**BABAN GIDA & ORS**

**V.**

**MOHAMMED SANI**

IN THE COURT OF APPEAL OF NIGERIA

ON WEDNESDAY, THE 19TH DAY OF FEBRUARY, 2020

CA/J/391M/2018(R)

**LEX (2000) - CA/J/391M/2018(R)**

**OTHER CITATIONS**

3PLR/2020/4 (CA)

(2020) LPELR-49487(CA)

**BEFORE THEIR LORDSHIPS**

ADZIRA GANA MSHELIA, JCA

MUDASHIRU NASIRU ONIYANGI, JCA

BOLOUKUROMO MOSES UGO, JCA

**BETWEEN**

1. BABAN GIDA

2. DAN LAMI

3. HABIBU - Appellant(s)

AND

MOHAMMED SANI - Respondent(s)

**ORIGINATING COURT(S)**

1. Gamboru Sharia Court, Maiduguri, Bornu State (gave judgments to the Plaintiffs)

2. Upper Sharia Court 1 Maiduguri. Bornu State (which reversed the judgment of the Sharia Court)

3. Sharia Court of Appeal, Borno State in Appeal No: BOS/SCA/CV/09/2005

**REPRESENTATION**

ZANNA HAMZA Esq. - For Appellant

AND

T. A. LENKAT Esq. holding the brief of A. A. SANI Esq. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL LAW – JUDICIAL POWERS:- Application by way of a motion on notice brought pursuant to Section 242 of the 1999 Constitution of the Federal Republic of Nigeria as amended, Section 15 and 24 (4) of the Court of Appeal Act and Order 6 Rules 1, 6 and 7 of the Court of Appeal Rules, 2016 - Extension of time for leave of Court to Appeal against the decision of the Sharia Court of Appeal – Proper treatment of

CUSTOMARY LAW – SHARIA COURT PROCEEDINGS:- Appeal arising from Sharia Court of Appeal to the Court of Appeal – Where based on issue of jurisdiction – Competency of

ALTERNATIVE DISPUTE RESOLUTION – MEDIATION:- Claim by a party as to the existence of a mediation by elders regarding a dispute which has received retrial order by an appellate Court – Where materially denied by the in a counter-affidavit by opposing party – Duty on claimant – Failure thereto – Whether amounts to admission of the counter-claim

ETHICS – LEGAL PRACTITIONER:- Duty of as officer of the Court – Duty not to mislead the Court or misrepresent the records of proceedings of a Court – Failure thereto – Attitude of Court thereof

REAL ESTATE AND PROPERTY LAW:- Assets/Estate subject to Sharia Law – Dispute arising therefrom – Issue of jurisdiction - How treated

RELIGION AND LAW – SHARIA LEGAL SYSTEM:- Disputes relating to estate/assets subject to Sharia Law – Trial and appellate pathways – Issue of jurisdiction – How treated

**PRACTICE AND PROCEDURE ISSUES**

COURT - DISCRETION OF COURT: Principles guiding the exercise of discretion by the Court – Need for judicial discretion to be founded upon the facts and circumstances presented to the Court from which it must draw a conclusion governed by the law – Duty of court thereto

EVIDENCE – AFFIDAVIT:- Affidavit asserting the existing of a set of fact – Where categorically and materially denied in a counter affidavit – Duty on claimant thereof – Failure to react to the counter deposition by way of any further affidavit – Legal effect

JURISDICTION:- Meaning and essence of – Whether can be raised at any stage of a proceeding

JURISDICTION:- Issue of - Where canvassed and rejected by lower court - Whether can be re-canvassed again on appeal

**CASE SUMMARY**

FACTS SUMMARY

The Applicants as plaintiffs sued the Respondent before Gamboru Sharia Court, Maiduguri in the year 2000 seeking amongst others the retrieval and distribution of estate of their father which were said to have been entrusted with the Respondent. Judgment was entered in favour of the Applicant on the 12th day of May 2003. Aggrieved by the outcome, the Respondent appealed to the Upper Sharia Court 1 Maiduguri. The Upper Sharia Court in its judgment delivered on the 4th day of January, 2005 allowed the Appeal and set aside the judgment of the Sharia Court and ordered a retrial. The Applicant appealed the judgment to the Sharia Court of Appeal on 4th day of February 2005. On the 22nd day of May, 2017, the Appeal was allowed in part. An order of retrial by the Upper Sharia Court 1. Maiduguri was also made. Dissatisfied with the outcome, plaintiffs/applicants brought this Application praying for extension of time to Appeal and leave to Appeal in that the period allowed to appeal under the law has expired.

DECISIONS HISTORY

1. Trial Court: Gamboru Sharia Court, Maiduguri, Bornu State (gave judgments to the Plaintiffs)

3. First Appellate Court: Upper Sharia Court 1 Maiduguri. Bornu State (which reversed the judgment of the Sharia Court)

3. Second Appellate Court: Sharia Court of Appeal, Borno State in Appeal No: BOS/SCA/CV/09/2005 (which gave an order of retrial)

4. Court of Appeal: granted the motion for leave to appeal out of time based on the recondite question of jurisdiction.

ISSUES FOR DETERMINATION

This case relates wholly to an application by way of a motion on notice brought pursuant to Section 242 of the 1999 Constitution of the Federal Republic of Nigeria as amended, Section 15 and 24 (4) of the Court of Appeal Act and Order 6 Rules 1, 6 and 7 of the Court of Appeal Rules, 2016 and under the inherent jurisdiction of the Court praying, among others, for an order for an extension of time for leave of Court to bring the substantive appeal against the decision of the Sharia Court of Appeal, Borno State. Thus, there were no issues for determination but the following grounds to support the application:-

“1) The Applicants are aggrieved with the decision of the Sharia Court of Appeal, Borno State.

2) The Appeal contains recondite point of law that touches on jurisdiction and Islamic law.

3) That the time within which to file notice and ground of Appeal has expired.

4) The Applicants without leave of the Court cannot appeal.”

**MAIN JUDGMENT**

MUDASHIRU NASIRU ONIYANGI, J.C.A. (Delivering the Lead Ruling):

The Applicants by way of a motion on notice brought pursuant to Section 242 of the 1999 Constitution of the Federal Republic of Nigeria as amended, Section 15 and 24 (4) of the Court of Appeal Act and Order 6 Rules 1, 6 and 7 of the Court of Appeal Rules, 2016 and under the inherent jurisdiction of the Court prayed for the following orders:

1. Extension of time for leave of Court to Appeal against the decision of the Sharia Court of Appeal, Borno State in Appeal No: BOS/SCA/CV/09/2005 between BABAN GIDA DANLAMI, HABIBU AND MOHAMMED SANI to this Honourable Court.

2. Leave of Court to Appeal against the decision of the Sharia Court of Appeal, Borno State in Appeal No. BOS/SCA/CV/09/2005 between BABAN GIDA DANLAMI, HABIBU AND MOHAMMED SANI to this Honourable Court.

3. Extension of the time within which to file notice and grounds of Appeal against the decision of Sharia Court of Appeal, Borno State in Appeal No: BOS/SCA/CV/09/2005 between BABAN GIDA DANLAMI, HABIBU AND MOHAMMED SANI to this Honourable Court.

4. And for any order or further orders as the Court may deem fit to make in the circumstance.

The grounds upon which the application is predicated are:

1) The Applicants are aggrieved with the decision of the Sharia Court of Appeal, Borno State.

2) The Appeal contains recondite point of law that touches on jurisdiction and Islamic law.

3) That the time within which to file notice and ground of Appeal has expired.

4) The Applicants without leave of the Court cannot appeal.

The application is supported by an affidavit of eleven paragraphs and two annexure namely:

1) The Judgment of the Sharia Court of Appeal, Borno State marked Exhibit A.

2) Proposed Notice and Grounds of Appeal marked Exhibit B.

The applicant also filed a written address as ordered by the Court on the 17th day of May, 2019. Upon all the foregoing, the Applicants relied in urging the Court to grant the reliefs sought.

In opposing the application, the Respondent filed a counter affidavit of sixteen paragraphs. He also filed written address on the 10th June 2019. He urged the Court to dismiss the application.

The facts leading to this application as can be captured from the processes filed by parties is that the Applicants as plaintiffs sued the Respondent before Gamboru Sharia Court, Maiduguri in the year 2000 seeking amongst others the retrieval and distribution of estate of their father which were said to have been entrusted with the Respondent. Judgment was entered in favour of the Applicant on the 12th day of May 2003. Aggrieved by the outcome, the Respondent appealed to the Upper Sharia Court 1 Maiduguri. The Upper Sharia Court in its judgment delivered on the 4th day of January, 2005 allowed the Appeal and set aside the judgment of the Sharia Court and ordered a retrial.

The Applicant appealed the judgment to the Sharia Court of Appeal on 4th day of February 2005. On the 22nd day of May, 2017, the Appeal was allowed in part. An order of retrial by the Upper Sharia Court 1. Maiduguri was also made. Dissatisfied with the outcome, hence this Application for trinity prayers for extension of time to Appeal and leave to Appeal in that the period allowed to appeal under the law has expired.

Respective Counsel filed and exchanged their brief of argument as indicated herein below.

In the brief of argument filed on behalf of the Applicant, authored by Zanna Hamza Esq., the following lone issue is submitted for the determination of the Appeal.

Whether the Applicants are entitled to be granted the relief sought.

The Respondent did not submit any new issue in his brief of argument authored by A. A. Sanni Esq. rather he adopted the lone issue formulated by the learned counsel representing the Applicant. In the light of the foregoing developments, the sole issue submitted by the Applicant is hereby adopted for the determination of this application.

The learned Counsel representing the applicants argued that in an application of this nature, the Court has to consider the following elements.

a) Whether the Applicants have given good and substantial reasons for the failure to Appeal within time.

b) Whether the Applicants have shown prima facie good cause why the Appeal should be heard.

Relying on the cases of IFEKANDU AND ANOR V. JULIUS UZOEGWU (2008) 5-6 S.C. (PT.1) 220, JIMOH V. MIN. F.C.T. (2019) 5 NWLR (PT.1664) 45 at 66. And paragraphs 5, 6, and 7 of the Applicants affidavit in support submitted that the applicants have shown good reasons for the delay and which reasons is the intervention of the elders to stay further litigation. In compliance with the resolution, the applicants desist from any further form of action, but when the Applicants noticed breach of the resolution by the Respondent hence their decision to pursue this application.

In fulfillment of the second condition, he contended that the Ground of Appeal as stated in Exhibit B attachment to the application raises serious issue of law challenging the jurisdiction of the Court. He relied on the case of JIMOH V. MIN FCT (supra) where Rhodes Vivour JSC said this:

Finally, if the grounds of appeal complains of lack of jurisdiction and it appears so, the Court would no longer inquire into the reasons for the delay. See FEDERAL HOUSING AUTHORITY V. KALEJAIYE (2010) 10 NWLR (PT. 1226) P. 147, FAMU AND 2 ORS V. KASSIM AND 2 ORS (2012) 11 SC P. 43, (2013) 7 NWLR (PT.1352) 166, FHA V. ABOSEDE (1998) 2 NWLR (PT.537) P.177, KOTOYE V. SARAKI (1995) 5 NWLR (PT.395) 256, IBODO V. ENAROFIA (1980) 5 - 7 SCP 43. UKWU V. BUNGE (1997) 8 NWLR (PT.518) P.527.

Referring to ground one of the Notice and grounds of Appeal which is-

The learned Kadis of the Sharia Court of Appeal, Borno State erred in law when they held that appellate Upper Sharia Court had jurisdiction to hear and determine an Appeal by a lone judge.

He contended that the counter affidavit by the Respondent did not raise any issue why the application would not be granted. He urged the Court to grant the application.

In opposing the grant of the application, the Respondent argued that the Applicants are Plaintiffs before the Gamboru Sharia Court in the year 2000 in suit No. CV/370/2000 and which case last for 3 years (Three years) and determined in favour of the Applicants. The Respondent appealed against the judgment and succeeded in setting aside the judgment of Gamboru Sharia Court on the 4th of April 2005. The Applicants appealed to the Sharia Court of Appeal and for lack of diligent prosecution, the Appeal was struck out on 8th April, 2010. In another development, the lower Court ordered a retrial. It is against this order that the Applicants are seeking for the order of the Court to Appeal. He contended further that the Respondents have effectively countered the deposition in paragraph 3 and 4 of his counter affidavit on the issues that the elders asked parties to stay action. He submitted that the Applicant has not shown any good reason why they could not appeal within time. He added that for an application of this nature for extension of time to succeed, the applicant must show to the Court that the delay in bringing the application is neither willful nor inordinate and that there are good and substantial reason for failure to Appeal. He relied on the following cases:- OKERE V. NLEM (1992) 4 NWLR (PT.234) 132, C.C.B (NIG) LTD V. OGWURU (1993) 3 NWLR (PT.284) 630 SC. S.B.N PLC VS. ABDULKADIR (1996) 4 NWLR (PT.443) 460 CA, OGBOGORO V. OMENUWOMA (2005) 1 NWLR (PT.906) 1 and F.G.N v. A.I.C. LTD (2006) 4 NWLR (PT.970) 337.

He contended further that the ground of Appeal raised by the Applicants challenging the jurisdiction of the Upper Sharia Court 1, Maiduguri to entertain the Appeal was never canvassed before the said Upper Sharia Court 1. Maiduguri. He submitted that the issue of jurisdiction raised is not bona fide but raised only to support the application. He concluded that the Applicants wanted to appeal against the order of a retrial by the lower Court (Sharia Court of Appeal) but did not provide any substantial or cogent reasons why they could not appeal within time and neither do they have any good reason disclosed by their grounds of Appeal and that the Applicants substantive case before the Upper Sharia Court 1 has been struck out for lack of diligent prosecution. He added that the applicant has been prosecuting this matter for the past 19 years and by that, depriving the Respondent of all his assets. He urged the Court to dismiss the application with substantial cost.

In the application at hand, the Applicants are asking the Court to exercise its discretionary power in his favour and grant the reliefs sought. It has become notorious that for a Court to exercise its discretionary power, such discretion must not only be exercised judicially but judiciously. I am equally not unmindful of the settled concept that the question of the exercise of discretion is governed by several factors, at the same time, those factors are not necessarily constant hence they change with changing circumstance and time. See HALIRU V. FRN. (2008) ALL FWLR (PT.425) 1697 at 1726 1727., HARUNA V. MODIBBO (2005) 16 NWLR (PT.900) P. 487, IDEOZU V. OCHOMA (2006) 4 NWLR (PT.970) 364. Let me add that a judicial discretion ought to be founded upon the facts and circumstances presented to the Court from which it must draw a conclusion governed by the law. Therefore, it must be exercised honestly and in the spirit of the statute otherwise the act done would not fall within the statute. See the case of UNIVERSITY OF LAGOS AND ORS v. C.I.O. OLANIYAN AND ORS. (1985) 1 SC 295 at Page 344 345. In the case of ANPP V. RESIDENT ELECTORAL COMMISSIONER AKWA IBOM STATE (2008) 8 NWLR (PT.1090) 453 at 513, the Supreme Court said thus:

Judicial Discretion is a science of understanding to discern between falsity and truth, between a shadow and substance, between equity and colourable glosses and preference and not to do to their wills and private affection.

Bearing the foregoing in mind and considering the facts of this case wherein the Applicant got judgment in his favour. The Respondent appealed against the said judgment. An order of retrial was made. Applicant posited that there was an intervention by elders for a peaceful resolution of the matter and hence he refrained from any further litigation which the Respondent denied, but upon the activation of a process toward the order of retrial, the applicant ignited this application.

The Respondent categorically and materially denied any dispute resolution by the elders, see paragraphs 3 and 4 of the Counter affidavit by the Respondent. The Applicant did not react to this deposition by way of any further affidavit. This in essence, constitute an admission of the averments in the counter affidavit of the Respondent by the Applicant.

I have equally considered the issue of jurisdiction raised by the Applicant as the second ground to buttress his application. Issue of jurisdiction is the authority or power of the Court to determine the subject matter in controversy between parties. See BABALOLA v. OBAOKU OTE (2005) 8 NWLR (PT.927) 386, USMAN v. K.S.H.A. (2007) 11 NWLR (PT.1044) P. 148. It is trite that issue of jurisdiction can be raised at any stage of the proceedings and even on Appeal. See IJEBU-ODE L.G. v. ADEDEJI BALOGUN AND CO. LTD (1991) 1 NWLR (PT.166) 136, NATIONAL BANK OF NIGERIA LTD v. JOHN AKINWUMI SHOYOYE & ANOR (1977) 5 SC 110, CHIEF IKEDI OHAKIM v. CHIEF MARTIN AGBASO AND ORS (2010) 19 NWLR (PT.1226) 172, SAMSON OWIE v. SOLOMON IGHIWI (2005) 5 NWLR (PT.917) 184.

The contention of the Applicant under this ground is that his ground of Appeal raises serious issue of Law i.e. issue of jurisdiction of the appellate Upper Sharia Court which is the trial appellate Court (Sharia Court of Appeal) concluded had the jurisdiction. Contrary to the assertion of the Respondent that the issue of jurisdiction was never canvassed at the lower Court, I found that the lower Court in its judgment on pages 5-9 properly considered the issue of jurisdiction and in its wisdom concluded in favour of the Respondent. In the light of this, it is my humble view that the issue of jurisdiction of the Upper Sharia Court is one of the live issues determined by the Lower Court and hence the Applicant has the vires to still activate and contest it in this Court or at the Apex Court even if it has not been raised before. In this Appeal, both parties joined issues on it before the Lower Court and the Lower Court made a pronouncement on it. The contention of the Respondent thereof in my view that it was not an issue before the lower Court, to say a little is designed to mislead the Court. I strongly condemn this in all ramifications. Having gone this far, and the fact that an issue of jurisdiction is a recondite point of law which constitutes a substantial and good reason to anchor an Appeal, I have no hesitation in my mind that exercising the Courts discretion in favour of the Applicant based on this ground alone will not only be judicial and judicious but also legal.

On that note, I answer the question in the affirmative and resolve the sole issue against the Respondent.

In effect, the objection by the Respondent to the application is overruled and dismissed. In consequence, the application is hereby granted.

Accordingly, order is hereby granted to the Applicant in the following terms.

1) Time is extended for the Applicants to seek leave to Appeal against the decision of the Sharia Court of Appeal Borno State in Appeal No: BOS/SCA/CV/09/2005, between BABAN GIDA, DAN LAMI, HABIBU AND MOHAMMED SANI delivered on 22nd day of May, 2017.

2) Leave is granted to the Applicants to appeal against the aforesaid judgment of the Borno State Sharia Court of Appeal.

3) Time is Extended for the Applicants to file and serve their notice and ground of Appeal against the aforesaid judgment of the Borno State Sharia Court of Appeal.

4) Applicants to file and serve their notice and ground of Appeal at the lower Court within 14 days from today. Parties to bear their respective cost.

**ADZIRA GANA MSHELIA, J.C.A.:**

I read before now the Ruling of my learned brother, Oniyangi, J.C.A, just delivered. I agree that the application is meritorious and same granted. I endorse all the orders made in the leading Ruling, inclusive of costs.

**BOLOUKUROMO MOSES UGO, J.C.A.:**

I had read in draft the ruling of my learned brother MUDASHIRU NASIRU ONIYANGI, J.C.A. and I am in agreement that the application for extension of time to appeal has merit and is hereby granted by me too. I also agree with the consequential orders made in the lead ruling by my learned brother including that as to costs.