to have ordered the appellant to be paying N20, 000 monthly to the respondent for maintaining the children in question having regards to the financial status of the appellant?***

He submitted that the evidence not challenged remains valid and subsisting. He therefore made reference to the case of **Ndako Gidi Vs Aminat Edogi Ndako** as reported in **2001 Sharia Court of Appeal Annual Report** in Appeal No. **KWS/SCA/CV/AP/LF/08/2001** delivered on 26th February 2001, p.80 at 83, also the book titled **Ashalul Madarik, Vol.III, p.119** and also page 10 of the record of the proceedings of the trial Upper Area Court. He then argued that the statement of the plaintiff/appellant on his financial status was not recorded by the trial court and that

reference was made to same in the judgment. The learned counsel thereafter canvassed that the plaintiff/appellant does not have the capability of paying N20, 000 monthly feeding allowance. He told the court that the appellant is a civil servant with the Nigeria Immigration Service on Salary Grade Level 06, Step 07.

The learned counsel in his conclusion prayed us to set aside the order of the Upper Area Court on the award of N20, 000 feeding/maintenance allowance to the children in question. The plaintiff/appellant offered to pay N5, 000 feeding/maintenance allowance to the defendant/respondent.

The defendant/respondent in her brief response stated that the plaintiff/appellant instituted a court action against her for the dissolution of the marriage between the two of them; that the marriage was eventually terminated after the failure of the purported reconciliation. That the plaintiff/appellant was ordered to refund her the sum of N57, 500 she paid for the school fees of the three children of their dissolved marriage. That the plaintiff/appellant was ordered to be paying her a sum of N20, 000 monthly as feeding and maintenance allowance for the three children and also a sum of N10, 000 as *Iddah* period allowance. The defendant/respondent prayed us to compel the plaintiff/appellant to comply with the order of the trial Upper Area Court on the monthly feeding and maintenance allowance of N20, 000. She informed the court that the plaintiff/appellant has the capability to pay the N20, 000 monthly because he is a staff of the Nigeria Immigration service on salary Grade Level 08 and not 06 as claimed by him. She urged us to uphold the decision of the trial Upper Area Court on this issue. However, she did not contest other orders of the court.

At this juncture, we find it necessary to invoke ***Order III, Rule 7(2) (c) of the Sharia Court of Appeal Rules, CAP. S4, Law of Kwara State, 2006*** and ordered the court registry to conduct findings

with the Nigeria Immigration Service, Ilorin Office to establish the authenticity of this assertion and to report back to us.

Having carefully perused the record of proceedings of the Upper Area Court and listened to the submissions of all the parties involved in this matter, it is our well considered opinion that the main issue before us in the instant appeal is the maintenance of the three children who are the product of the dissolved marriage between the plaintiff/appellant and the defendant/respondent. We therefore opined to apply the Islamic procedural rule governing the maintenance otherwise known as *an-nafaqah* النفقةon this appeal.

It is the consensus opinion of the jurists according to Ibn al-Mundhir that a man should be responsible for the maintenance of their off-springs who are in needs. See ***Kitab al-Mughni by Ibn al-Qudamat, Vol.8, pp. 169-170***:

It was reported by Ibn Mundhir that jurists agreed in their works that a man shall maintain his off-springs who are not financially capable.

وأما الإجماع فحكى ابن المنذر قال:".....واجمع كل من نحفظ عنه من أهل العلم على أنّ على المرء نفقة أولاده الأطفال الذين لا مال لهم". (كتاب المغنى لابن القدامة، الجزء 8، ص 169–170).

According to the tradition of the Prophet narrated by Abu Dawud and others, any father that offends the above principle has committed a sin.

It is a grave sin for any man to neglect those whom he should feed or maintain.

(See Kitab az-Zakat in Al-

كفى بالمرء إثما أن يضيع من يقوت. المستدرك على الصحيحين لأبى عبد الله محمد النيسابورى: (كتاب الزكاة

الجزء 2، صفخة 42).

Mustadrik ᶜala As-Sahihayn by Abu Abdullah bn. Muhammad An-Naisaburiy, Vol. II, p.42)

The above principles are sourced to the injunction of the holy Qur'an which goes thus:

" ...وعلى المولود له رزقهن وكسوتهن بالمعروف..."

(سورة البقرة , آية: 234),

...and the man to whom the child belongs shall be responsible for their maintenance and clothing according to usage... (Quran 2:234)

In the light of all the foregone, the position of Islamic law is crystal clear on the responsibility of the father to maintain their incapable children. The Islamic law in its golden principle says further that the responsibility of maintenance shall be shouldered by the father even if he facing a hard financial condition

لا يشارك الأب أحد فى الإنفاق على أولاده كما لا يشاركه أحد فى نفقة الزوجة لأنهم جزء منه واحيائهم واجب بإحياء نفسه ولأن نسبهم لاحق به فيكون عليه غرم النفقة.

(راجع كتاب الفقه الإسلامى وأدلته للأستاذ الدكتور وهبة الزحيلي، الجزء 10، ص 7359).

The responsibility of maintenance rests solely on the father, akin to his responsibility upon his wife, because they are part and parcel of him. Their survival is his responsibility because they are affiliated to him by blood. He shall be compelled to maintain them.

(*Al-Fiqh Al-Islamiy wa Adillatuhu, by Dr. Wahbat Az-Zuhayliy, Vol. X, p.7359)*

....ويستثنى الأب فنفقة أولاده واجبة عليه ولو كان معسرا.....(الفقه الإسلامى وأدلته للأستاذ الدكتور وهبة الزحيلي، الجزء **10** ، ص**7353**).

The father is exceptionally charged to mandatorily maintain his offspring even when it is hard.
(Ibid, Vol. 10, p.7353)

Where the above principles are strictly complied with, the plaintiff/appellant in the instant appeal will have no chance to escape this responsibility of maintenance; he would therefore be compelled to pay the maintenance allowance on the three children of the dissolved marriage between him and Alhaja Dupe Mashood as demanded by law and we so hold.

The question on whether or not he is financially capable to pay the sum of N20, 000 maintenance allowance per month as awarded by the trial Upper Area Court to the children in question. We took judicial notice of this aspect and therefore moved our registry to go to the Nigeria Immigration Service office where the plaintiff/appellant works to make findings on his status and remuneration. It was established after the investigation through an authentic letter ***Ref: KWSC/ADM/814/Vol. I*** dated 24th October, 2012 and endorsed by the Assistant Comptroller of Immigration (Admin.), Umanah A.J. that the plaintiff/appellant; Alhaji Mashood Olayinka is on salary Grade Level 08/Step 05 and his monthly net pay is **ninety-six thousand and thirty-five naira, twenty kobo (N96,035.20)**.The said letter, having been shown to the plaintiff/appellant who confirmed same to be true reflection of his status and remuneration, was marked as **"Exhibit A"**.

We are not happy that this established fact is against the statement of the plaintiff/appellant who deceitfully told the court that he is on salary Grade Level 06/Step 07. This is grossly an act of irresponsibility on the part of the plaintiff/appellant and also an

abuse to the legal profession on the part of the learned counsel. A learned counsel is supposed to be double sure of any information, as *a minister in the temple of justice,* before its dissemination to the court in order for him to be respected and to promote the course of justice. Similarly, the trial court ought to have investigated further before its conclusion.

Having said that much, it is our well considered opinion that the argument of the learned counsel could not hold water, his submissions in this regard are nothing short of bundles of fallacy and should be disregarded. Also, the case and the authority cited by the learned counsel to the appellant in this instant appeal will not be helpful for lack of relevance. This we so hold.

The decision of the trial Upper Area Court II, Oloje, Ilorin in its judgment of 10th day of February, 2012 particularly on the order affecting the maintenance of the three children of the dissolved marriage is hereby upheld. The plaintiff/appellant is thus ordered to pay the sum of N20, 000 on monthly basis for the maintenance of the three children of the dissolved marriage between him and the defendant/respondent.

Appeal fails.

SGD	**SGD**	**SGD**
M.O. ABDULKADIR	**I.A. HAROON**	**S.M. ABDULBAKI**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
06/11/2012	**06/11/2012**	**06/11/2012**

(37) IN THE SHARIA COURT OF APPEAL OF KWARA STATE
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY 13TH OF NOVEMBER 2012
YAOMUL – THULATHA- 28TH DHUL-HIJJA1433 A.H

BEFORE THEIR LORDSHIP:

I.A. HAROON - HON. GRAND KADI

S .M. ABDULBAKI - HON. KADI

M.O. ADBULKADIR - HON. KADI

MOTION NO: KWS/SCA/CV/M/IL/15/2012

BETWEEN

ALHAJA AWAWU JAJI - APPLICANT

VS

RASAQ ADI - RESPONDENT

Principles:

1. An application for an adjournment or extension of time is within the discretionary power of a judge.
2. The door of litigation would be closed except in homicide, detention, consanguinity and divorce.

BOOKS/STATUTES REFERRED TO:

1. Mukhtasar Khalil, page 261.
2. Order IV Rule 3 (a) (b) of the Sharia Court of Appeal Rule Law of Kwara State.
3. Ahmed Ad- duraid's Akrabu Masalik vol 4 page 65.
4. Order 4 Rule 3 (2) of the Sharia Court of Appeal Rules.

RULING: WRITTEN AND DELIVERED BY M.O.ABDULKADIR

On 3/8/2012 Hon. Judge **Ibrahim Isihaq Adio** of the Area Court 1 NO 3 Ilorin delivered a ruling in respect of a suit NO340/2012 in which he refused to entertain the motion on notice filed before it by **Alhaja Awawu Jaji** against **Rasaq Adi** on the ground that its own court lacks jurisdiction.

On 17 September 2012 the applicant herein filed the instant application with 15 paragraph affidavit in support and seeking the following reliefs from the court.

(1) Leave of this court permitting the applicant to appeal out of time against the said ruling.

(2) Leave of this court to allow the applicant to file the notice of appeal out of time against the ruling of the court.

(3) An order of this court extending the time for the applicant to file his notice of appeal against the ruling of the court.

(4) An order of this court deeming the notice of appeal marked EXHIB "A" as properly filed and served having paid the appropriate filing fees.

(5) And for such further orders as this court may deem fit to make in the circumstances.

The Respondent also filed 13 paragraph counter affidavit. The Applicant Alhaja Awawu Jaji was represented by S.A. Akanbi counsel, while the Respondent **Mr Rasaq Adi** was represented by A.H. Sulu Gambari Esq.

The aforesaid motion was moved and argued on10/10/2012, The learned Applicant's counsel placed reliance on the supporting affidavit with much emphasis on paragraphs 4-10 thereof.

The main reason referred to as the cause for filing this application late or filing the application out of time by the applicant is specifically in paragraph 12 where it states that " The appealing out of time is not deliberate but deceived by the Respondent 's antics who filed an appeal but failed to pursue it. It was also the submission of the applicant's counsel that carefully looking at all the facts deposed to in the affidavit in support, the court would see that the applicant is Justified in law in filling this application out of time and that, this court being the court of substantial justice where the justice and fairness are praticised, he therefore urged the court to grant this application as prayed.

The leaned counsel to the Respondent H. A. Sulu Gambari Esq opposed this application and also placed reliance on the Respondent's counter – affidavit He made reference to paragraphs 2, 4 and 10, he then submitted that Respondent did not deny the 3 paragraphs and therefore they are deemed to have been admitted by the applicant He again submitted that the allegation of deception raised by the applicant is misconceived in law, and he therefore urged us to discountenance with it.

Furthermore, the Respondent counsel submitted that In Law before a court exercises its discretion positively in granting an application of this nature, the Applicant must be able to show special and convincing reasons for filing the application out of time, he said this application is devoid of any convincing reasons for this court to grant the application. He also said that the appeal of the applicant cannot be predicated on the appeal of the Respondent as deposed to in paragraph 8 of the affidavit in support .To appeal against decision of any court is a constitutional right, so therefore, for the Applicant to say that we want to know what happens to the appeal of the Respondent before they can file their own appeal is not a good reason. The Respondent counsel finally submitted that this court should not be attracted by technicalities and therefore urged the court

to discountenances with all the submissions of the applicant and we should therefore refuse it.

We have pondered on this application, we read through the pages of the affidavit in support and against this motion coupled with the submission by respective counsel to the parties, we have also taken judicial notice of the 2 annexure as attached to the affidavit in support i.e. the notice of appeal which contains the Ground of the proposed appeal and Ruling of the trial court i e the Area court 1 No3 Adewole Ilorin in case NO.269/2009 and suit NO, 340/2012 respectively delivered on 3/8/2012

Having done this we observed and discovered that the following facts emerged.

(1) That, we have earlier heard and granted the similar application in a motion NO KWS/SCA/CV/M/ IL 11/2012, between RASAQ ADI VS ALHAJA AWAWU JAJI the Applicant /Respondent therein , and Respondent /Applicant herein,

(2) The record of proceedings and the Ruling against which the applicant filed his application for extension of time was attached to the affidavit in support of that motion

(3) The said record of proceedings and ruling to that effect was delivered by Hon. Ibrahim Abdullahi (JUDGE) on the 18/9/2009.

(4) That the cause of action in that case was for CUSTODY OF A MALE CHILD.

(5) It is this same case, that applicant, herein was referring us to in his paragraph 5 of the affidavit in support as CONSENT JUDGEMENT dated 18/9/2009.and or as he also referred to in his Ground TWO of the Ground of appeal attach to the affidavit in support of this motion which was marked EXHIBIT"A"

Without much we do, we want to say here that we have gone through the law which gives us power to exercise our jurisdiction on whether or not to grant this type of application if brought before us, that is, Order iv Rule 3 (a) & (b) which says:

(1) Every application for enlargement of time shall be supported by –

(a) An affidavit or affirmation or declaration having in law the effect of an oath setting forth good and substantial reasons for the application.

(b) grounds of appeal which primafacie shall give cause for leave to be granted.

In all indications and based on all the records placed before us, we are of the view that the applicant has met the condition precedent that must be satisfied by an applicant in this type of motion for enlargement of time before a court can consider him worthy of being granted of the application, That in to say (a) supporting the application with an affidavit setting forth good and substantial reasons for the application. (b) grounds of appeal which primafacie shall give cause for leave to be granted.

The question on whether or not the applicant has given good and substantial reasons is depending on the circumstance of each case, and in the instance motion the applicant, in our view, has done so having considered all together the paragraphs in support of his application.

We have also considered the fact that this motion abinitio, emanated from suit NO. 340/09 and case NO.269/09 respectively, the cause of action for which is custody of a male child as we have said earlier and, be that as is may, it falls within five issues under which litigation cannot be foreclosed, See page 261 of Mukhtasar khalil. It says:

"ويعجزه إلا في دم وحبس وعتق ونسب وطلاق" (راجع مختصر خليل ص **261**)

The (Judge) will close the door of litigation except in cases involving homicide, detention, consanguinity and divorce.

Finally, we state that, the applicant having satisfied the condition precedent before an applicant can be granted extension of time within which to appeal out of time as enshrine in our Rule of court that is order iv Rule 3 (a) (b) of the sharia court Rule Law of kwara state , and having also considered the subject matter of this motion right from its substantive suit being that of custody of a male child, we have no alternative than to invoke our power under the aforesaid Rule, and as well as under sharhus- sagir commentary on Ahmed **Ad- duraid's Akrabu Masalik** vol 4 page 65 which states that :-

" ومن استمهل أي طلب المهلة لدفع بينة أقيمت عليه أمهل الطالب بالاجتهاد من الحاكم"

Whoever seeks an adjournment or extension toward the defense of a claim, the grant of the indulgence sought is at discretion of the judge ".

In conclusion, we grant this application and order as follows:

(1) Leave is hereby permitted to the applicant to file his appeal against the decision of Area Court 1 NO3 Adewole, Ilorin in suit NO.340/2012 and case NO. 269/2009 decided on 3rd of August 2012.

(2) The notice of appeal shall be filed in our registry here in Ilorin within 14 days from today 13/11/2012.

(3) The applicant's prayer for deeming the notice of appeal as properly filed and served is hereby refused for the reason that the appeal is yet to be properly placed before us.

(4) A copy of these orders shall be annexed to the proposed notice of appeal incompliance with order 4 Rule 3 (2) of the sharia court of appeal Rules.

Motion succeeds.

SGD	**SGD**	**SGD**
M.O ABDULKADI	**I.A HAROON**	**S.M.ABDULBAKI**
HON. KADI	**HON.GRAND KADI**	**HON.KADI**
13/11/201	**13/11/2012**	**13/11/2012**

(38) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF LAFIAGI JUDICIAL DIVISION
HOLDEN AT SHARE ON THURSDAY, 22ND DAY OF NOVEMBER, 2012

BEFORE THEIR LORDSHIPS:

S. O. MUHAMMAD - HON. KADI.
A. A. IDRIS - HON. KADI.
M. O. ABDULKADIR - HON. KADI.

APPEAL NO: KWS/SCA/CV/AP/LF/07/2012

BETWEEN

MOMO ADAM - SELF REPRESENTATION

VS.

ALHAJI SHA'ABA NDA - SELF REPRESENTATION

Principles:

1. Whoever admits other person's right over him is bound to discharge it.
2. The plaintiff will not be disturbed if he decides to abandon his claim.

BOOKS/STATUTES REFERRED TO:

1. (Ashalul Madarik on Irshadu Salik Vol. 3 P. 212)
2. Mayāratul-Fāsī 'alā Tuhfatul Hukkam Vol. 2, Page 225).
3. Fawakihud Dawani Vol. 11, P. 220

JUDGEMENT: WRITTEN AND DELIVERED BY S.O. MUHAMMAD

Momo Adam, the appellant, was the plaintiff at the Area Court Grade 1 No. 2, Centre Igboro, Ilorin. She sued her husband Alhaji

Sha'aba Nda, the respondent for divorce at the trial Area Court. She said that: "I pray the Court to grant me divorce for lack of maintenance". The respondent was not in court to affirm or reject the claim. He instead wrote a short note to the trial Area Court. The note was written at the back of the Civil Summon served on him. The note is hereby reproduced as follows:

> ***I Alhaji Nda Shaaba, I agree my wife Momo Adam to go free. So I am pleading with Honourable Court to pardon me for inability to be in the court (sic)***
>
> ***23/08/2012***
>
> ***4: 40 pm (sic)***

The note was duly signed by the respondent.

Based on the appellant's claim and the respondent's written consent, the trial Area Court Judge on 06/09/2012 dissolved the marriage between the two parties accordingly. He further ordered that:

> ***2……the petition observe her Idddah by writing for three periods of purity before she can remarry (sic).***
>
> ***3. That the absent party, the respondent herein, be served with this judgment for his knowledge and compliance (sic).***

The appellant felt aggrieved with this judgment and appealed against it in our registry with Appeal **No.**

KWS/SCA/CV/AP/LF/07/2012 dated and filed on **29/09/2012**. Her grounds of appeal are as reproduced below:

(1) That, decision of Trial Area Court was unreasonable, unwarranted because **my complain before the court was divorce and claiming of Maintenance Fees for our Male Child, and the trial court determined only divorce.(sic).**

(2) That, the trial court directed me to file another Suit for claiming of Maintenance fees if I, wish to pursue it. (sic)

(3) That, more grounds of Appeal may be filed later.

We sat at Shaare to hear this appeal on 22/11/2012. The appellant was present. The respondent was absent. Instead, he wrote his response to us which we accordingly read and comprehended.

Making her statement before us, the appellant said that her grievances with the decision of the trial Area Court were based on the fact that the court only dissolved her marriage with the respondent without making pronouncement on her other claim of maintenance. She stated further that she had a seven month old male child for the respondent by name Adam, and that she expected the trial Area Court Judge to make a pronouncement on the child's maintenance. She stated further that the respondent had visited her after the judgment to accept that he would be giving her =N=3,000.00 per month for the child's maintenance but that up to the time of hearing this appeal, he had not paid anything. She finally urged us to allow her to withdraw this appeal since the issue of the child's maintenance had been settled amicably.

We, once again, read the respondent's letter on this issue dated 21/11/2012. In the letter under reference, the respondent said in part:

> ***Sir, we have resolved our differences amicably and, I resolved (sic) to be paying her the sum of =N=3,000.00 for maintenance allowance of 1 male child, and she agreed with me and any question of medical complaint should be referred to me for my response (sic)***

We thereafter read the contents of this letter to the appellant who affirmed same.

Based on the respondent's agreement above quoted and also based on the appellant's satisfaction with the agreement and arrangement, we had no other option than to allow the appellant's withdrawal of this appeal. We were guided to take this decision by the provisions of the Islamic Law which state as follows, regarding the position of both the respondent and the appellant in this instant appeal.

1. *Whoever admits other persons right over him is bound to discharge it…… (**Ashalul Madarik** on **Irshadu Salik** Vol. 3 P. 212)*

2. *A matured (and) sane person who admits any right in favour of another party is bound by it.*

١- ومن اعترف بحق لزمه الأصل في الإقرار....

٢- ومالك لأمـره أقــرّ في ** صحـته لأجنبي إقـتفى

٣- المدعي هو الذى لو سكت لترك على

*(See **Mayāratul-Fāsī 'alā Tuhfatul Hukkam** Vol. 2, Page 225).*

سكوته .

(راجع: الفواكه الدوانى ج ٢ ص ٢20)

*3. The plaintiff will not be disturbed if he decides to abandon his claim. See **Fawakihud Dawani** Vol. 11, P. 297.*

Consequent upon the cited authorities above, we concluded that this appeal shall be struck out.

The appeal is therefore struck out.

SGD	SGD	SGD
M. O. ABDULKADIR	**S. O. MUHAMMAD**	**A. A. IDRIS**
HON. KADI,	**HON. KADI,**	**HON. KADI,**
22/11/2012	**22/11/2012**	**22/11/2012**

(39) IN THE SHARIA COURT OF APPEAL OF KWARA STATE
IN THE SHARIA COURT OF APPEAL OF KOSUBOSU JUDICIAL DIVISION
HOLDEN AT KOSUBOSU ON THURSDAY 29th OF NOVEMBER, 2012.
YAOMUL – KHAMIS 15th MUHARAM 1434 A.H

BEFORE THEIR LORDSHIP:

ADAM .A. IDRIS	**-**	**HON. KADI**
M .O. ABDULKADIR	**-**	**HON. KADI**
A .A. OWOLABI	**-**	**HON. KADI**

APPEAL NO: KWS/SCA/CV/AP/KB/02/2012

BETWEEN

ADAMA MOHAMMED	**-**	**APPLLANT**
VS		
MOHAMMED SABI JIMOH	**-**	**RESPONDENT**

Principles:

1. The burden of proof lies on he who asserts.
2. An appellate court can set aside the decision of the trial court for lack of fair hearing.

BOOKS/STATUTES REFERRED TO:

1. Ashalub Madarik commentary on Ir-hadus-Salik by Abubakar Bn Hasan Alkalsinawi Vol III pg 199.
2. Fiqus sunna by Sayyi Assabik v.3, p 322

JUDGMENT: WRITTEN AND DELIVERED BY M.O.ABDULKADIR

MOHAMMED SABI JIMOH the respondent in this appeal was sued by the appellant **ADAMA MOHAMMED** on 22/02/2012

at Area Court 1 Ilesha-Baruba in its case No 6/2012, decided on 23/02/2012. None of the parties was represented by counsel at the court.

The appellant's claimed before the trial court against the respondent was "DIVORCE" and for the purpose of emphasis we refer to page 1 of the trial court of record of proceedings. Thus:

Ct – Complainant: What is your Complaint?

Complainant – Ct: I am seeking for divorce

as no more love. (sic)

The respondent did not only agreed with the claim of the appellant, but also made an oral counter claim, when he was saying at the same page 1of the record of the proceedings as follows:-

Deft – Ct: - "I do hear all She said but is not that she has no love for me but one (Dodo Bi water) is the one trying to snatch her from me, which I have no objection to the divorce, but I will not want the said Dodo Bi water to marry her" (sic).

Without any hesitation, the trial court granted the divorce to the appellant and ordered that the appellant should not marry one Dodo Bi water for life. "Dodo Bi water" the man the Respondent alleged to have been enticing his wife and for the purpose of clarity the order of the trial court is hereby reproduced thus:

"Divorce is hereby granted to ***Adama Mohammed Sabi Jimoh*** *today the 3rd Feb 2012 (sic).*

Order 1The plaintiff is not marry one Dodo Bi water For life, but she can marry any other husband of her choice within or outside Ilesha Baruba" (sic)

The appellant was not satisfied with the decision of the trial court especially on the bond over order as to not marry any husband of her choice. Her grounds of appeal read as follow:

Ground I. *That the trial court judge misdirected himself by restricting me from marrying the man of my choice.*

Ground II. *That I am dissatisfied with the decision of Area Court Grade 1, Ilesha Baruba.*

Ground III. *That I urge this Hon court to set aside the judgment of the trial Area Court Grade 1, Ilesha Baruba*.

The summary of the submission of the appellant herself is that, She brought this appeal to this court in respect of the judgment given by the trial Area Court because, after the Lower Court had granted her divorce she was asked to sign a paper which she obliged, but the irony of it is that she did not understand the contents on the paper until later on the contents of the paper was interpreted to her and that was when she became aware of what was on the paper to mean that she was bond over not to marry one "Dodo Bi water" but that she was free to marry any other person, and that was the reason why she has appealed to this court, and she therefore urged the court to set aside that aspect of the judgment of the trial Area Court. The appellant stated further that it was as a result of the fact that she is an illiterate that is what made her not to understand the proceedings and the judgment of the trial court, and also the court did not provide for an interpreter to explain the proceedings and the order of the court to her. She finally prayed the court to set aside this aspect of the judgment of the trail court.

In his response, counsel to the respondent submitted that he wanted to base his submissions on 2 issues:

The 1st one is that, the respondent at the lower court gave his consent on the request of the appellant before the trial court for divorce on condition that she should not marry one Dodo Bi water otherwise known as Ishiak Dodo. The counsel submitted further that, the appellant understood the content of the proceedings as well as the judgment of the trial court in the sense that everything was interpreted to her, as it is trite that court are always attached with an interpreter.

The counsel also said that assuming without conceding that this court is inclined to granting this appeal, he urged us to remit the counter claim of the respondent to another court of competent jurisdiction to re-hear or retry the case.

The 2nd issue is that, it is trite that he who asserts must prove, the respondent therefore submitted that, the onus is on the appellant to prove that the judgment was not interpreted to her in open court, he said this duty has not been discharged, he also said that the absence of the letter or paper alleged by the appellant to have been giving to her for signing which she said she did not understand that purported document is fatal to the appellant's appeal, the absence to which this appeal is liable to dismissal by this court.

On the whole, the counsel urged the court to resolve the 2 issues in favour of the respondent.

The appellant's reaction to the submission of the respondent's counsel is that, she did not want the case to be remitted back to another Area Court for retrial.

We carefully perused the record of proceedings and painstakingly listened attentively to the submission of the appellant and the responses of the counsel to the respondent and we are of the opinion that the issues in this appeal certainly centered on lack of fair hearing. On the part of the court and lack of inability of the appellant to prove her allegation at the trial court.

Under Islamic Law principle of fair hearing, the procedural Law is that:

"*A court shall not give verdict against any party until It listens to all claims from the plaintiff, when any one of them finishes the court should ask the other party to react to the claim. There is no problem if he admits the claim, but if he denies, the plaintiff has to establish his assertion"* *See* ***Ashalub Madarik*** *commentary on* ***Ir-hadus-Salik by Abubakar Bn Hasan Alkalsinawi Vol III pg 199.***

يعني لا يحكم القاضي على أحد من الخصام حتى يسمع تمام الدعوى *فإذا* فرغ سال القاضي المدعى عليه فيما ادعى فيه خصمه من الحق، فإن أقربه كما ادعى عليه فلا اشكال، وإن أنكر فعلى الطالب البينة لإثبات حقه. (راجع أسهل المدارك شرح إرشاد السالك لأبي بكر حسن الكسناوي ج (3) (ص) 199)

In this case, it is our candid opinion that before the trial court gave its decision in respect of the oral counter claim of the respondent, it ought to have called upon him to prove his allegation, that is, by allowing him to produce his witnesses before it, in order to testify in respect of his allegation to the effect that he has no objection to the divorce, but the court should not grant the divorce except the appellant is ordered not to marry one Dodo Bi water For the court to have granted the counter claim of the respondent after granting the divorce without prove by the counter claimer would tantamount to offending the golden rule of Islamic law as quoted above.

Secondly, we also formed an opinion that the appellant at the trial court was not given fair hearing; this is because of the fact that

the trial court based its judgment solely on the oral counter claim of the respondent at the trial court without given the appellant the opportunity of being heard. The trial court should have allowed the appellant to defend the allegation levied against her. The failure of the trial court to give the appellant that opportunity was fatal to the decision of the trial court in that regard. The **prophet Mohammed** (S.W.A) has warned against passing of judgment by Islamic Law court without giving both parties opportunity of being heard. The prophet said this to **Aliy Bn Abu Talib that:**

"*When two parties appeal before you Do not pronounce any judgment in favour of any party until you hear from the other as you heard from the first one*"

يا علي إذا جلس إليك الخصان فلا تقض بينهما حتى تسمع من الأخر كما سميت من الأول فإنك إذا فعلت ذلك تبين تبين لك القضاء (راجع فقه السنة لسيد السابق ج3 ص 322)

It is therefore mandatory on any kadi to follow this golden rule of Islamic law of fair hearing.

On the whole as we could not find it on the record of proceeding of the trial court where the appellant was asked by the trial court to defend the allegation against her, we have no alternative than to be fortified by the above prophetic saying quoted above and to hold that the appellant was not given fair hearing by the trial court. In the circumstance, we order that the judgment and order of the trial Area Court 1 Ilesha Baruba in its case No 6/2012 delivered on 23/02/2012 and in respect of counter claim of the respondent be set aside. We order a retrial of that aspect of the judgment before Area

Court Okuta while we hold that the judgment and order in respect of divorce as binding and subsisting.

Appeal succeeds in part.

SGD	**SGD**	**SGD**
A.A. OWOLABI	**ADAM .A. IDRIS**	**M.O. ABDULKADIR**
HON. KADI	**HON. KADI**	**HON. KADI**
29/12/2012	**29/12/2012**	**29/12/2012**

(40) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF SHARE JUDICIAL DIVISION
HOLDEN AT SHARE ON THURSDAY 6TH DECEMBER, 2012.

BEFORE THEIR LORDSHIPS:

S. O. MUHAMMAD - HON. KADI.

A. A. IDRIS - HON. KADI.

M. O. ABDULKADIR - HON. KADI.

APPEAL NO. KWS/SCA/CV/M/LF/11/2012.

BETWEEN:

MANDOWU MADIU - APPLICANT

VS.

AWAWU MANDOWU - RESPONDENT

Principle:

An appellate court is duty bound to affirm the proceeding of the trial court if is correct.

RULING: WRITTEN AND DELIVERED BY S.O. MUHAMMAD

This is a motion challenging the recording of proceedings of the Area Court Grade 1 Bacita in a divorce case between Awawu Mandowu as Plaintiff and Mandowu Madiu as Defendant. Mandowu Madiu, the Defendant at the Lower Court was the applicant before us. This motion was dated filed at our Registry on 28/11/2012. It was also supported by 11 – paragraph affidavit deposed to by the applicant himself. Paragraphs 1 – 6 were the core matters in this motion. They are hereby reproduced for clear understanding.

1. That, I am the Appellant/Applicant and by the virtue of my position, I am very familiar with all facts of this case.
2. That my wife Awawu Mandowu petitioned me for divorce on the ground of misunderstanding and maltreatment.
3. That on the 16/2/2012 when the case came up for the second time at the trial court, the respondent lamented before the court that I beat her for using my hand set, and one time tried to Jacked her neck and also accused her that she is an harlot.
4. That, I responded to the allegation to be untrue and prayed for the reconciliation.
5. That to my surprise the trial court recorded me that, I, agreed to the allegation against me.
6. That there was no where I, accepted the alleged maltreatment at lower court.

We sat at Share on Thursday 6/12/2012 to hear this application. The applicant was present like-wise his wife, Awawu Mandowu, the respondent. We listened to the applicant regarding the complaints he had against the proceedings of her Bacita Grade 1 Area Court. Due to his illiteracy and lack of any form of Education status, we took time carefully, slowly and dutifully to read the proceedings complained against to him. To every paragraph, we read and explained to him, he confirmed. He then told us finally (in his words) that;

> *I don't understand all what the trial court did. I now understand what the court did through this (i.e. Sharia Court of Appeal) court's clear explanation and interpretation of the record of proceedings. Thanks.*

When the respondent was requested to react to this motion, she simply said that;

The Record of proceedings is correct.

Having listened to the statement s of both parties, and having gone through the record of proceedings with detailed explanation to both parties, more especially, to the applicant hereby we resolved, and correctly too, that nothing was wrong with the trial court's proceedings and we so hold.

Meanwhile, the substantive appeal in this case **No. KWS/SCA/CV/AP/LF/09/2012** dated and filed in our Registry on 5/11/2012 and which files were accordingly given to us, was adjourned till the next Share session for hearing. Both parties would however be served accordingly by our Registry at the appropriate time.

Motion therefore, fails.

SGD	**SGD**	**SGD**
M. O. ABDULKADIR	**S. O. MUHAMMAD**	**S. M. ABDULBAKI**
HON. KADI,	**HON. KADI,**	**HON. KADI,**
06/12/2012	**06/12/2012**	**06/12/2012**

(41) IN THE SHARIA COURT OF APPEAL OF KWARA STATE OF NIGERIA
IN THE SHARIA COURT OF APPEAL OF ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN ON TUESDAY 11TH DECEMBER 2012
(ATH-THULATHA' 27TH MUHARRAM 1434 A.H)

BEFORE THEIR LORDSHIPS:

I.A. HAROON	**-**	**HON. GRAND KADI**
A.A. IDRIS	**-**	**HON. KADI**
S.M. ABDULBAKI	**-**	**HON. KADI**

MOTION NO: KWS/SCA/CV/M/IL/06/2012

BETWEEN

1. AMUDALAT AKANKE		
2. IBRAHIM AKANBI	**-**	**APPLICANTS**
AND		
JAMIU ALAO	**-**	**RESPONDENT**

Principle:

An appellate court can dismiss the application if it is frivolous, misleading and of no substance.

BOOKS/STATUTES REFERRED TO:

1. Section 3(1), 8(3) and 10 of the Sharia Court of Appeal Law CAP S.4 Laws of Kwara State (2006)**.**
2. Section 277 of the 1999 Constitution of the Federal Republic of Nigeria**.**
3. Order III, Rule 2 of the Sharia Court of Appeal Rules, CAP 112, Laws of Northern Nigeria.
4. Al – fawakhu Ad- dawaniy vol.2.p.220

RULING: WRITTEN AND DELIVERED BY I.A. HAROON

This Motion on Notice was brought pursuant to Section 3(1), 8(3) and 10 of the Sharia Court of Appeal Law CAP S.4 Laws of Kwara State (2006), Section 277 of the 1999 Constitution of the Federal Republic of Nigeria and Order III, Rule 2 of the Sharia Court of Appeal Rules, CAP 112, Laws of Northern Nigeria. The application was dated and filed on 17th July 2012.

The application prays our Court to strike out the appeal with Appeal No. ***KWS/SCA/CV/AP/IL/09/2011*** and for such further order(s) as the Court may deem fit. The ground of the preliminary objection was that the application filed by the Respondent; Jamiu Alao before the trial court was to commit the 1st Applicant; Amudalat Akanke to prison for disobeying the court order upon which the trial court declined jurisdiction and thus dismissed the case.

On 11th December, 2012 when the matter came up for hearing, both parties were absent. Lukman Raji, *Esq.* appeared for the Applicants while A.H. Folorunsho, *Esq.* appeared for the Respondent.

The learned counsel to the Applicants; Amudalat Akanke and Ibrahim Akanbi submitted that his motion was supported by a 6-paragraph affidavit deposed to by one Nimat Salaudeen; a litigation clerk at the office of Gobir Imam and Co. He said that he relied on all the provisions therein particularly paragraphs 2-5. He told us that annexed to the affidavit was an Exhibit marked **'NS1'** which was a motion filed by the Respondent; Jamiu Alao against the Applicants at the trial court for committal to prison in contempt of the court. He averred that the case before the trial court was committal to prison against the Applicants in this motion. He further submitted that the Applicants filed a preliminary objection at the trial court which led to the dismissal of the case. He stressed that the claim at the trial court

was contempt proceedings. He however argued that the learned counsel to the Respondent misled this honourable Court by bringing the Notice of Appeal on paternity to us. He urged us to hold that the matter in the said appeal was committal to prison, which is criminal in nature and not paternity. He canvassed that jurisdiction is fundamental in any proceedings that our Court cannot entertain matters of contempt from trial courts unless where it is committed against our Court. He cited the constitutional provision i.e. Section 277 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and further argued that it is not stated therein that our Court can entertain matters on contempt of court. He finally prayed us to dismiss the application by striking out the appeal for lack of jurisdiction.

The counsel to the Respondent in his defense argued verbally that the preliminary objection was ill-motivated and that the Applicants' counsel failed to prove his case as he did not attach the ruling on the proceedings. That mere emphasis by reiterating the date of the ruling was not same with proof as demanded by the Sharia that the onus of proof is on he who alleges **البينة على المدعى**. He argued that the Applicants had misconstrued the entire proceedings; that the matter before the trial court was on enforcement of the ruling of this Court on issue of paternity. That the trial judge only declined jurisdiction to entertain the matter before it on the ground of "oversight" on the part of Sharia Court of Appeal in its decision of 21st May, 2010 in Case No. ***KWS/SCA/CV/M/IL/03/2010*** and ***KWS/SCA/CV/M/IL/09/2010*** where the court was wrongly referred to as **Area Court Grade III** instead of **Area Court I, No. III**. He therefore emphasised thus: *"this is what we have appealed against"*. He said an appeal could be against a part or the whole of a court decision; that the appeal in question, was against the court pronouncement as reflected on page 23 of the record of proceedings of the said appeal delivered on 21st August 2011 hereby attached and

marked as **"*Exhibit A"***. He prayed us to dismiss the application and allow the appeal to proceed on hearing.

Having listened to the submission of both parties for and against, it is our candid opinion that the main issue in the instant application is to determine the course of action at the trial Area Court which consequently led to the application of preliminary objection before us; whether it has bearing on committal to prison or not?

We frowned at the counsel to the Applicants as he derailed and misconstrued the course of the appeal before us. This could be unambiguously seen from the pronouncement of the trial court on page 23 of the record of proceedings which reads thus:

> ***…I have equally perused the order of the Hon S.C.A of Appeal Ilorin on this case very well together with the submission of the 2 counsel from both side as I said earlier I notice that this case is referred to Area Court Grade III to be enforced and this court is Area Court I No. III Adewole Ilorin of Kwara State judiciary and having there for going by the argument of judgment debtor objector counsel O.Y. Gobir who pray that this court lacking jurisdiction to enforce or ascertain same on a case which is not referred to that court. As allowed in law in the light of the above stated fact I hereby refuse to entertain the case on the ground of jurisdiction. (sic)***

The above statement which reflected the trial Area Court pronouncement in its decision of 21st July 2011 by the trial Judge; Hon. Ibrahim Isiaka Adio was the course upon which the appeal in question (Appeal No. ***KWS/SCA/CV/AP/IL/09/2011***) was grounded.

This being the case, the issue of jurisdiction is out of point. The preliminary objection sought by the applicant in his motion (***KWS/SCA/CV/M/IL/06/2012***) dated and filed on 17th July 2012 is hereby declared misleading and of no substance; and we so hold. The motion is therefore refused and dismissed. The Appellant is therefore allowed to prosecute his case in Appeal No. ***KWS/SCA/CV/AP/IL/09/2011***.

Application failed.

SGD	**SGD**	**SGD**
S.M. ABDULBAKI	**I.A. HAROON**	**A.A. IDRIS**
HON. KADI	**HON. GRAND KADI**	**HON. KADI**
11/12/2012	**11/12/2012**	**11/12/2012**

Distribution
Of
Estates

No. 28, Daudu Banni Compound,
Alore,
Ilorin.

23rd September, 2010

Hon. Grand Kadi,
Sharia Court of Appeal,
Ilorin.

Salamu Alaekun,

DISTRIBUTION OF THE ESTATE OF THE LATE ALHAJI UMAR FAROUK BANNI.

With humble and respect we write to seek the assistance of your lordship in the distribution of the Estate of the Late Alhaji Umar Farouk Banni in accordance with the provisions of the Islamic Law.

We will be very grateful to your early response.

Yours faithfully,

(SGD)
Alhaji Adelodun Orilonise
07064986616 & 08135568655
For: The Family.