THE DECISION OF THE SUPREME COURT IN HADA V MALUMFASHI[1] ON THE ADMISSIBILITY OF THE EVIDENCE OF A RELATION IN ISLAMIC LAW: LEGAL MATTERS ARISING*

Abstract
Trust has been described as a right enforceable solely in equity for the beneficial enjoyment of property the legal title of which resides with another person; or, a property interest held by one person at 'the request of another for the benefit of a third party'[2]. From this perspective, it may be difficult to see how the SJLGA created by section 162(6) of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN) could be an object of trust. Adopting the doctrinal research method, case law, newspapers, journals and internet-based materials would be used as this paper sets out to establish the trust status of the SJLGA, discuss states' responsibilities over the SJLGAs, states' violations of trust rules in administering these accounts. This paper recommends legal enforcement of the rights of beneficiaries of the SJLGAs in the interim and the scrapping of SJLGAs in the long run.

Keywords: Trust, account, joint, constitution and beneficiary.

1. Introduction

One of the areas of life that humanity cannot resist expressing sentiments in our contemporary world is religion. It does not matter the fact or reality or even the legality of a matter, once a religious belief is brought to bear, people take sides with the area favoured by their religion without the slightest waste of time. It is never the notion here that the decision of the Court under review was given because religious sentiment was the driving force, but as the study would reveal, it was a decision founded on religious beliefs, teachings and customs; and, in a nut shell, Shari'a Law which Muslims the world over see as second to no other law. Interestingly, Shari'a Law of the Maliki School that binds Muslims in Northern States of Nigeria has provisions that collide with federal laws or even the Constitution. The onerous task before members of the bench is to decide the fate of these rules of Shari'a in the situation of any such conflicts with any written law in assertion of the secularity of Nigeria and the supremacy of the rule of law which they are bound by the oath of their offices to uphold. This work is not setting out to comment on every point of such conflicts but is focusing its light on the 'admissibility' of the evidence of relations to litigants before courts applying Shari'a Law.

2. Shari'a Law as 'Customary Law'

Referring to Shari'a Law as customary law may meet resentment on religious grounds in some quarters. An ordinary Muslim mind may understand such a reference as derogatory of the law of his faith. It's like placing Shari'a that is believed to have a divine origin with all other rules of native law and custom that are products of the beliefs and cultural practices of other tribes and ethnic groups that have attained the position of law through the acceptance of members of such tribes and ethnic groups[3]. These other rules of customary law are void of any divine touch and origin as the Shari'a that was divinely inspired and has divine content. The truth makes it unnecessary to say, without any intention to harm the feelings of anyone, that Shari'a is a body of customary law. This bold assertion finds support in the admission of Muslims world over that the *hadiths, i.e.* the sayings and practices of the Prophet Mohammed (PBH) are part of the Shari'a; and that Islam is a complete way of life. A way of life that is guided by law is certainly guided by its customary law if custom is not to lose its true meaning. Statutory provisions in states of Northern Nigeria have defined customary law to include the rules of the Shari'a[4]. Admittedly, the rules of Shari'a Law differ from the rules of other customary law because while the rules of Shari'a are codified and ascertainable at any given moment, rules of other customary laws are not so codified but are by law proved as facts[5] which have been accepted by members of the community as binding on them in the given circumstances they are pleaded as the law[6]. The certainty of its provisions does not graduate Shari'a Law

***By Musa Y. SULEIMAN, LLB (Hons), BL, LLM, PhD**, Lecturer, Faculty of Law, Bingham University, Keffi-Abuja Road, Karu Nasarawa State, Nigeria. Tel:+2348029717918. Email: suleimanlaw@gmail.com;
***Naomi E. OKIBE, LL.B (Hons), BL, L**awyer, Law Firm of Suleiman M.Y. and Associates, Liberty House (Opp. FCMB), Kuje Abuja with an exceptional interest in legal research and writing. +2348101288266, email-Neyomi99@gmail.com; and
***David D. GOAR, LLB (Hons), BL, LLM**, Lecturer, Faculty of Law, Bingham University, Keffi-Abuja Road, Karu Nasarawa State, Nigeria. Tel: +2348038583310. Email: davidgoar664@gmail.com

[1] [1993] 7 NWLR (Part 303) 1.
[2] Bryan A Garner, Tiger Jackson and Jeff Newman, *Black's Law Dictionary*, 8th end (Dallas: West Group, 1992) P. 1546.
[3] *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] A.C. 662 at 673.
[4] Section 2 of the High Court Act of the Federal Capital Territory, Abuja, Cap. 510, Laws of the FCT, Abuja 2007.
[5] Sections 16, 17 and 121(1) of the Evidence Act, 2011 (EA), Laws of the Federation of Nigeria.
[6] *EshugbayiEleko v Officer Administering the Government of Nigeria* (supra).

from being the Muslim's customary law in Nigeria where statutes, case law, common law and equity, customary law and rules of international law that have been domesticated by virtue of section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999 are the only sources of law.

The Area Courts Law of Kaduna State (then in application on the 1st day of May, 1987 when the case was instituted in Area Court II, Malumfashi before the creation of Katsina State on the 23rd September, 1987)[7] does not define customary or Shari'a Law but merely provided in section 21 that the law to be applied by an area court should be the customary law agreed by parties to be applied in non-land matters, or the customary law parties may be presumed in the circumstances to have agreed to apply, etc. The practice of the courts in this legal regime was to treat Shari'a Law as the customary law referred to by this statute when Muslim litigants invoke the jurisdiction of an area court. Section 2 of the High Court Law of the then Kaduna State explicitly provides that '...'customary law' includes Islamic Law.'[8]

3. The case of *Hada v Malumfashi* under consideration

The brief facts of this case that merit consideration for the purpose of this work are that the respondent before the Supreme Court, as plaintiff before the trial court, had sued the appellant as defendant before the trial court for a piece of land he alleged was given to the appellant on trust by his deceased father, thus the appellant was holding the land on trust for him. The appellant put up the evidence of purchase of the land from one Magajin Gari Aliyu, the village head of Malumfashi, thirty-seven years before then and called five witnesses to the purchase transaction. On his own part, the respondent relied on a letter written by his elder brother, one Alhaji Lawal Malumfashi, to buttress his allegation of trust but did not call any witness. The case went on an appeal voyage from the Area Court of Malumfashi in Katsina to the Upper Area Court, Malumfashi, to the High Court of Katsina State in its appellate jurisdiction after the creation of Katsina State, Court of Appeal, Kaduna Division and finally to the Supreme Court. One of the issues the Apex Court made a pronouncement upon that is material to this presentation is the admissibility of the evidence of a relation, to wit, the letter of Alhaji Lawal, the elder brother of the respondent 'in prove' of the trust alleged by the respondent as plaintiff before the trial court. In a unanimous decision of the five-man panel read by his Lordship, Wali JSC the Court held that: 'The statement of the respondent alleging the existence of any trust in respect of the disputed farmland is not *per se*, evidence of such a trust. This was part of, if not, the thrust of the respondent's complaint which he had to prove'.[9] One cannot help agreeing with his Lordship on this point; a statement of complaint made by a plaintiff before inferior courts as their procedure is, amounts to an allegation that he must lead evidence to prove or his case fails. This work is not comfortable with the decision of the Court in this case when his Lordship, Wali JSC in the lead judgment of the Court, quoted with approval the decision of his Lordship, Maidam JCA in *Mafolaku v. Alamu*[10] where it was held that:

> It is pertinent to state here that under Moslem Law, unlike the English law, *parties are not competent witnesses in court in their respective cases* hence their statement in court would not be regarded as evidence. But something akin to statement of claim and defence in the District and High Courts. (Emphasis supplied)

With respect to his Lordship Wali JSC who aligned himself with the view of his Lordship, Maidam JCA, it would have been preferred that he allowed the appeal on the ground that there was no prove of the alleged trust by the respondent as plaintiff before the trial court since the only evidence he had in support of his statement of claim before the trial court was a letter from his brother which was far from proving the alleged trust. His Lordship had no need going the further unnecessary step of positing that:

> None of the witnesses called by the respondent gave evidence in proof of the alleged trust. The only evidence, other than the respondent's statement which is anyway not evidence, is a letter written by the respondent's brother Alhaji Lawan Malumfashi Sarkin Dawan Katsina, who is also an interested party[11]. (Emphasis supplied)

His Lordship continued to provide the limited instances that evidence is admissible from a person in a legal combat that his relation is a party in the following terms:

[7]Cap. 10, Laws of Kaduna State 1991 which came into Force in 1968.
[8] High Courts Laws of states of the North provide for a similar definition of customary law.
[9] Ibid at p.16, paragraph H.
[10][1990] 1 LR 60 at 70.
[11]*Hada v Malumfashi* (supra) at p.17.

> The general principle under Islamic Law is that the evidence of a near relative is admissible in favour of another if: (1) the witness will not derive some benefits from such evidence or (2) by giving such evidence he may not escape some harm or loss.[12] (Emphasis supplied)

The admissibility of the evidence of a 'near relative' of a litigant under this principle of Shari'a Law is made conditional; and not a matter of the weight to be attached to it or its probative value. Shari'a Law leans more on the evidence of witnesses that are not closely related to a litigant; 'two male unimpeachable witnesses or such one male witness or two female witnesses with claimants Oath in either case' as was held in *Baba v Aruwa*[13] quoted by his Lordship, Wali JSC in the case under review[14] The implication of this principle of Shari'a Law is that two non-near male relations to a litigant can give evidence in support of his case; in the alternative, a single male witness in the same circumstances could give evidence or two females could give evidence which must now be backed up by an oath by the litigant himself in either of these two instances. The oath is needed in these two circumstances because the evidence of a single male witness that meets the condition of admissibility under Shari'a Law cannot ground a finding in favour of a litigant. Similarly, the evidence of two females in both cases no matter how unimpeachable or credible and cogent cannot ground a finding in favour of a litigant. Closely related to this principle of admissibility established in the case under consideration and other cases cited in it is the principle of Shari'a that a litigant is not a competent witness in his own case; this too has one implication, that the evidence of a person as a litigant in support of his own case is not admissible. In the faithful words of his Lordship, Maidam JCA in *Mafolaku v Alamu*[15]: 'It is pertinent to state here that under Moslem Law, unlike English law, parties are not competent witnesses in court in their respective cases...' The courts in the case under review and other cases cited invoked Islamic jurists' views to arrive at their conclusions[16].

4. The Evidence Act and the admissibility of the evidence of 'near relations' in Islamic Law

The Evidence Act[17] has no provision placing any condition for the admissibility of the evidence of relations to a litigant, and, of course, the evidence of the litigant himself in his own cause other than the conditions of relevancy of the facts given in evidence to the issue before the court[18], the direct and non-hearsay nature of the evidence, its cogency and credibility[19], for the purpose of the weight to be attached to it. There is undoubtedly a conflict between the position projected by Islamic Law on the admissibility of the evidence of 'near relations' in proceedings involving Islamic Law that has found judicial blessing in the decision of the Supreme Court in the case under review and other cases cited in that case and the position of the Evidence Act which has no restriction other than on grounds of relevancy and the non-hearsay status of the evidence.

5. The Resolution of the conflict in *Hada v Malumfashi* with the provisions of the Evidence Act

The resolution of the conflict contained in the position projected by the unanimous decision of the Supreme Court in *Hada v Malumfashi*[20]and the position statutorily provided for in the Evidence Act is no difficult task to undertake. It is the provision of section 20(2) of the Area Court Law of Kaduna State applicable to the case under review then that a rule of customary law that is incompatible directly or by implication with any written law for the time being in force cannot be enforced by any area court. This provision is similarly provided for in section 34 of the High Court Law of Kaduna State through which the appeal in the case under review passed[21]. The position of Islamic Law forbidding the admissibility of evidence of 'near relations' in matters of Islamic Law as justified by the unanimous decision of the Supreme Court in *Hada v Malumfashi*[22] was, with respect to their Lordships of the Apex Court, not in harmony with the statutory provisions cited above[23]. It is beyond argument that this decision of the Supreme Court endorses the validity of a rule of native law and custom that is incompatible impliedly with the provisions of the Evidence Act which does not place any restriction on the admissibility of the evidence of near relations in the circumstances allowed by Islamic Law as was held in the case under review. The view that the decision of the Apex Court was an error would still be sustained even if by a law of Kaduna State then, where the case emanated from,

[12]Ibid at p.17.see also *Sule v Gajere* [1988] 4 NWLR (Part 90) 516 at 522.
[13][1986] 5 NWLR (Part 44) 744 at 786.
[14]*Hada v Malumfashi* (supra) at p.17, paragraph H.
[15]Supra.
[16]Ashalul Madrik Fi Irshadis Salik Vol. III, p.238, Ruxton on Maliki Law p. 281 and Tuhfatul Hukkam (English translation by Bello M. Daura) p.3 all cited in the case under review at p.17.
[17]Laws of the Federation of Nigeria, 2011.
[18] The Evidence Act, Laws of the Federation of Nigeria, 2011, ss1 and 2.
[19] Ibid, sections 37 and 38.
[20]Supra.
[21] Cap. 67, Laws of Kaduna State of Nigeria, 1991 which later found its way into the laws of Katsina State after its creation in September, 1987.
[22]Supra.
[23]Section 20(2) of the Area Court Law of Katsina State.

Shari'a Law was provided for to guide such proceedings. The admissibility or otherwise of evidence oral or material was then[24] and till the present moment[25], a matter under the legislative competence of the National Assembly to the exclusion of States' Assemblies. Therefore, even if Kaduna State had a law that permitted the practice endorsed by the Apex Court in the case under review, such a law would have been a legislation without jurisdiction and consequently void as judicially settled in *Benjamin v Kalio*[26] and *Ugoala v State of Lagos*[27]. In the latter case, the Court of Appeal held that:

> In the Exclusive Legislative List, evidence is listed as item 23 falling under matters exclusively reserved for the National Assembly to make laws relating to them. Thus, admissibility of documents or evidence is hitherto regulated by the provision of the Evidence Act 2011, an Act of the national Assembly, consequently, the provision of section 9(3) of the Administration of Criminal Justice Law of Lagos State, cannot govern the admissibility of evidence in the criminal proceedings in the trial court.[28]

The decisions in the cases of *Benjamin v Kalio*[29] and *Ugoala v State of Lagos*[30] have no habitation in a fog on the null status of a state legislation on evidence thereby making it unnecessary to say that a rule of customary law on evidence is not only incompatible with a written law (Evidence Act) but is a rule of practice that invades the territory of the legislative competence of the national law maker[31] and is consequently void. This submission finds support in the provisions of section 1(1) and (3) of the Constitution[32] which provide for the supremacy of the Constitution and its binding effect on all other laws in the Federal Republic of Nigeria which are rendered invalid to any extent of their inconsistency with the Constitution[33]. The above leaves us with only a position in the question of the 'Resolution of the conflict in *Hada v Malumfashi*[34] with the provisions of the Evidence Act'; and that is that the decision of the Supreme Court in the case under review and those of the Court of Appeal cited in it on the status of the evidence of a near relation or in fact any relation no matter how closely or remotely related to a litigant does not represent the right position of law. This submission is far short of saying that their Lordships of the courts concerned do not know or acted in any state of mistake in arriving at their conclusion. The reason for this assertion shall form the sustructure of our next submissions.

6. The rock inscription rule of the principles of religious laws and the rule of law: The judges' dilemma

'The rock inscription rule of the principles of religious laws' depicts the 'unalterable principles of religion' and its laws be it Islam or Christianity. The belief of adherents of these two major religions is that their Holy Books have divine origin, any human effort to alter any of these divine rules would not only be resisted but could be the little spark of fire that could lead to a global fire disaster. We are living witnesses to dire consequences in some quarters brought to bear by mobs on any critique of the tenets of a religious law or teaching. All the judges of the courts that heard this case, apart from being part of the adherents of these two major religions in Nigeria, are not unaware of the sensitive subject they handled when they were on duty and the security implication of placing these principles of law in their rightful place in our legal system. They are laws that cannot be amended and must be given effect to no matter what. The judges who see and know the law are placed in a dilemma, to pronounce the right position of the law and face the negative consequences the society has to offer them or suppress the law and allow religious principles to flourish for their safety and, of course, the safety of thousands of people far and near. A typical example of the religious sentiment attached to cases before courts that touch on religious beliefs found expression in the recent decision of the Supreme Court in *Lagos State Government and ors. v Asiyat Abdulkareem*[35] also popularly referred to as the Hijab case. Succinctly put, the decision permitted the wearing of hijabs by Muslim females to public places of course, including courts when Muslim females appear as counsel. In a swift reaction to this decision, a human rights lawyer, Chief Malcom Omirhobo wore an Ifa Priest's attire, bare footed, with metals tied to his ankle

[24] In 1989 when the case started in Malumfashi in the former Kaduna State, evidence was a legislative matter with the exclusive legislative zone of the Federal Law Maker to the exclusion of states. See section 4(2), item 23 on the Exclusive Legislative List (2nd Schedule, Part I) of the 1979 Constitution of the Federal Republic of Nigeria.
[25] Section 4(2), See section 4(2), item 23 on the Exclusive Legislative List (2nd Schedule, Part I) of the 1999.
[26] [2018] 15 NWLR (Part 1641) 38, [2018] All FWLR (Part 920) 1 (SC).
[27] [2021] 3 NWLR (Part 1763) 263
[28] *Ugoala v State of Lagos (supra)at* p. 289-290, paragraph D-E); *Benjamin v Kalio* (supra) followed.
[29] Supra.
[30] Supra.
[31] Section 4(2) and particularly item 23 on the' second Schedule Part 1' of the Constitution of the Federal Republic of Nigeria, 1979 then.
[32] Federal Republic of Nigeria, 1999.
[33] *Ahmed v RTAKRCC* [2019] All FWLR (Part 1014) 104 at 131, paragraph B-F per Bage JSC.
[34] Supra.
[35] Unreported Suit No. SC/910/16 delivered on Friday, 17th June, 2022.

that made jingling sound as he walked into the Supreme Court on the 23rd day of June, 2022[36] barely a week later. He took at the bar of the Apex Court impliedly pleading the judgment in this case in vindication of his abnormal appearance. Their Lordships of the Apex Court could not take a swipe at the lawyer in their no unusual zero tolerance posture for awkward dressing but unsurprisingly went on recess! Such is the danger inherent in exalting rules of religion above the rule of law.

7. Conclusion and Recommendation

Religious principles and laws in Nigeria as is in many other countries are like inscriptions on a rock that are indelible. Changing them has a variety of implications ranging from casting a doubt on the veracity of their origin as contained in the Holy Books, placing man above God in knowledge, the giver of these books that contain such rules and principles and his Prophets *inter alia*. It is no wonder that in the terms of conflict between the rules of religion and secular laws the disciples of Jesus Christ would 'obey God rather than man'[37] and Islamic scholars like El Zak-Zaky would confront the military in assertion of the principles of his Islamic faith rather than bow to secular law. For this reason, it is our humble recommendation that the decision of the Supreme Court in the case under review be allowed to stay not because it is the right position of the law in the circumstances but because it is the right thing to do in the interest of peace. The decision of the Supreme Court in *Hada v Malumfashi*[38] has been cited by judges of Shari'a Courts as the most authoritative rendition of the law on the subject of the admissibility of the evidence of relations in a matter that another relation is a party. It is, with due respect to their Lordships of the Courts that held that opinion, wrong in law and does not represent the right position of the law then and today.

[36]< http://www.premiumtimesng.com> visited on the 14/7/2022.
[37]Acts of the Apostles 5:9 of the Holy Bible.
[38]Supra.