**BABAYO BAKA SEYO**

**V.**

**HUSSAINI BABA TUMFURE**

IN THE SHARIA COURT OF APPEAL OF NIGERIA

ON MONDAY, THE 10TH DAY OF JULY, 2006

CA/J/33/S/2003

**LEX (2020) - CA/J/33/S/2003**

**OTHER CITATIONS**

3PLR/2006/77

[2007] 8 NWLR (PT. 1035)

**BEFORE THEIR LORDSHIPS**

IBRAHIM TANKO MUHAMMAD, JCA

ABUBAKAR ABDULKADIR JEGA, JCA

MOHAMMED LADAN TSAMIYA, JCA

**BETWEEN**

BABAYO BAKA SEYO - Appellant(s)

AND

HUSSAINI BABA TUMFURE - Respondent(s)

**ORIGINATING COURT**

1. SHARIA COURT OF APPEAL GOMBE State [coram: Hon. Kadi Tukur Abdulkadir, Hon Kadi Ahmadu Sa'id Dukku and Hon Kadi Adamu Mohammed Abubakar]

2. BOGO AREA COURT GOMBE

**REPRESENTATION**

C. D. KADALA - For Appellant

AND

Respondent not in court and not represented by counsel even though served - For Respondent

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

REAL ESTATE AND PROPERTY LAW – LAND:– Proof of Ownership of land by long possession – What party must show to succeed – Islamic principle of Hauzi – When applicable – Duty of court thereto

FOOD AND AGRICULTURE LAW – LAND HOLDING PRACTICES AND SUSTAINABILITY OF ANIMAL HUSBANDRY BUSINESSES:- Ownership of land by prescription – Implications for animal husbandry operations

RELIGION AND LAW - SHARIA/ISLAMIC LAW – LAND HOLDING:- Ownership of land by prescription – Guiding principles – Exceptions thereto

RELIGION AND LAW – HAUZI:- Islamic principle of Hauzi – Meaning - Application – Exceptions to Hauzi - When court would be deemed to have wrongly applied the principle

CONSTITUTIONAL LAW - FAIR HEARING:- Violation that would amount to breach of a party’ right to fair hearing – Effect

ETHICS:– Duty of court when one party fails to enter appearance or is not represented

**PRACTICE AND PROCEDURE**

ACTION:- Absence of one party to the case – Non Representation – Effect on the outcome of proceedings – Whether adopting legal argument of absent party from lower court proper

APPEAL – BREACH OF FAIR HEARING:- Court raising the issue of Hauzi for the first time at Judgement - Whether breached the parties’ right to fair hearing? - Effect

APPEAL - INTERFERENCE WITH THE FINDINGS OF FACT:- Findings of fact of trial court not shown to be perverse - Whether an appellate court can interfere therewith

PLEADINGS:– Failure to file brief of argument by one party – Effect thereto

WORD AND PHRASES – “HAUZI”:– Meaning

**MAIN JUDGMENT**

**ABUBAKAR ABDULKADIR JEGA, J.C.A. (Delivering the Leading Judgment):**

This is an appeal against the Judgment of Sharia Court of Appeal Gombe State in appeal No. GMSJ/SCA/CYA/113/2002 delivered on 3rd December, 2002 - coram: Hon. Kadi Tukur Abdulkadir, Hon Kadi Ahmadu Sa'id Dukku and Hon Kadi Adamu Mohammed Abubakar.

At Bogo Area Court Gombe, Baka Seyo instituted an action against Hussaini Baba claiming his farmland from him. In his statement of claim, the plaintiff said he lend the Respondent's father Mallam Saba his farmland on his return to Tumfure to be keeping his cattle and after six years he requested it back but the Respondent's father implored him to be patient since the land is given to him on loan and the loan is a loan that is known. That even if he dies the land will be returned to him. He allowed him to continue keeping the land. Later when he heard he fell ill, he requested for the land again but could not get it back up to when the Respondent's father died. Therefore he instituted an action against the son (the Respondent) to enable him retrieve his land.

In his response, the Respondent disputed the claim saying the farmland belonged to his late father. That since their return to Tumfure 35 years ago, they were keeping their cattle there and that they came to Tumfure when he was only two years old. He grew up to maturity and up to getting married in that farmland that the plaintiff had at no time requested for its return until after his father's death.

In the course of the trial before the trial Area Court, the plaintiff presented five witnesses to proof his claim, while the Respondent presented three witnesses and both witnesses of the parties appeared before the court and gave their testimonies. After investigation, the trial Area Court awarded the ownership of the farmland to the plaintiff. The Respondent being dissatisfied with the Judgment appealed to the Upper Area Court 1 Gombe which reviewed the case again and dismissed the appeal of the Respondent and affirmed the Judgment of the trial Area Court. The Respondent still not satisfied, appealed to the Gombe State Sharia Court of Appeal which set aside the Judgments of the trial Area Court and the Upper Area Court and entered Judgment in favour of the Respondent on the ground that the Respondent's father by his long stay on the land has acquired tittle to it by prescription (Hauzi)

It is against this Judgment of the lower court that the Appellant has now appealed to this court upon three grounds of appeal contained in his notice of appeal dated 9th December, 2002.

We took this appeal on the 11th May 2006. The Appellant was represented by his counsel Mr. C. D. Kadala while the Respondent even though served with hearing notice of the appeal was not physically present in court nor was he represented by counsel.

Counsel to the Appellant adopted his brief of argument dated 14th October, 2004 and deemed filed on 20th October, 2004 and urged us to allow the appeal and set aside the Judgment of the lower court.

The Respondent was not in court to argue his appeal and did not file any brief of argument accordingly the court adopts his submissions at Bogo Area Court, Upper Area Court I Gombe and the Sharia Court of Appeal Gombe.

From the three grounds of appeal as contained in the Appellant's notice of appeal dated 9th December, 2002, learned counsel to the Appellant formulated three issues for determination which are stated thus:

1. Whether the lower court rightly applied the Islamic principle of Hauzi (prescription) in this case.

2. Whether the principle of fair hearing was not breached when the lower court raised the issue of Hauzi without hearing the parties on it.

3. Whether the decision of the lower court is not altogether unreasonable and unwarranted having regards to the weight of evidence."

The three issues as formulated by the learned counsel to the Appellant are in line with the three grounds of appeal as contained in the notice of appeal filed by the Appellant. Accordingly they will be used in the treatment of the appeal.

Issue No.1 is whether the lower court rightly applied the Islamic principle of Hauzi (prescription) in this case. On this issue, learned counsel to the Appellant submits that the decision of the lower court was not based on a proper application of the Islamic principle of Hauzi. Counsel referred to the case of Hada v. Malumfashi (1993) 7 SCNJ (Pt.2) 504 at 518; (1993) 7 NWLR (Pt. 303) 1, where Wali, JSC stated the principle thus:

"Whoever is in peaceful possession of a thing (real property) for 10 years, he becomes its owner."

But there are exceptions to this principle namely:

1. Cogent reason for not complaining in time e.g. blood relationship or fear of harm from authority;

2. Minorship;

3. The persons in possession was put there by the claimant either as a free or paying tenant.

4. The person in possession is put there as a trustee;

5. The claimant is a partner or co-proprietor to the person in possession - reference made to Kada v. Yawa (1998) 6 LRCN 4244; (1998) 10 NWLR (Pt.569) 196.

It is submitted for the Appellant that the trial Area Court rightly found as a fact that the Appellant has proved his title to the land in dispute and that the land was lent to the Respondent's father for whom he paid tribute to the Appellant yearly. It is further submitted for the Appellant that where such loan is established, it neutralizes the principle of Hauzi. Counsel to the Appellant contends that it is manifestly clear from the Judgment of the lower court that it did not consider the exceptions before it blankly applied the principle.

Counsel argues that the lower court did not apply the principle correctly as it did not assess the issue of loan which the trial Area Court found proved and which the Upper Area Court affirmed.

Learned counsel for the Appellant further submits that it was wrong for the lower court to have disturbed those findings of fact by the trial Area Court when such findings have not been shown to be perverse - reference made to Ladipo v. AJani (1997) 52 LRCN 1919 at 1939; (1997) 8 NWLR (Pt. 517) 356; Aseimo v. Abraham (2001) 88 LRCN 2271 at 2280; (200 I) 16 NWLR (Pt. 738) 20.

Finally, learned counsel for the Appellant submits that the wrong application of the principle of Hauzi by the lower court has occasion serious miscarriage of Justice. That loan is loan and the length of possession by the Respondent under such circumstance can never defeat the title of the Appellant - reference made to Adesanya v. Otuewu (1993) SCNJ 77 at 114 (1993) 1 NWLR (Pt. 270) 414; Odubeko v. Fowler (1993) SCNJ (Pt.2) 185 at 198; (1993) 7 NWLR (Pt. 308) 637, Counsel urged us to allow the appeal and set aside the decision of the lower court.

The contention of the Appellant on issue No.1 was that the decision of the lower court to reverse the concurrent Judgments of the trial Area Court and Upper Area Court 1 Gombe and entered Judgment for the Respondent was not based on a proper application of the Islamic principle of Hauzi. The lower court in its Judgment awarding the disputed farmland to the Respondent based on the principle of Hauzi state at pages 36-37 of the printed record thus:

"We discovered that the lower appellate court re-invited the witnesses and listened to them. From the testimonies of the witnesses which we saw in the copy of the record, we discovered that the Respondent testified to the court that he lend his farmland to the Appellant's father to be keeping his cattle and it will be up to 20 years ago as it is written on the first page of the copy of the record of proceedings of the trial court and he claim that he request the Appellant's father to return his farmland after six years but pleaded with him to be patient but he himself proved to the trial court that he never ask him for the farmland in the presence of anybody but only within themselves. Therefore no any witness that proof him asking for his farmland when he was alive and there is no any reason why he did not ask him until he died, then was when he asked the son after more than 20 years. Therefore is improper for the court to entertain him and even reaching to the extent of awarding him the ownership of the farmland as it is stated in the book of Hushiyatul Adawi Volume 11 pages 340-341 where it says:

'Whoever Hauzi a house or a place and is occupying same and is a sane person of on any relation to the subject or person for up to the period of 10 years, under normal circumstance, if he did not erect any building or embark on any demolishing or he is been referred to or relate to with the house or place while the claimant is present at that place knowing fully the property belongs to him but did not make any claim throughout the whole period of time, therefore he doesn't have any ground to claim that property. The lower appellate court during her investigations she did not consider these rules when she heard the appeal she held the Judgment of the trial court”

In the instant appeal, the claim of the Appellant before the Bogo Area Court is stated thus:

"I lend the Respondent's father named, Mallam Baba my farmland and he was farming it and when he died, I tried to collect my farmland back but it was not possible that is why I am instituting an action against him."

In line with his claim, the Appellant called five witnesses to establish his claim that he lent out his farmland to the father of the Respondent.

After hearing the evidence adduced by the five witnesses of the Appellant and the three witnesses called by the Respondent, the trial court made a definite finding of fact that all the five witnesses called by the Appellant testified to the fact that the land in dispute was lent out to the Respondent's father by the Appellant and accordingly the trial court entered Judgment in favour of the Appellant which in my view was correct since the evidence led and accepted by the trial court was in line with the claim before it. It is apparent that the lower court wrongly deviated when it introduced the issue of Hauzi which was never canvassed at the trial Bogo Area Court and on appeal at Upper Area Court 1 Gombe. It is therefore grossly wrong for the lower court to have disturbed the findings of fact made by the trial Area Court and affirmed on appeal by Upper Area Court 1 Gombe when such findings have not been shown to be perverse. See Ladipo v. AJani (1992) 52 LRCN 1919 at 1939; (1997) 8 NWLR (Pt. 517) 356; Aseimo v. Abraham (2001) 88 LRCN 2271 at 2280; (2001) 16 NWLR (Pt. 738) 20 accordingly issue No.1 is resolved in favour 'of the Appellant against the Respondent.

Issue No.2 - Whether the principle of fair hearing was not breached when the lower court raised the issue of Hauzi without hearing the parties on it.

On issue No.2, learned counsel for the Appellant submits that the lower court grossly erred in law when it failed to accord the Appellant fair hearing. That the lower court raised the issue of Hauzi in its Judgment at page 37 lines 9-18 of the record of proceedings. That the Respondent did not raise the issue of Hauzi in his grounds of appeal at the lower court. The Respondent also did not argue his appeal in the lower court on the issue of Hauzi; it is further the submission of the learned counsel to the Appellant that if the lower court had wanted to make Hauzi an issue to be decided, it should have given the parties an opportunity to be heard on it. That the lower court raised the issue suo motu in its Judgment and did not give the parties particularly the Appellant the opportunity to be heard on it. Counsel contends that this is wrong in law - reference made to Ladipo v. AJani (1992) 52 LRCN 1919 at 1932; (1997) 8 NWLR (Pt. 517) 356; Tinubu v. I.M.B. Securities Plc (2001) 16 NWLR (Pt. 740) 670; (2001) 90 LRCN; Juwo v. Shehu (1992) 10 SCNJ 26 at 31; (1992) 8 NWLR (Pt. 258) 129. Counsel submits that the procedure adopted by the lower court has resulted in the violation of the Appellant's fundamental right to Justice and such breach vitiates the proceedings - reference made to Adeyemi v. Y.R.S. Ike-Oluwa Ltd. (1993) 9 SCNJ 293 at 300; (1993) 8 NWLR (Pt. 309) 27; The State v. Onagoruwa (1992) 2 SCNJ (Pt.1) at 22; (1992) 2 NWLR (Pt. 221) 33.

Counsel urged us to allow the appeal on this issue and set aside the judgement of the lower court which was made in error of law.

Issue No.2 centred on fair hearing which is fundamental in the conduct of any proceeding before any court of law and its breach is fatal to any proceeding. It is apparent from the printed record before the court that the lower court in its Judgment raised the issue of Hauzi suo motu and did not give the parties especially the Appellant the opportunity to be heard on it. This is clearly in breach of the fundamental principle of fair hearing. The effect of this violation of fair hearing principle is that it vitiates the entire proceedings accordingly issue No.2 is resolved in favour of the Appellant against the Respondent.

Issue No.3 - whether the decision of the lower court is not altogether unreasonable and unwarranted having regard to the weight of evidence. On issue No.3, counsel to the Appellant submits that the trial Area Court found as a fact that the land in dispute belongs to the father of the Appellant and that it was lent to the father of the Respondent upon his migration to Tumfure. That before an appellate court can disturb the finding of fact it must be shown that these findings are perverse and are not supported by evidence - reference made to Ukatta v. Ndinaeze (1997) 49 LRCN 884; (1997) 4 NWLR (Pt. 499) 251; Uche- Williams v. Business Ventures Ltd. (2000) 72 LRCN 849 at 874; Oduntan v. Akibu (2000) 8 LRCN 2595 at 2631; (2000) 13 NWLR (Pt. 685) 446; Agbaka v. Amadi (1998) 61 LRCN 4605 at 4625; (1998) 11 NWLR (Pt. 572) 16.

Issue No.3 relates to the reasonableness of the decision of the lower court in face of the evidence adduced before the trial court. It is crystal clear that the trial Area Court found as a fact that the land in dispute belong to the Appellant and that it was lent to the father of the Respondent upon migration to Tumfure. The evidence of the Appellant's witnesses recorded at pages 5-11 of the printed record of proceedings is very lucid. Also the findings of the trial Area Court on these points are on page 17 lines 11-30 and page 18 lines 1-24 of the printed record of proceedings. These finding of fact were upheld by the Upper Area Court. Before an appellate court can disturb the findings of fact, it must be shown that those findings are perverse and are not supported by evidence.

In the instant appeal, the lower court did not in anyway find these findings to be perverse so as to warrant it to disturb the concurrent findings of the trial Area Court and the appellate Upper Area Court. The finding of the trial Area Court which was affirmed by the Upper Area Court that the farm in dispute was lent to the father of the Respondent was adequately supported by evidence which the trial court properly evaluated. The mere application of the principle of Hauzi by the lower court cannot displace the concurrent Judgments of the trial Area Court and appellate Upper Area Court where such have not been assessed to be perverse. Moreover, the application of the principle of Hauzi by the lower court in the face of the findings of the trial Area Court is totally unreasonable and unwarranted as the trial Area Court found the issue of loan established. Accordingly, issue No.3 is resolved in favour of the Appellant against the Respondent.

Thus, in conclusion, I hold that this appeal is meritorious. It therefore succeeds and it is accordingly allowed. The Judgment of the Sharia Court of Appeal Gombe State in appeal No. GMSJ/SCA/CVA/GM/113/2002 delivered on 3rd December, 2002 is hereby set aside. In its place the Judgments of Bogo Area Court in suit No. 119/02 delivered on 16th July, 2002 and Upper Area Court No.1 Gombe in suit No. GUACI/GM/CYA/47/2002 delivered on 2nd August, 2002 are hereby restored. The Appellant is entitled to costs which I assessed at N5,000.00.

**IBRAHIM TANKO MUHAMMAD, J.C.A.:**

I agree.

**MOHAMMED LADAN TSAMIYA, J.C.A.:**

I agree. Appeal Allowed.