AN ANALYSIS OF ISLAMIC CIVIL PROCEDURE IN NIGERIA

by

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A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL, AHMADU BELLO UNIVERSITY ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE IN LAW (LL.M)

DECLARATION

I hereby declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented in any previous application for a higher degree.

All quotations are indicated and the sources of information are acknowledged by means of foot notes and references.

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CERTIFICATION

THIS THESIS TITLED AN ANALYSIS OF ISLAMIC CIVIL PROCEDURE IN NIGERIA MEETS THE REGULATIONS GOVERNING THE AWARD OF DEGREE OF MASTER OF LAWS, AHMADU BELLO UNIVERSITY, ZARIA AND IS APPROVED FOR ITS CONTRIBUTION TO KNOWLEDGE AND LITERARY PRESENTATION.

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DEDICATION:

This work is dedicated to the memory of my late Parents: **ALKALI ADAMU ALIYU BIRNIN-KUDU AND HAJIYA DADA HASSAN KILA**. May Allah (SWT) reward them with Jannatul-Firdausil a'la.

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I thank Allah (S.W.T.) who, in His infinite mercy and wisdom enabled me to accomplish this intellectual task of knowledge. This work has come to fruition as a result of the untiring effort of several persons. They are so numerous that space will not permit me to mention all.

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ABSTRACT

As a result of interactions between individuals, it is normal for dispute to arise. Islamic Law had provided the procedures through which such dispute can be judicially determined. Nigerian Courts are enjoined to apply procedural Rules enunciated by Makili School of jurisprudence.

Full application of Islamic Civil procedure in Nigeria has been limited by some statutes. Most of the texts on Islamic Civil Procedure are classical and written in Arabic language. The rules of Islamic Civil Procedure enunciated by the classical books are yet to be comprehensively codified to guide Nigerian Courts in conducting trials. Unfortunately the poor level of knowledge of Islamic procedure rules among lawyers and the lower courts judges has led to incorrect appreciation and application of the rules.

The scope to be covered by this research is: the sources of Islamic Civil procedure, conditions precedent to commencement of civil action, hearing and determination of disputes. The research methodology of the thesis is doctrinal and analytical.

In the course of the research, some findings or observations were made. The research found that there is no clear distinction between substantive and procedural law in Islamic Law and most of the texts on the subject are written in classical Arabic which is technical in nature. The jurisdiction of Shari'a Court of Appeal in Nigeria is limited to Islamic personal Status. Suggestions were made in the research as proffered solutions to the enumerated findings/observations.

LIST OF ABBREVIATIONS:

ALL FWLR	-	All Federation Weekly Law Reports.
BOS	-	Borno State.
CA	-	Court of Appeal.
CFRN	-	Constitution of the Federal Republic Nigeria
F.S.C.	-	Federal Supreme Court Cases.
FWLR	-	Federation Weekly Law Reports.
KSW	-	Kwara State.
LFN	-	Laws of the Federation of Nigeria 1990.
NWLR	-	Nigerian Weekly Law Reports.
RSMNW	-	Rahotannin Shari'ar Musulunci Na Wata-Wata A Najeriya.
SCA	-	Sharia Court of Appeal
SCNJ	-	Supreme Court Judgments Of Nigeria.
SHLRN	-	Sharia Law Report Of Nigeria.
SLR	-	Sarauniya Law Reports.

GLOSSARY

Adalah :	Honesty; referring to person.
Adillah :	Sources.
Ahkam ahwalul shakhsiyyah :	Islamic law of personal status; branch of Islamic law that deals with personal interest of Muslim as an individual.
Ahkamul Dusturiyyah :	Constitutional law.
Ahkamul Madaniyyah :	Rules that regulates relationship between individuals and their transactions such as sale, mortgage, e.t.c.
Ahkamul Murafa'at :	Islamic law of Evidence and procedures.
Al-laghw :	Futile oath; oath taken on the truth of something that suspected to be true and correct but the opposite emerges to be the case.
Al-mudda'iy :	The Plaintiff in an action.
Al-mudda'iy alayhi :	The Defendant in an action.
Al-Qibla :	Direction facing the Ka'abah(Holy House of Allah situates at Makkah).
Amarah :	sign; evidence or indication that that leads to an indirect ruling in sharia.
Asl :	Root, basis; the normal state of things.
Attaukif :	Written statement of claim.
Baitulmal :	Treasury.
Bid'a :	Innovation.
Da'awah :	Claim.
Dalil :	Source or Proof.
Faskh :	Repudiation of Marriage.
Ghadab :	Anger.
Hadanat :	Custody of children.
Hadith :	Sayings of prophet Muhammad (P.B.U.H).
Haqq :	Right or entitlement.
Ibaha :	Permission.
Iddah :	Waiting term; prescribed period of delay between women's divorce and re-marriage, or death of husband and re-marriage.
Ijtihad :	Juristic efforts to expound rule.
Imam :	The leader.
Iqrar :	Admissions.
Istihsan :	Juristic preference.
I'zar :	The question put by the court: " have you any thing to say".
Kadi :	Judge.
Khalifah :	The successor of prophet Muhammad

	(P.B.U.H.).
Khultah :	Relationship; sort of association that occurs between two individuals.
Mahjur :	A person who is not allowed by Islamic law to exercise full control over his property – his affairs are manage for him/her due to lack of capacity to do so.
Mazalim :	Department introduced during Holy prophet's time which has wide general jurisdiction both correctional and remedial in nature.
Mubarriz :	Witness of proven integrity that excels his peers.
Mujtahidun :	An exponent of Islamic law.
Mukallaf :	Person accountable for all his deeds.
Musafir :	Traveler; person not usually resident of one place.
Muqim :	Non-traveller; person that is usually domiciled in one place.
Muqirr :	Acknowledger of a right; i.e person who admits liability.
Muqirr lahu :	Person whose right/ interest was admitted by admission maker.
Nass :	Legal authority in Islamic law.
Nikah :	Marriage.
Qat'i :	Definitive; referring to clear-cut ruling or legislation.
Qur'an :	Book of Allah revealed to prophet Muhammad (P.B.U.H.) to guide mankind.
Rashid :	A person who is sane and mature.
Shahadatus-sama'i :	Hear say evidence.
Shari'a :	Islamic law.
Shuf'ah :	Pre-emption.
Sigha :	Mode or manner of doing things.
Sulh :	Compromise.
Sunnah :	Whatever is reported about holy prophet (P.B.U.H.) be it saying, action, or silent approval.
Sunnah fi'liyyah :	Acts prophet (P.B.U.H.) used to do.
Sunnah Qawliyyah :	Things prophet (P.B.U.H.) enjoined Muslims to do through his sayings (words).
Sunnah Taqririyyah :	Tacit approval of prophet (P.B.U.H).
Ta'jiz :	A judicial declaration of forfeiture.
Talaq :	Dissolution of marriage.
Taulij :	Suspicion.
Ulama :	Scholars.

Ummul Mu'minin :	The Mother of faithful; (nick name) of Aisha (RA) wife of the Holy Prophet (P.B.U.H) and daughter of Khalif Abubkr As-siddiq.
Urf :	Custom; referring to customary law.
Wakil :	Representative.
Waqf :	Endowment.
Wasiyyah :	Bequest.
Yamin al-mu'aqqabah :	Deliberate oath.
Yamin al-tuhumah :	The oath of exoneration.
Yamin ma'a shahid :	An oath to support the evidence of a single witness.
Yaminul munkar :	Oath to deny liability.
Yaminul qada'i :	Oath impose on a person that make an assertion against a deceased person.
Zanni :	Speculative; non-definitive.
Zhul yadd :	Person in possession.

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⇒ Bauchi State Shari'ah Courts (Civil Procedure) Rules 2001

⇒ Jigawa State Shari'a Courts (Administration of Justice and Certain Consequential Changes) Law 2000.

⇒ Jigawa State Shari'a Courts (Civil Procedure) Rules 2006.

⇒ Kano State Shari'a Courts Law 2000.

⇒ Kano State Shari'a Courts (Civil Procedure) Rules 2000.

⇒ Katsina State Shari'a Courts Law 2000.

⇒ Katsina State Shari'ah Courts (Civil Procedure) Rules 2008

⇒ Shari'a Court of Appeal Rules Cap 550 LFN (Abuja) 1990.

⇒ Shari'a Courts (Establishment and Territorial Jurisdiction) Order 2000 of Kano State.

⇒ Zamfara State Shari'ah Courts (Administration of Justice certain Consequential Changes) Law 1999.

⇒ Zamfara State Shari'ah Courts (Civil Procedure) Rules 2003.

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CHAPTER ONE

1.0 Introduction

History of mankind shows that at a point in time when there was no divine revelation individuals used to depend on the might of their strength in the protection of their rights. At that time there was no law and order. Jungle justice was the order of the day. Islam came and met Arabian societies in this era of darkness. Through divine intervention sanity was brought to the Arabian system of justice established and aggrieved individuals enjoined to resort to it in settling disputes. However, Islamic law provided the procedure through which complaints can be presented and proved before courts of law in order to arrive at just and fair decisions.

Islamic law does not differentiate between substantive law and law of procedure. The law of procedure is in itself substantive law which a judge must comply with. Such being the case, one cannot get a book distinctly for law of procedure since it is mixed with the substantive law. Islamic law does not provide a uniform procedure for governing any criminal or civil trials as

in the case with man made law. Some laws of procedure differ from others as regard to provision for trials[1].

The emphasis Islamic law puts on the process and means to justice is as much as the emphasis it puts on justice itself. The concept and process of justice stipulated by the Sharia rests primarily on six foundations:

i. The judge whose person and process of his appointment satisfy the laid down rules and regulations,
ii. The applicable substantive law,
iii. Parties
iv. The issue in dispute,
v. The procedures to be followed to arrive at the decision[2].

Islamic law is all inclusive and contains solutions to any problem that may arise out of all of circumstances. Allah (SWT) is the legislator of Islamic law[3] and His beloved Prophet Muhammad (S.A.W) was a judge,[4] during his life time, he used

[1] Mahmud, A.B. (1991) Supremacy of Islamic Law. Hudahuda Publishing Company, (Zaria), Nigeria. p.103.
[2] At-Tasuli, A.A. (1951) AlBahjah, Commentary on the Tuhufah, Mustafa Al-Babi, al-Halabi and Sons Press , (Cairo) Vol. 1. p.25
[3] Q 65:18
[4] Q 4:105; 57:25

to settle disputes. Prophet Muhammad (S.A.W) had laid down rules of procedure during his life time. When he (S.A.W) appointed Kadi Ali as a judge to Yemen, Ali said to him; "Oh Messenger of Allah, you are sending me to Yemen as a judge while I don't know how to judge. Prophet (S.A.W) replied that God the sustainer, the Almighty, will prepare your mind, and confirm your work, when a dispute is brought before you give equal hearing to both sides before making judgment, that is how you will understand the dispute in question"[5]. It is also a well known rule of Islamic procedure laid down by Prophet (S.A.W): "He who asserts must prove and oath lies on he who denies"[6].

The Prophet's (S.A.W) judgments are remarkable for their simplicity, fairness and equanimity. The cases are decided based on evidence. It was reported from Umm Salamah that the Prophet (S.A.W) said "You bring to me for (judgment) your disputes, some of you perhaps being more eloquent in their plea than others, so I give judgment on their behalf according to what I hear from them. (Bear in mind, in my judgment) if I slice off anything for him from the right of his brother, he

[5] Mahmud, A.B. Op. Cit. pp. 117 – 118.
[6] Al-Baihaqi, A.H. (1973) Sunan – Al-Kubra. Dar al-Fikr, (Beirut) Vol.Viiii P.177.

should not accept that, for I sliced off for him a portion of hell fire"[7]. On the demise of Prophet (S.A.W), he left behind an explicit lesson on trial procedure together with rules and regulations.

The first Khalifah, Abubakr al-Siddiq (R.A) continued to adjudicate amongst the Muslim community in accordance with the Holy Qur'an,[8] the Sunnah of the Holy Prophet (S.A.W)[9] and the consensus of the companions of the holy Prophet (S.A.W) known as Ijma. In 634 A.D Khalifah Umar (R.A) succeeded Abubakr, the boundaries of Islamic territory expanded vastly, and the administration of justice and law, and the maintenance of peace and order were systematized. It is interesting to read the famous letter sent by Khalifah Umar (R.A) to Abu Musa Al-ash'ari, the Governor of Kufa. The letter reads:

> .....The court must observe equality between the parties .... The burden of proof is on the plaintiff and the defendant may be put on oath .... If you have decided a case, then after due care and thinking you may revise your decision .... When a

[7] Siddiqi, A. H. Sahih Muslim (English Translation) Dar al Arabia, (Beirut), Lebanon Vol.3 P.927 Hadith N0.4247.
[8] Q 58:17
[9] Q 53:3-4

> party wants to tender evidence then fix a time limit and if he proves his case then decide accordingly. All Muslims are fit to be witnesses except those who have received the prescribed punishment for Hadd and those who have tendered false evidence...[10].

Similarly Khalifah Umar (R.A) created a precedent in accepting the evidence of an expert. A defamatory suit was filed in his court by Zibriqan Bin Badr against a poet Hutaya alleging that a verse composed by the poet was defamatory. It was not quite clear from the verse in dispute whether it was defamatory or not. So Khalifah Umar summoned a poet Hassan Bin Sabit and decided the case according to the expert's opinion[11]. Khalifah Usman and Ali (R.A) became successors respectively after the death of Khalifah Umar (R.A.) and during their reigns Islamic law was developed, later on development of Islamic law was confined to the works and opinions of the great Jurists.

However Islam as a practical religion and a way of life had been a force to reckon with in many parts of what today

[10] Zuhaily, W. (1997) al-Fiqhu al-Islami Wa adillatahu. Darul Fikr Al-Mu'asir, (Damascus), Syria, 4th Edition PP. 5928 – 5929.
[11] Mahmud, A.B. Op. Cit. P.22.

constitutes the Federal Republic of Nigeria[12]. And the Islamic law of Maliki School continued to regulate the affairs of that state (most especially, Northern Nigeria). The Europeans defeated and colonized the defunct Northern Nigeria around 1902-1903. When the British imperialists came, they found the Emir's courts manned by learned and pious jurists whose decisions were always based on authorities from the Qur'an, Hadith or other Islamic law books. Such proceedings were always recorded in Arabic[13]. After Nigerian independence in 1960, rules of Islamic civil procedure continued to be applicable. However full operations of some aspects of Islamic civil procedure in Nigeria has been limited by some statutes; for example the 1999 Constitution and the common law principle of judicial precedence: "Islamic law judge (Kadi) has to be cautious and alert that he operates, in our present dispensation, within the procedural rules including the enabling statutes that create his court/other courts and spell out powers for the court's operation"[14].

[12] Ambali, M.A. (2003) The Practice of Muslim Family Law in Nigeria. Tamaza Publishing Company, (Zaria), Nigeria p.14
[13] Mahmud, A.B. (1988) A Brief History of Shari'ah in the Defunct Northern Nigeria. Jos Press University Ltd, (Jos), Nigeria pp.1-2
[14] Alh. Inua Dandago V. Shu'aibu Adamu & 2ORS. CA/K/94/01 Judgement Delivered 5/6/06

Under Section 277 of 1999 Constitution and Section 5(1) of Jigawa State Shari'a Court (Administration of justice and certain consequential changes) law 2000[15], only procedural rules of Islamic law dealing with civil proceedings may be observed and enforced by the courts competent to observe and enforce Islamic civil law. Fortunately, there seem to be few areas of conflict between Islamic law and the general law, especially in the area of the rules of civil procedure, and the repugnancy doctrine which determines what principles are applicable has hardly found expression in respect of Islamic law of civil procedure. Once a case involves Islamic law, the court before which the case is seized shall hear the case in accordance with Islamic law of practice and procedure[16].

1.1 **Statement Of The Problem**:

Islamic civil procedure is paramount in the application of Islamic law in Nigeria. Judges are obliged to apply rules of civil procedure according to Maliki principles in conducting cases. As important as the area is, in the settlement of disputes, the realm has not been receiving adequate attention. Most of the texts on Islamic civil procedure are to be found not in English

[15] (Which is in pari-materia with section 5(1) of the establishment of Shari'a Courts Law of Zamfara State 1999)
[16] Marmara V Yaye (1974) N.S.N.L.R. 131; Sh.L.R.W 47.

language, but in numerous classical Arabic texts authored by Maliki school jurists.

The Tuhfah, Bahjah, Bidayah, Jawahirul iklil are some of the texts usually referred to by courts of law in Nigeria. Translating these reputable books is cumbersome.

Rules of Islamic civil procedure are yet to be codified comprehensively to guide courts in conducting trials. Each time a matter is filed before court, the judge is expected to conduct a wide research in various classical procedural books. Unfortunately the poor level of knowledge of Islamic civil procedure rules, most especially among the lower courts judges has led to incorrect appreciation and application of the rules. In the case of Dakasoye V. Dakasoye[17] the Court of Appeal Kaduna Division[18], while commenting on procedural lapses of Upper Area Court Yankaba (Kano State) observed that: "..... Some of the Area Courts and even Upper Area Courts fall frequently into the mistake of asking the defendant to call his or her witnesses in the event that the Plaintiff failed to call required number of witnesses or even when the

[17] (2000) 3 NWLR Pt. 647 P.50 at P.55 Paras A – B.
[18] Per Coomassie J.C.A. (as he then was).

claimant failed completely to call any witness. In such a situation the Court should call upon the defendant who is in possession to take (sic) Yaminul Qada'a the oath of judgment and dismiss the claim of the Plaintiff". The Civil Area Court Gombe, fell into the same procedural irregularity observed[19] in Danjuwa V. Ba'aji[20]. This time Court of Appeal, Jos Division,[21] commented thus:

> I cannot understand how the trial Court first ordered the defendant (and not the plaintiff) to prove his case. Hajja Baaji never took the matter to the Court. The facts as stated in the record of proceedings, do not show that Hajja Baaji could be a plaintiff. After the statement of the claimant the defendant (Hajja Baaji) merely denied the claim. Instead of the judge to order the claimant to adduce evidence in proof of his claim by calling the required witnesses that Court directed the defendant to call witnesses which was done by the defendant ..... This is wrong. The Court below therefore cannot, with due respect, be right in upholding the decision of the Upper Area Court which in turn affirmed the wrong decision of the trial Court.

Moreover before the afore cited comment by the Court of Appeal, the said Court had held interalia that the trial judge

[19] By Court of Appeal Kaduna Division in Dakasoye V. Dakasoye.
[20] (2000) 7 NWLR Pt 665 P.396 at P.402, paras C – E.
[21] Per Coomassie J.C.A. (as he then was).

did not discharge his primary duty at the onset, to determine who is the plaintiff and the defendant among the parties that appeared before him. This is clearly contrary to Islamic principles and fundamentally wrong.

Furthermore the case of Hamza V. Yusuf[22] is another decision that exposes the apparent wrong application of Islamic Civil Procedure Rules among the lower courts judges in Nigeria. The trial Area Court Wudil, Kano State, in a claim for inheritance, ordered one of the defendants and counter claimant to establish the root of his possession or how did the person through whom he got the land came into possession of the land. Court of Appeal held that in Islamic law, where a person is in possession he is never asked how he came about his possession. Justice I.T. Muhammad J.C.A. (as he then was)[23] stated thus: "on the issue of Zhul-Yadd, i.e a person in possession, I observed earlier on that the trial court record (P.20) where, after the Court made a finding on possession by the children of Alasan where the latter got the land into his hands. I think it is procedurally wrong. The settled practice in Sharia is that where a person is in possession, he is never

[22] (2006) 10 NWLR Pt. 988 P.238.
[23] At page 254 – 255, paras H – B.

asked how he came about his possession". The learned Court of Appeal Judge went further to support his pronouncement by quoting the correct position of the law on the issue of person in possession from the Tabsiratul Al-Hukkami Fi Usulil Aqdhiyati wa Manahijil Ahkami[24] Thus: "The person in possession should not be asked to explain how did the thing in his possession come into his hand...."

Most legal practitioners in Nigeria are not sufficiently trained and knowledgeable to conduct research in the area. Most of the legal practitioners in Nigeria are not literate in Arabic, the language which most of the classical Islamic civil procedure books are written. This problem has crippled most of the legal practitioners appearing before courts in matters bordering on Islamic Civil Procedure.

The pertinent questions among others to be asked and answered in this research are:-

[24] Vol. 2 page 93.

(1) How can the apparent procedural lapses in the application of Islamic Civil Procedure Rules in Courts applying Islamic Law and Practice be avoided.

(2) Can legal practitioners appearing before courts with Islamic law jurisdiction assist these courts in correct application of rules of Islamic civil procedure?

1.2 **Objectives Of The Research**

It is the aim of this research to add to the existing scarce English texts on Islamic civil procedure in Nigeria. The objectives of the research are as follows:-

1. To examine and analyse the principles of Islamic Civil procedure rules.
2. To identify the problems facing courts in applying the Islamic civil procedure rules in Nigeria.
3. To make suggestions on how the problems identified can be solved.

1.3 **Justification**:

This research is justified having regard to the fact that the 1999 Constitution has recognized Islamic law as one of the

three legal systems co-existing in Nigeria. Justice Usman Muhammad J.C.A (as he then was) in the case of Malarima Kalliminta v Alh. Bukar Kori had deprecated the argument of a counsel by calling Islamic procedure in proving paternity as unconstitutional. According to his lordship ".....The learned counsel for the appellant ..... committed a serious blunder by calling the procedure unconstitutional when the constitution itself has recognised Islamic law and its procedure"[25].

This researcher is capable of conducting the research, being a student of Islamic law at both undergraduate and postgraduate level he possesses the know how to carry out the research. The previous research experience of the researcher at undergraduate level was in the area of Islamic law. His LL.B. Project is titled: The Proof of Zina and the Question of DNA: The Islamic Law Perspective.

1.4 **Scope Of The Research**:

The scope of this research is to be guided by its objective. The research would focus on sub-topics such as conditions precedent to commencement of action; the procedure laid

[25] (1989) 1 NWLR (Part 100) P.718 at P.723 para F.

down under Islamic law for trial in civil cases; nature of pleadings in Islamic civil procedure. The research would also discuss judgment and its nature under Islamic law and procedure. The research will give much emphasis to the Maliki works. Cases decided by Nigerian courts would be cited in the research.

1.5 **Research Methodology**:

Doctrinal and analytical research methodology shall be adopted in conducting the study. The doctrinal approach shall be library oriented method. Research materials would be sourced from primary and secondary materials in the libraries. Decision of courts would be utilized in this research.

1.6 **Literature Review**:

In the process of conducting this research many books had been found relevant for the purpose of carrying out this research, The Mayyarah (Commentary on the Tuhufah)[26] by Muhammad Ibn Ahmad Mayyara Al Fasi is a book that discusses adjudication and matters relating to it. The author wrote extensively on Islamic procedure such as the procedure

[26] Muhammad, A.M. (2000) Sharhu Mayyarati al-Fasi, Ala Tahfati al-Hukkum. Daru al-Kutub al-Ilimiyya, Beirut.

to ascertain plaintiff and defendant in an action, what a plaintiff is expected to prove and how a defendant is to respond to the plaintiff's claim.

The Book discusses jurisdiction of Court in respect of landed property and liquidated money demand. The book also examines summoning of a defendant in an action and the procedure relating to the summoning. The book discusses the manner in which a judge is to treat witnesses that appear before him. Oath and matters relating to it are also discussed; I'zar has also been discussed in the book.

The style of writing adopted by the author is to quote verses from the Tuhufah and to go further to explain them. In explaining Islamic procedural rule, Al-Fasi makes reference to many juristic views of Maliki school such as Khalil (in his famous book; Mukhtasar Khalil), Ibn Arafa, Ibn Abdulbarr and others. Mayyarah has advantage of detailed theoretical analysis of Islamic procedure with a clear heading of topics. It is easier for a researcher to utilize the book in tracing a topic.

Another book that is worth mentioning in the research is Tabsiratul Hukkami Fi Usulil Aqdiyati Wa Manahijil Ahkami[27] Written by Burhanuddeeni Ibraheem Ibn Ali Abdul Qasim Ibn Muhammad Ibn Farhun, Al-Maliki. The book extensively discusses the office of judge, its meaning, position and the importance of the office. The book discusses jurisdiction of court in respect of parties and when court is to assume jurisdiction over a party. Claims generally are also examined, amendment of the claim and agency generally as it relates to civil and criminal actions. Response to a claim by the defendant is also analysed. The book also discusses computation of time and stay of execution. Witnesses and matters relating to their testimonies are analysed. Oath generally was also discussed in the book. I'zar was discussed by the author. The book had examined circumstances in which a judge can set aside judgment.

The Tabsirah is arranged into sections. Unlike Mayyarah, the author of the Tabsirah presents practical cases that were brought before judges of Andalus (now Spain) and the Magrib (North Africa). The author of the book has provided an

[27] Ibn Farhun, (2005) Tabsiratul Hukkam Fi Usellil Aqdhiyati Wa Manahijil Ahkami. al-Azhariyyah Lit turasi, Cairo.

abstract of his write up at the beginning of the book. The book also contains references of juristic opinion of the Maliki jurists (earlier and later) such as Ibn Naji, Ibn Habib, Ibrahim al-Tujibiy and host of others. Further more some times the author of Tabsirah makes reference to views of other schools[28].

Next book extensively consulted in the course of the research is Abul Hasan Ali Ibn Abdussalam Attasuli's Bahja Commentary on the Tuhfatul Hukkam[29], Written by Alqadhi Abi Bakr Muhammad Ibn Muhammad Ibn Asim Al-Andalusi Al-Ghurnati. The book makes extensive discussion on adjudication and its fundamentals. Procedure of ascertaining who is a Plaintiff and who is a Defendant was discussed; The procedure of stating claim by the Plaintiff and the manner in which the Defendant is to respond to the plaintiff's claim; The relationship between courts within same jurisdictional district and out had been discussed. The book extensively examines testimony of witnesses, oath and matters relating therefrom.

[28] He makes reference to the opinion of Shafi'i and Hanafi Schools on conditions that must exist before a sale transaction can be valid. The learned author also cites the views of Hanafi, Hambali and Shafi'i Schools of jurisprudence on the instances in which circumstantial evidence can be use in sale transactions. In discussing the scope of judges powers, Ibn Farhun makes reference to juristic opinions as to whether the powers are wider or restrictive in nature; he cites the opinions of Ibn al-Qayyim and that of later Shafi'I and Hambali jurists.

[29] Al-Tasuli, M.A. (1951) Al-Bahjah Sharh Tuhufatul Hukkam. Mustafa Al-Babi al-Halabi and Sons Press.

I'zar was also discussed in the commentary. Detailed and extensive theoretical analysis is the style of writing adopted by this author. Each Islamic procedure taken in the book is defined literally and technically. The writer quotes Qur'anic verses and ahadith to buttress his points. The book also contains various scholarly views such as Mansur al-Azhari, Shuraih, Sahnun, Ibn Rushd and others. The author also cites verses from the Tuhufah.

The next book consulted in the research is the Ashalul Madariki Commentary on Irshad al-saliki[30], Written By Abubakar Ibn Hassan Al Kashnawi: the author in the book discusses adjudication and matters relating therein such as qualification of a judge, witnesses generally, claim or Da'awa was discussed, admission and confession was also examined in the book. The author of the Ashalul Madariki has adopted a precise and concise style presentation of Islamic procedure. He is quoting verses from Tuhufah and follows them with brief explanation. The author use to make reference to the Risala,the Iziyyah, the Mukhtasar and juristic views of Maliki school such as Ibn Qasim, Ibn al-Majishun and others.

[30] Al-Kashnawi, A.M. (nd) As'halu al-Madariki; Sharh Irshadu as Saliki Fi Fiqhi Imam al-A'imma Malik. Dar-al-Fikr, Beirut 2nd Edition.

The next book extensively consulted in this research is: late Abdulamalik Bappah Mahmoud's Book Titled: Supremacy of Islamic Law[31]. A book written by a distinguished scholar and a former Grand Khadi. The book makes extensive analysis of the differences of evidence under Islamic and English laws. The position of evidence in civil matters under Islamic law was also analyzed in the book. The book discusses classification of cases that can be filed in court. The book had made an appraisal on evidence regarding increase or decrease of a claim. Conditions under which a plaintiff can institute another action after it has been disposed of is also appraised in the book. The book also discusses conditions precedent for commencement of an action and also analyzes rules of procedure laid down by the holy Prophet (S.A.W) in the course of his judgments.

The only minus of this book, is the non utilization of judicial authorities by the author being a retired judge to buttress the Principles of Islamic Procedure and its application in Nigeria. All of the above books omitted discussion on the importance to

[31] Mahmud, A.B. (1991) Supremacy of Islamic Law. Al-Hudahuda, Zaria.

harmonize and codify juristic opinions on Islamic judicial procedure to guide judges in conducting civil trials in court.

It is these gaps or omissions in the present literature on Islamic civil procedure and further development creeping into Islamic civil litigation in Nigeria that this thesis intends to fill. By bridging the gaps, this thesis will be unique and different from the previous research or works in the realm of Islamic Civil Procedure.

1.7 Organisational Layout

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CHAPTER TWO
Sources Of Islamic Civil Procedure

2.0 Introduction:

Islamic law is divine in origin and it represents the will of Allah which must at all times be obeyed. Islamic law is not found in any one code but must be sifted through several sources (adillah). Literally, dalil means a guide to something;[32] proof, indication or evidence. Technically, it is an indication in the source from which a practical rule of Islamic law is deduced. The rule so obtained may be definitive (qat'i) or it may not be definitive (zanni) depending on the nature of the subject, clarity of the text, and the value which it seeks to establish.[33] There are a number of verses in the Qur'an which identify the sources of Islamic law.[34] Some Muslim jurists have drawn a distinction between dalil (source) and amarah (sign or allusion) and apply dalil to the kind of evidence which leads to a definitive ruling. Amarah, on the other hand, is reserved for evidence or indication which only leads to an indirect ruling[35]. Most of the rules of Islamic civil procedure are not derived from text, but were

[32] Khallaf, A. (2003) i'Imu usulil Fiqh. Darul Hadith, Cairo, Egypt. P. 26.
[33] Badran, A.B. (1984) Usul Al-Fiqh al-Islami. mu'assasah shabab al jami'ah, Alexandria, Egypt. P46.
[34] The principal sources are indicated in Q.4:58-59.
[35] Al- Amidi, S.A (1982) Al ihkam fi Usul Al-Ahkam(Edited by Abd Al Razzaq Afifi) Almaktab Al-Islami, Beirut, Lebanon P.9.

extracted from legal reasoning and deductions of jurists through istihsan (juristic preference), which can be found in numerous classical and Contemporary works. It is to be noted that the Qur'an and even the Sunnah contain only general rules of procedure. The Qur'an, Sunnah, classical and contemporary works of Islamic jurisprudence are sources of Islamic civil procedure in Nigeria. Apart from these sources, the 1999 constitution, various enabling statutes, rules of Courts and Decisions of superior Courts on Islamic law practice and procedure are relevant sources of Islamic civil procedure which render assistance to courts in conducting civil trials in Nigeria. With this brief introduction subsequent pages of the chapter will consider sources of Islamic Civil procedure.

2.1 Qur'an[36]

Qur'an is the basis of Islamic law; it provides authority for Islamic legislation. Qur'an literally means 'reading or recitation'. Technically it may be defined as: The words of Allah revealed unto Prophet Muhammad Ibn Abdullahi, through angel Jibril in Arabic language, so that it would be

[36] Is a Book of Allah that encompasses everything.

an authority to show the authenticity of his Prophethood, messengership and a Constitution for the entire Muslims to serve as guidance to them in the worship of Allah by way of rehearsing it; it is recorded in the holy Book, which begins with Suratul Fatihah and ends with Sura al-Nas, transmitted to us through transmission and it is protected against any alteration or changes.[37]

There are 114 suras (chapters) and 6235 (ayat) of unequal length in the Qur'an. Each chapter has a separate title. The contents of Qur'an are not classified subject wise. The verses on various topics appear in unexpected places and no particular order can be ascertained in the sequence of it's texts[38]. To give just a few examples, the command concerning prayer appears in the second verse. In the midst of other verses which relate to the subject of divorce (al Baqarah) 2:228 – 248). In the same verse, there are rules which relate to wine drinking, apostasy and war, followed by passages concerning the treatment of orphans and the marriage of unbelieving women (al Baqarah, 216). Similarly the verse

[37] Khallaf, Op. Cit. P. 26.
[38] Kamali, M.H. (1991) Principles of Islamic Jurisprudence. Islamic text society, Cambridge, England p. 14.

relating to pilgrimage occurs both in chapter al- Baqarah (196 – 203) and chapter al-Hajj (22: 26 – 27). Rules on marriage, divorce and revocation are found in the chapter al-Baqarah, al-Talaq, and Nisa.i[39]

The Qur'an deals with different subjects and only a small part of it deals with what is purely law. Rules relating to non ritualistic matters in the holy Qur'an in legal parlance are referred to as Mu'amalat, in contemporary times these rules (Muamalat) vary according to the purpose for which they are used.[40] The holy Qur'an deals with rules of Islamic personal law/status (Ahkamul Ahwalul Shakhsiyyah) in about seventy verses. Civil rules (al- ahkamul madaniyya) is also a subject the Qur'an deals with, it regulates relationship between individuals and their transactions such as sale, hire, mortgage, pledges, surety, company, loan, etc[41]. Another set of rules contained in the holy Qur'an is: criminal rules, these rules deal with crimes, punishment which aim at protecting sanctity of human life property, dignity and rights. Criminal rules also define the relationship between victim, culprit and

[39] Ibid P. 15.
[40] 2:282.
[41] 2:178, 2:196, 2:219, 4:43, 5:92 – 93, 6:51, 16:126, 24:2, 24:4-5.

society, about thirty verses can be found in the Qur'an dealing with these types of rules.[42]

Furthermore rules of procedure (ahkamul murafa'at) have being enunciated in the Qur'an; the rules deal with adjudication, testimony of witnesses and oath. These rules are meant to regulate proceedings; there are about thirteen such verses in the Qur'an[43]. The holy Qur'an also provides constitutional rules (ahkamul dusturiyyah) these are rules relating to system of governance and its basis. It has defined relationship between governments and the governed and it decides what rights are available for individuals and groups of people. There are about 10 verses in the holy Qur'an that clearly deal with these kinds of rules[44]. The holy Qur'an has also provided rules of international relations and those of economic and financial matters in about twenty five and ten verses respectively[45]. However, Ibn Arabi and al-Ghazali opined that there are 500 verses in the Qur'an which give legal provisions. Some scholars state the verses are more

[42] 3:159, 4:58, 42:38, 59:7 abd 60:8-9.
[43] E.g 2:282, 4/:15, 4:105, 4:135, 5:8, 24:6-9.
[44] 2:275, 3:97, 4:29, 4:58, 5:1, 16:44 and 61:2.
[45] Ibid pp. 36 – 37.

than 500, while others view the number of verses as not more than 200.[46]

By a community reading of all rules in the holy Qur'an it is apparent that all the rules relating to worship, Islamic law of personal status and inheritance are self explanatory and most of these rules leave no room for employing rationality. But for rules relating to non worship such as civil, criminal, constitutional and economic rules, these are general in nature. They constitute basic principles and do not contain detailed explanations except in very rare cases. These rules are developing by the development of the society, that is why the Qur'an limited them to general rules, basic principles so as to allow the leaders of any time of age to make laws within the rules of Qur'an without contradicting it[47]. The Qur'anic verse that directly defines itself (the Qur'an) as a source of Islamic law is Q 4: 58: "O you who believe! Obey Allah...." obedience to Allah in the verse refers to obedience to the Qur'an.

[46] Al-Saleh, M.A (2002). Masadirut Tashri' Al – Islami wa manahijul istinbati. Al-ubaykan, Riyadh, Saudi Arabia. 1st Edition.
[47] Khallaf op, Cit. P. 37.

The Qur'an is the chief source of Islamic law. It is the final authority for both religion and the laws governing all Muslims in their individual and social behavior[48]. It is the original and primary source of Islamic law[49].

However, the most important feature of Qur'anic legislation, is its division into Qat'i(definitive) and Zanni (speculative), precepts as it relates to almost every aspect of law. Qat'i qur'anic legislation is a provision of the Qur'an which is clear and specific it has only one meaning and accommodates no other interpretation.[50] An example of this is the text on the entitlement of the husband in the estate of his deceased wife. "In what your wives leave your share is a half, if they leave no child ..."[51]. Other examples are "The adulterer, whether a man or woman, flog them each a hundred stripes ... "[52]. And "those who accused chaste woman of adultery and fail to bring four witnesses (to prove it) flog them eighty stripes ..."[53]. The quantitative aspect of these Qur'anic rulings,

[48] Ambali, M.A. The Practice of Muslim family law in Nigeria. Tamaza Publishing Company L.T.D, Zaria, Nigeria, 2nd edition p. 4.
[49] Wali v Ibrahim (1997) 9 NWLR (Pt.519) P 160.
[50] Khallaf Op Cit. P. 38.
[51] Q 4:12.
[52] Q2:196.
[53] Q 24:4.

namely one half, one hundred and eighty are self evident and therefore not open to interpretations. These rulings of the Qur'an are Qat'i (clearcut or definitive) their validity is unequivocal and every one is bound to follow them, they are not open to other interpretations. Furthermore where a Qur'anic provision can accommodate various interpretations, such verse is Zanni (not definitive) in character. The Qur'an it self should be looked at as a whole to find the necessary elaboration elsewhere in a similar or even different context. Other sources that can supplement interpretation of Zanni, Qura'nic legislation are: Hadith, when necessary interpretation can be found in it, becomes an integral part of the Qur'an and will carry a binding force. Next in this order comes interpretation of Zanni Qur'anic legislation by companions who are particularly well qualified to interpret it in light of their close familiarity with the text, the surrounding circumstances, and teachings of the Prophet (SAW).[54]

[54] Abu Zahra, M. Usul al fiqh (1958), Dar alfikr al – Arabi, Cairo, Egypt p.71.

Where a provision of the Qur'an indicates a meaning that can accommodate various interpretations,[55] Such verse is Zanni or ambiguous in character. In other words, the Zanni text is a Qur'anic legislation conveyed in a language that is open to different interpretations: "Prohibited to you are your mothers and your daughters...."[56], is an example of Zanni Qur'anic text. The word banatukum: your daughters could be taken for its literal meaning: a female child born to a person either through marriage or illicit sexual relations (Zina). Or its legal meaning, a legitimate daughter (female child born in a marriage). Jurists have disagreed as to which of the two meanings (literal or juridical meanings) should be read into the Qur'anic text. The Hanafis are of the opinion that, a female child born to a person in marital relations or illicit sexual Intercourse should be read into the text. Whereas the Shafi'is opined that only a legitimate daughter should be read into the text[57].

[55] Matlub, A.(2005) Usul al-fiqh al-islami. Mu'assatul Mukhtar lil nashri wattauzi',Cairo,Egypt p. 64.

[56] Q4:23.

[57] Sha'aban Z. A. Manhaj al-Qur'an Fi Bayan Al-ahkam (1971) in ed., Muhammad T. Uwaydah, al-Fiqh al-Islami Asas altashri, matabi' al-ahram' Cairo, Egypt. pp 21-22.

In a similar vein, the Ulama (scholars) have differed on the definition; of futile, as opposed to deliberate oaths: “God will not call you to account for what is futile (Al Laghw) in your oaths, but He will call you to account for your deliberate oaths ...”.[58] According to the Hanafis, a futile oath is one which is taken on the truth of something that is suspected to be true but the opposite emerges to be the case. The majority view of jurists have, on the other hand, held it to mean taking an oath which is not intended, that is, when taken in jest without any intention. Similar differences have arisen concerning the precise definitions of what may be considered as a deliberate oath (Yamin al-Mu’aqqabah).[59]

However, there are some instances where the scope of disagreement over the interpretation of the Qur’an is fairly extensive. These are Ijtihad opinions; Ijtihad is not only permissible but is encouraged. The Shariah, restricts ijtihad to the Mujtahidun to investigate and express an opinion. They may be right or they may be wrong in either case, the diversity of opinion offers the political authority range of choice from which to select the view it deems to be most

[58] Q 5:92.
[59] Sha’aban, Op. Cit. P. 22.

beneficial to the community. When the ruler authorizes a particular interpretation of the Qur'an and enacts it into law, it becomes obligatory for every one to follow only the authorized version.[60]

2.2 Sunnah

Literally Sunnah means way or path, be it good or evil.[61] it may be a good example or bad, and it may be set by individual, a sect or a community.[62] In pre-Islamic Arabia, the Arabs used the word "Sunnah" in reference to the ancient and continued practice of the community which they inherited from their fore-fathers. Thus it is said that the pre-Islamic tribes of Arabia had their own Sunnah which they considered as a basis of their identity and pride. Sunnah in a literal sense implies an established practice or course of conduct.

Technically, the Sunnah has a specified/restricted definition, depending on the scholar that offered the definition. The scholars of Hadith have defined Sunnah as: what ever is reported about the holy Prophet (P.B.U.H) be it his sayings,

[60] Shatlut, M.(1996) Al-Islam, Aqidah wa-shariah. Matabi Dar al-qalam, Kuwait p. 498.
[61] Khallaf, Op. Cit. p.40; Matlub, Op. Cit. p. 89.
[62] Al-Ishnawi, J A. (nd) Nihayah al-sul fi sharh Minhaj al-wusul ila ilm al-usul. Mataba'ah al tawfiq, Cairo, Egypt. Vol.2 p. 170.

actions, approvals, description of his physical features, character even if it is before his messengership. To jurists of bias to jurisprudence, Sunnah means: whatever is reported from the Holy Prophet (P.B.U.H), his Sayings, actions or approvals.[63] it can be discerned that, scholars of jurisprudence have excluded the description of the physical features of the Prophet from the definition of Sunnah.

According to jurists of jurisprudence, Sunnah is an action of the Prophet, if done by a Mukallaf (a competent person who is in full possession of his faculties) will be rewarded for doing it and will not be punished for abandoning it. For instance supererogatory prayers (Nawafil). Sunnah is used among jurists to mean the opposite of (bid'a) innovation. There is consensus among jurist on the importance of Sunnah in Islamic law and it is the second source of legislation, obligatory on the Mukallaf to know and observe it.[64]

The differences of scholars in technical definitions of Sunnah can be attributed to the different purposes in which the

[63] Al-Saleh, Op. Cit. p. 109.
[64] Ibid. pp.111-112.

scholars view the Sunnah. For example, the scholars of Hadith restricted works to the Holy Prophet as a worthy of emulation and leader to be followed. That is why they reported every thing about the Prophet. For jurists (Ulama of Usul) their main concern with Sunnah is, the holy Prophet as a custodian of Islamic law that explains the Qur'an, the explanation which guides jurists in arriving at the best way for extracting legal rules; and he also set a constitution for Muslims. This is why the jurists concentrated their works on his (prophet) actions, sayings and approvals from which legal rules are ordinarily extracted[65].

However the legality of the Sunnah as a source of Islamic law can be found in the holy Qur'an. Allah Has ordained compliance with whatever the Prophet came with and the abstaining from what he prohibits[66]. And He (Allah) associates obedience to Him with obedience to the holy Prophet[67]. Whoever obeys the Prophet indeed has obeyed Allah.[68] The Qur'an is categorical about obedience to Holy

[65] Ibid.
[66] Q59:7.
[67] Q3:132.
[68] Q4:80.

prophet: "Say: obey Allah and his messenger ..."[69]. The Muslims are enjoined to submit to the Holy Prophet as the final arbiter in whatever dispute that arises between them[70]. The Holy Prophet is saddled with the responsibility of explaining the content of the Qur'an[71]. The words of the prophet according to the Qur'an are divinely inspired[72].

Should Muslims happen to dispute over something, the Qur'an enjoins such dispute to be referred to Allah and to the messenger.[73] To refer a dispute to Allah means recourse to the Qur'an, and referring it to the messenger means recourse to the Sunnah. The rulings of Qur'an and Sunnah are binding on the Believers in that they are not at liberty to differ with the dictates of the divine will or to follow a course of their own choice;[74]. It is clear from afore-mentioned verses and other passages in the Qur'an, that the Sunnah derives its legitimacy from the Qur'an. Sunnah is next to the Qur'an in all legal matters; conformity to the terms of prophetic legislation is a Qur'anic obligation on all Muslims.

[69] Q3:32.
[70] Q4:65.
[71] Q16:44.
[72] Q53:3.
[73] Q4:59.
[74] Q33:36.

Furthermore legality of Sunnah has backing of the Sunnah itself. It has been reported that holy prophet used to instruct companions to convey or inform whatever they heard from him to those who were absent. And also he used to urge them (the companions) to understand whatever he informed them about, this is clear evidence that shows importance of Sunnah and its prominent position in legislation.[75] Legality of Sunnah as a source of Islamic law can be inferred from the works of companions during the lifetime of Prophet and after his demise. It has been established that the companions during the lifetime of the Prophet used to consider his sayings, deeds and approvals as legislation, they considered Sunnah to be binding in line with Allah's command of obedience to Holy Prophet[76].

Thus when the Prophet sent Muadh Ibn Jabal (RA) as judge to the Yemen, he was asked to the sources on which he would rely in making decision. In reply Muadh referred first to the "Book of Allah", and then to the "Sunnah of the

[75] Al-saleh, Op. Cit. p. 115.
[76] Ibid. p. 119.

messenger of Allah".[77] This encounter between the Prophet and Muadh is an example that companions of the Prophet do use Sunnah as sources of Islamic law during his lifetime. However, after the death of Prophet, companions continued to use the Sunnah as legislation bound to be complied. This is because obedience to holy Prophet as contained in the Qur'an is not restricted to the Prophet's lifetime[78]. The first two Chalifs, Abu Bakr and Umar, resorted to the Sunnah of the Prophet whenever they know of it. In case they did not know, they would ascertain if other companions had any knowledge of the Sunnah in connection with that particular issue. It is on record Khalifah Umar Ibn al-Khattab issued written instructions to his judges; he instructed them to follow the Sunnah of the Prophet whenever they could not find the necessary explicit guidance in the Qur'an[79].

2.2.(i) Classifications of sunnah:

According to Usuliyyun sunnah has been classified into; verbal (Qawliyyah), actions (Fi'liyyah) and tacit approval (Taqririyyah).

[77] Abu Dawud, Sunan, vol III Hadith No. 3585.
[78] Al Saleh, Op. Cit pp. 120 – 121.
[79] Badran, Op. Cit p. 81.

The other classification of Sunnah is, Legislative and Non-Legislative Sunnah. Sunnah (Qawliyyah) are traditions of the Prophet dealing with those things he enjoined Muslims to do through words of mouth, such as the Hadith;

"Whoever kills a warrior (in battle) may take his belongings[80]." The actual Sunnah (Fi'liyyah) of the Prophet are those things or acts he used to do in his daily activities such as performing prayers, pilgrimage and other acts of worship[81]. The tacit approval Sunnah (Taqririyyah) of the Prophet consists of the acts and sayings of the companions which came to the knowledge of the Prophet and of which he approved by showing his appreciation and acceptance[82].

Non legislative Sunnah mainly consists of the natural activities of the prophet such as the manner in which he ate, slept, dressed and such other activities. Activities of this nature do not constitute legal norms. According to majority of jurists, the Prophet's preferences in these areas, such as his

[80] Abu Dawud, Sunan Hadith No. 2715.
[81] Al-saleh, Op. cit. p. 110.
[82] Ibid.

favorite colours, or the fact that he slept on his right side etc. only indicate permissibility (ibahah) of the acts in question[83]. Acts and sayings of the Prophet that relate to particular circumstances such as strategy of war, including such devices that misled the enemy forces, timing of attack, siege or withdrawal, these are considered to be situational and not part of the sunnah strictly[84]. However, the legislative Sunnah consists of the exemplary conduct of the Prophet, be it an act, saying, or a tacit approval, which incorporates the rules of Shari'a. The Sunnah may be categorized into three, namely the Sunnah which the Prophet laid down in is capacities as messenger of Allah, as Head of State or imam, or in his capacity as a judge. In his capacity as messenger Allah, the Prophet laid down rules which are, on the whole complementary to the Qur'an, but also established rules on which the Qur'an is silent. Allocations and expenditure of public funds, decisions pertaining to military strategy and war, appointment of state officials, distribution of booty, signing of treaties, etc. are Sunnah of the Prophet which

[83] Khallaf Op. Cit. pp. 47-48.
[84] Ibid.

originates from him in his capacity as imam or head of state[85].

Sunnah which originates from the Prophet in his capacity as a judge in particular disputes usually consist of two parts; the parts which relates to claims (Da'awa), evidence and factual proof and the judgment which is issued as a result. The first part is situational and does not constitute general law, whereas the second part lays down general law, with the provision, however, that it does not bind the individual directly, and no one may act upon it without the prior authorization of a competent judge. Since the Prophet himself acted in a judicial capacity the rules that he enacted must therefore be implemented by the office of judge (Qadi).[86] Hence when a person has a claim over another which the latter denies, but the claimant knows of a similar dispute which the Prophet has adjudicated in a certain way, this would not entitle the claimant to take the law into his own hands. He must follow proper procedure to prove his claim and to obtain a judicial ruling.[87]

[85] Shatlut, Op. Cit. p. 513.
[86] Khallaf, Op. Cit. pp. 47-48.
[87] Shatlut, Op. Cit. p. 514.

In summary whatever the messenger of Allah did, i.e. be it, a saying, an action or tacit approval constitutes part of his Sunnah from him (action or saying) in his capacity as Messenger of Allah which is intended to be a general legislation, then it is a law and obligatory on Muslims to follow.[88]

2.3 Classical Works Of Islamic Jurisprudence

These are writings by early Muslim jurists; their works are widely accepted and have been used for a long period of time. The jurists have shown much insight and intellectual understanding of the principles of Islamic law in their classical writings. Works of classical Islamic jurisprudence cover the whole field of human conduct. Areas dealt with in the classical works include; rituals, prayer, fasting, almsgiving and pilgrimage. Other matters covered by the works are family law, law of contract, law of crimes, law of war and peace, and the law of evidence and procedure.

[88] Khallaf, Op. Cit. p. 49.

The general rule of Islamic procedure was provided or laid down during the period of Holy prophet (SAW). The procedure is simple; parties must be present before settlement of a dispute. Burden of proof is on the asserting party and the defendant has to deny on oath the plaintiff's claim. Upon such denial the plaintiff must prove his case but if the defendant refuses to take the oath, judgment should be given in favour of the plaintiff. Possession is also regarded as *prima facie* proof of the right to hold the property. Thus if evidence of both sides claiming the property was equal the decision would go in favour of the person in possession.[89]

The early Muslim jurists have played a vital role in the growth and development of Islamic procedure. The general procedural rules enunciated by the Holy Prophet (SAW) were expounded and shaped by these jurists. Their contribution in the development of Islamic law of procedure is a source of Islamic Civil Procedure. The jurists made their contribution in developing Islamic Procedure through Ijtihad. The first

[89] Ullah, M. A. (1990) The Administration of Justice in Islam. Nusrat Ali Nasri, (New – Delhi), India, 3rd Edition PP.4-5.

legal instrument issued pertaining to Islamic Procedure was given by Khalifah Umar Ibn Khattab (RA)[90]. The letter reads:

> Jurisdiction is to be administered on the basis of the Qur'an and Sunnah. First understand what is presented to you before passing any judgment... Full equality for all (litigants): in the way they take places in your presence, and in the way you look at them, and in your jurisdiction. That way, no highly- placed person would look forward to your being unjust, not would a weak one despair of your fairness... The burden of proof is the responsibility of the plaintiff, and the oath is upon the denying party. Compromise is always the right of litigants except if it allows what (Islam) has forbidden or forbids what (Islam) has allowed. Clear understanding of every case that is brought to you for which there is no applicable text of Qur'an and Sunnah. Yours, then, is a role of comparison and analogy, so as to distinguish similarities and dissimilarities thereupon seeking your way to the judgment that seems nearest to justice and apt to be the best in the eyes of Allah. Never

[90] Through the historic letter he sent to Abu Musa Al-Ash'ari.

succumb to anger or anxiety, and never get impatient or fed-up with litigants...[91]

The above quotations are brief extracts from the long letter that has been held authentic by all jurists[92]. The letter could best be described as an instrument that laid down the foundation for rules of Islamic law of procedure. The letter established the Islamic Judicial system; Practical Rules of procedure and Evidence which all together made up the civil and criminal Sharia procedural Rules. Some important issues that flow from the letter are: The position of a judge; the jurisdiction of a judge; parties to an action (Plaintiff and the Defendant); equality of parties; statement of claim; burden of proof; judgment, its consequences and review of judgment.

Judgment delivered based on Ijtihad by one judge may not be set aside by another merely because the latter happens to have a different opinion on the matter. It is reported that a man whose case was adjudicated by Khalifah Ali (RA) and

[91] Sabiq, S. (1983) Fiqhus sunnah. Darul Fikr, (Beirut) 4th Edition P.321.
[92] Ibn al-Qayyim, (nd) I'Lam al-Muwaqqi'in. Al-Munirah Publishers, (Cairo) Vol.I. P.62.

Zayd informed Khalifah Umar Ibn Khattab (RA) of their decision, to which the Khalifah Umar (RA) replied that he would have ruled differently if he was the judge. To this man replied, "Then why don't you, as you are the Khalifah". Khalifah Umar replied that had it been a matter of applying the Qur'an or the Sunnah, he would have intervened, but since the decision was based on Ijtihad, they were all equal in this respect[93].

The precedent of the companions on this issue has led to the formulation of a legal maxim which provides that: Ijtihad may not be overruled by its equivalent (al-Ijtihad la Yunqad bi-Mithlih). Consequently unless the judge is convinced that his previous decision was erroneous, he must not attempt to reverse it. Thus a judicial decision which is based on the Ijtihad of a particular judge is irreversible on the basis of a mere difference of opinion by another judge[94].

Further more, another area of Islamic procedure in which the Khalifah Umar Ibn Khattab created a new precedent is, accepting the evidence of an expert. Experts of a particular

[93] Ibid P.177.
[94] Ibid.

science or art in question were called to give testimony in Court. For instance in a defamatory suit filed by Zibriqan Ibn Badr against a poet Hutaya, the verse in dispute was not clear hence Khalifah Umar summoned another Poet Hassan Ibn Thabit and decided the case according to the latter's opinion[95]. No special change in the development of Islamic procedural law took place in the times of Khalifah Usman (R.A.) and Ali (R.A.).

However, the system of judicial administration remained more or less the same even under the Ummayad Caliphate. The Ummayad Caliphate contributed in shaping Islamic procedure by introducing the jurisdictional power of Kadi. A judge of that time may have had limited or unlimited power to entertain a case. Judges with limited jurisdiction were restricted either to specified territory or nature of cases they could entertain (i.e Civil or Criminal). Other judges during the Ummayad period had unlimited jurisdiction over all matters.[96]

[95] Ullah, Op. Cit. P.7.
[96] Al-Mawurdi, A. A. (2006) Al-Ahkam As-Sultaniyyah Wa Wilayat Addiniyya. Darul Hadith, (Cairo), P.123.

Moreover it was during the Abbasid period that the science of jurisprudence flourished and attained its golden age. It was in this age that traditions were collected, commentaries on the Qur'an were written and the science of the sources was developed. The four great Sunni Schools of law Hanafi, Maliki, Shafi'i and Hambali became established. The Abbasids developed a procedure for consulting specialists in the Shari'ah through Muftis and jurists[97].

However, parties to a litigation could also appear through representatives appointed in accordance with the Islamic law of agency or mandate, called a Wakil. The Wakil had to submit his power of attorney or tawakkil to the Qadi before being allowed to plead.[98]

Most of the rules of Islamic Procedure expounded and developed by classical works of Islamic jurisprudence are based on legal reasoning and deduction through the means of Istihsan (juristic preference).[99] For example, oral testimony is the standard form of evidence in Sharia.

[97] Ullah, Op. Cit. PP.10 – 11.
[98] Ibid P.13.
[99] Ibn Farhun, Op. Cit. Vol.1, P.169.

Muslim jurists have insisted on oral testimony and have given it priority or preference over other methods of proof, including confession and documentary evidence. In their view, the direct and personal testimony of a witness who testifies before a judge with no intermediary is the most reliable means of discovering the truth[100]. Another juristic preference that shapes Islamic procedure is: where the testimony of two competent witnesses of the plaintiff conflict with the evidence of a defendant's witness that is Mubarriz (i.e witness of proven integrity that excels his peers); some jurists are of the opinion that judgment should be given in favour of the plaintiff because testimony of his two witnesses are more preferable over the testimony of the Defendant's Mubarriz witness. Asbag, a Maliki jurist prefers judgment to be entered in favour of the defendant. (but the defendant must subscribe to the complementary oath). Asbag argued that, the testimony of the Mubarriz witness carries heavy weight that is why he preferred judgment in favour of the defendant.[101]

[100] Kamali, M. H. Op. Cit. P.248.
[101] Daura, M.U. Op. Cit. P.83.

The Maliki jurists have contributed in shaping the concept of jurisdictions; the power of Court or judge to entertain an action depends on the subject matter in dispute and parties involved in the case.[102] A non traveler shall be sued at his place of residence notwithstanding where the subject matter in dispute is located. In the case of a traveler, an action against him is to be instituted where ever he is found.[103] Power of a judge to determine a case is restricted to a specified territory. Ibn Asim has stated that, the popular opinion of the Maliki School is that a judge is not permitted to accept or entertain a suit in a territorial jurisdiction of another judge. While the minority view of the school is that, he can entertain the suit provided he notifies the judge that has power over the territory.[104]

Another area of Islamic law of procedure which the classical works have contributed in shaping is the identification of who the plaintiff is and who is the defendant. In al-Qawanin al-Fiqhiyyah[105] it has been stated that, the plaintiff is the person stripped of advantage in terms of possession,

[102] Al-Kafiy, M.Y. (2000) Ihkamul Ahkam. Darul Fikr, (Beirut) P.13.
[103] Ibid.
[104] Daura, M. U. Op. Cit. P.31.
[105] Written by Ibn Juzay.

circumstances and convention. The defendant is presumed stronger and thus the burden lies upon the plaintiff to adduce evidence. Some jurists have held that the plaintiff is the one who claims a fact, and the defendant is the one who denies that fact. The Plaintiff could also be in the form of person who sues and the defendant is the one who is sued.[106]

After proper identification of parties standing or position, Ibn Asim opined that the judge is to hear cases on first to come basis unless there are cases instituted by travelers or there is a case that involves perishable goods.[107] In presenting a case before the court, the Plaintiff is to speak first, then, the defendant should be ordered to respond to the plaintiff's claim.[108] Furthermore, classical works have laid down a procedural rule on the equality of parties in terms of sitting or standing arrangement before a Court. In the Jawahirul Iklil it has been stated that a judge should treat the parties alike even if one of the litigants is a believer in Islam and the other is not.[109]

[106] Ibn Juzay, (n.d) al-Qawanin al-Fiqhiyyah. Dar al-Fikr (Beirut) P.257.
[107] Tuhufah Rule 28.
[108] Daura, M. U. Op. Cit P.9.
[109] Al-Azhari, S.A. (n.d) Jawahirul Iklil. Dar al-Fikr (Beirut) Vol.II P 225.

Islamic law of procedure as contained in the classical works attaches much emphasis on clarity and precision of claim that is why they allow judge and the defendant to interrogate the plaintiff who fails to make his claim vivid and clear.[110]

Admission is one of the means of proof in civil matters; early jurists have discussed the means extensively. A precedent created by early jurists which contributed in shaping Islamic law of procedure is that, admission made by a person in favour of his heir while the maker of the admission is healthy, the jurists have two opinions. According to the jurists of Medina such admission is invalid, because there is suspicion in it. (Taulij). But the jurists of Egypt held that, the admission is valid and it has no suspicion.[111]

Furthermore, classical works have developed the procedural law for absent parties. According to the jurists, absence of plaintiff is easier to handle than the absence of the defendant. Abdulkarim Zaidan in his work,[112] Quotes Al-Mawardi's Adabul Qadi thus:

[110] Ibid P.226.
[111] Daura, M. U. Op. Cit. P.512.
[112] Nizamul Qadai.

> ...and the Plaintiff did not come to Court on the date fixed for hearing, the court shall not proceed on his/her matter. It shall leave it for him/her to come for it.
>
> The basis of that is what the learned jurist, Al-Mawurdi... said: when a party who files a suit is called and he/she is absent, the call shall be repeated thrice and if he does not show up, the court proceeds to the next suit. If the former shows up before the beginning of the latter's case, he is attended to. But if the session has started, proceedings shall not be stopped. The former has to wait....[113]

Moreover, where the person absent from the court proceeding is the respondent who lives close to the court and the road or path to the court is safe the procedure laid down by jurists is that: claims against the respondent shall be heard and judgment entered against him provided the claimant has provided proof for the claim. The respondent is not allowed thereafter to put up any response or defence because he has no reason to do that.[114] This represents the popular opinion with which courts work in the Maliki School. Ibn al-Majishun and Sahnun have made contributions in shaping the growth of this procedural law. According to Ibn al-

[113] Zaidan, A. (1984) Nizamul Qadai. Al-A any Printing Press, (Baghdad). PP.149-150.

[114] Ibn Farhun, Op. Cit Vol. III, PP.86 – 87.

Majishun, the absent respondent shall be informed of the claim and proof in its support while Suhnun insists that the absent defendant must be present in court before anything can be done[115].

Another important area of Islamic procedure classical authors made contribution in laying a solid foundation is; substituted service. The purpose of a substituted service is to bring to court, a defendant who is evading the court or refuses to honour summons of the court. The two circumstances that can lead to a substituted service, as stated in Bahjah are: when the defendant disregards the summons and refuses to show up despite the fact that the summons has reached him and; when the defendant hides himself from the Court as a result of his awareness of the claims against him which are pending before a Court of law.[116] Muhammad al-Kafiy[117] states that:

> ...whoever the judge (court) or his/its agent orders to appear before him and refuses to come and hides in his house or somewhere else, the judge or

[115] Al-Azhari, Op. Cit Vol.II P.32.
[116] Al-Tasuli, Op. Cit. Vol.I, P.35.
[117] In his commentary on the Tuhufah.

his agent will paste a summons at a conspicuous place where he lives. He does this by using candle, a sticker or what is similar to it, which is good to be used to imprint the invitation indelibly.[118]

Ibn Asim states that, the cost of a court Messenger sent to summon the defendant is to be paid by the plaintiff; but if the defendant refuses to abide by the order, the costs fall upon him.[119]

Procedural laws developed by classical authors were made in consonance with the objectives of the Shari'a; Thus to bring people close to well being and move them away from harm, even if no authority is found for them in the Holy Qur'an or authentic Sunnah of the Holy Prophet (SAW)[120].

2.4 Contemporary Works Of Islamic Jurisprudence

The time or period being referred to as contemporary for the purpose of this research is from 1900 to date. Writings made on Islamic jurisprudence within the afore-mentioned period

[118] Al-Kafiy, M. Op. Cit P.12.
[119] Tuhufah Rule 36.
[120] Ibn Qayyim al-Jawziyyah, (1906) Turuq al-Hukumiyyah Fis-Siyasatish-Shariyyah. Al-Mu'assah al—Arabiyyah Lil Tiba'ah, (Cairo), P.6.

are termed as contemporary works of Islamic jurisprudence. The works were written in Arabic and English languages. Contemporary works of Islamic jurisprudence unlike the classical works have not passed the test of time. The works were not subjected to much scrutiny. Unlike classical works, there are no various commentaries written for the contemporary works. Contemporary works covers many fields of Islamic jurisprudence. The authors of contemporary works used to make reference to classical works in their writings. Common law has influenced the contemporary works of Islamic jurisprudence written in English language. The works were made to spark passion for further research in Islamic jurisprudence.

The Contemporary works of Islamic jurisprudence are also a source of Islamic procedural rules. The contributions made by these authors in shaping Islamic procedural laws are not much, infact the works are mostly restating the Islamic procedural rules enunciated by the Ijtihad of classical authors.[121] The works have made additional contributions on the admissibility of the evidence of non-Muslims before

[121] Ambali, M. A. (2003) The Practice of Muslim Family Law in Nigeria. Tamaza Publishing Company, (Zaria), PP 95-127.

Sharia Courts. The authors are of the opinion that Qur'an, the grand norm of Sharia allows the evidence of non-Muslims[122].

To these authors, it will be in the interest of the present day situation in Muslim countries to allow non Muslims to give evidence for and against one another in matters other than Hudud[123]. Professor Anwarullah states that, the evidence of non-Muslims may also be accepted for and against a Muslim in matters other than Hudud because there is no express text of the Holy Qur'an and Hadith of the Holy Prophet (PBUH) which prohibits the admissibility of the evidence of non-Muslims, on the contrary according to Qur'an 5:106, the evidence of two non-Muslims for a Muslim is acceptable in connection with his will at the point of his death during a journey when Muslims are not available there[124].

Further more, Kadi Ambali has opined that, the nature of Nigeria being a multi-religious society where Muslims and people of other faiths freely mix in political, social, cultural

[122] Ibid, PP.115 – 116.
[123] Anwarullah, (2006) The Islamic Law of Evidence. Kitab Bhavan, (New- Delhi), P.22.
[124] Ibid; Ambali, M. A. Op. Cit. P.113.

and economic interactions recommends that Qur'an 5:106 should be critically examined and intellectually interpreted to give a meaningful procedural law in Nigerian Courts where Islamic law is applied[125]. In the case of Mai Aiki V Mai Daji[126]: The Court of Appeal, per Murtala Okunola, JCA held that: "Evidence of a non-Muslim is acceptable and reliable against a Muslim." The pronouncement of Justice Okunola on this issue is wider and slightly different from the views of most of the Muslim jurists who allowed the evidence of non-Muslim to be admissible against Muslims in cases other than Hudud only. The position held in the case has given the impression of the admissibility of testimony of non-Muslims against Muslim in all cases, Hudud matters inclusive.

Moreover, Muhammad Hashim Kamali[127], has made suggestion that recourse to Istihsan can be utilized to shape Islamic procedure rules in the present day time. The learned contemporary author cites an example that oral testimony is the standard form of evidence in Islamic law. Muslim jurists have given it priority over other methods of proof, in their

[125] Ibid P.115.
[126] (2004) FWLR (Pt. 189).
[127] In his book Principles of Islamic Jurisprudence.

view testimony of a witness who gives evidence before a judge with no intermediary is the most reliable means of discovering the truth. Kamali posed a question: Whether one should still insist on oral testimony at a time when other methods such as photography, sound recording, laboratory analyses, etc. Offer at least reliable methods of establishing facts. The author went further to opine that, this is a case for recourse to Istihsan which would give preference to the new reliable means of proof. It would mean departing from the established rules of evidence in favour of an alternative ruling which is justified in the light of new circumstances. The rationale of this Istihsan would be that the law requires evidence in order to establish the truth, and not oral testimony for its own sake. If this is the real spirit of the law, then recourse to Istihsan would seem to offer a better way to uphold that spirit[128].

Contemporary works of Islamic jurisprudence are books of reference in Nigerian courts[129]. One of the works used as an authority by courts is Ruxton's Maliki Law. In Gwabro V

[128] Kamali, M. H. Op. Cit P.248.
[129] Most especially Court of Appeal and Supreme Court.

Gwabro[130], the Court of Appeal quoted a principle of law from the Maliki Law: "Admission is more preferable than the testimony of witness"[131]. Other cases where Court of Appeal relied on Ruxton as authority in its judgment are: Umma V Bafullace[132]. Ahmad V Umaru[133] where it stated thus: ".....this has been clearly stated in the Maliki Law by Ruxton on page 297 Rule 1536 to the effect that it is permissible under Islamic law for a witness to give evidence in the same case in favour of one another"

2.5 Constitution Of The Federal Republic Of Nigeria 1999

The Constitution of the Federal Republic of Nigeria is a source of civil procedure in Nigeria that binds all courts including Shari'a courts. It is an enabling law for the making of the rules of practice and procedure, for example, Shari'a Court of Appeal Rules.[134] The Constitution also provides provisions relating to right and procedure of appeal. Section 277 of the Constitution confers appellate jurisdiction upon

[130] (1998) 4 NWLR pt 544 p.60.
[131] Ibid p.70; which is contained in chapter XXIII p.205 para. 718.
[132] (1997) 11 NWLR pt. 529 p.363; where court of appeal per Okunola.
[133] (1997) 5 NWLR pt. 503 p. 103.
[134] Sections 264 and 279 of the CFRN 1999 empowered the Grand Khadi of FCT and a state to make rules regulating the practice and procedure of the Shari'a Court of Appeal.

the Shari'a Court of Appeal of a State[135]. However, section 244(1) of the Constitution saddles the Court of Appeal with the power to entertain an appeal against the decision of the Shari'a Court of Appeal of a state and F.C.T. The section provides thus: "An appeal shall lie from the decisions of a Shari'a Court of Appeal to the Court of Appeal as of right in any civil proceedings before Shari'a Court of Appeal with respect to any question of Islamic personal law which the Shari'a Court of Appeal is competent to decide".

Furthermore section 244(2)(a) and (b) of the Constitution contain the procedure to be adhered to by the Court of Appeal in entertaining an appeal from the Shari'a Court of Appeal[136].

After the court of appeal hearing and determination of an appeal from Shari'a court of appeal of a state or FCT, an aggrieved party or any other person having an interest in the matter can appeal against the decision of Court of Appeal to

[135] Section 267 of the same CFRN 1999 conferred the same appellate jurisdiction to Shari'a Court of Appeal of FCT Abuja.

[136] Which by section 240 of the CFRN 1999 Court of Appeal has exclusive jurisdiction to hear and determine appeals from the Shari'a Court of Appeal of a state and that of fact.

the Supreme Court. Section 232(2) of the Constitution provides that: "an appeal shall lie from the decisions of the court of appeal as of right ....." While sub section (3) of the said section provides thus:" Subject to the provisions of subsection (2) of this section an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court"[137].

2.6 Statutes Creating Shari'a Courts In Nigeria.

Statutes means, laws passed by a legislative body[138]. Statutes by which courts are created constitute a source of civil procedure. Apart from the fact that in most cases the civil procedure rules of the court are made pursuant to powers conferred on the appropriate authority by the statute creating that court the statutes also make specific provisions for practice and procedure. For example, Section 3(1) of the Kano State Shari'a Courts Law[139] provides for the establishment of Shari'a Courts in Kano State thus: "For the

[137] It is to be noted that section 233(1) of the CFRN 1999 is the provision that empowers the Supreme Court with exclusive jurisdiction to hear and determine appeals from the Court of Appeal.

[138] For example Establishment of Shari'ah Courts Law 1999. Enacted by Zamfara State House of Assembly and assented by the state Governor on 8th October, 1999 as amended.

[139] Similar provisions can be seen in section 3(1) of Zamfara State Establishment of Shari'ah Courts Law 1999; Section 3(1) of Jigawa State Shari'a Court (Administration of Justice and certain consequential changes) law 2000 and section 3(1) of the Katsina State Shari'a Courts Law 2000.

purpose of smooth implementation of Shari'a in the state there is hereby established the following courts:

a. the Shari'a Court; and

b. the Upper Shari'a Court"[140]

However section 7 of the Kano state Shari'a Courts Law 2000 provides for the practice and procedure to be followed by the Sharia Courts: "The practice and procedure to be applied in civil matters by the courts shall be in accordance with:

a. .....

b. The principles of Islamic law and procedure; and

c. Any codified practice and procedure of courts made by the Grand Kadi pursuant to section 279 of the Constitution[141].

As it can be seen from the above section, the law has empowered the Grand Kadi to make codified practice and procedure of court. Section 7 goes further to state that: "In

[140] In Bauchi State, Sharia Court Grade II; Sharia Court Grade I; and Upper Sharia Court were established by virtue of Section 3(i) of the Shari'ah Court's (Administration of Justice and certain Consequential Changes) Law 2001.

[141] Section 7(1) of Zamfara State, 10(1) of Jigawa State and 8(1) of Katsina State are identical respect of hearing and determination of all Civil proceedings. The proceedings shall be as prescribed under Islamic Law comprises of ten sources as stipulated in Zamfara and Jigawa States Laws and includes among others six sources listed in Katsina State L.aw.

exercising his power under paragraph (c) above, the Grand Kadi shall be guided by the principles of: Rajih Mashhur-Mu'utamad in accordance with Maliki School of law"[142]. Section 7 of the Katsina State Shari'a Courts Law 2000, empowers the Grand Kadi in consultation with the State Shari'a Commission to make rules and regulations for the practice and procedure of Shari'a Courts[143].

Moreover, in exercising the power conferred upon him[144], the Grand Kadi of Kano state made codified Shari'a Courts (civil procedure) Rules 2000[145]. The latter rules are to assist Shari'a Courts in conducting civil trials. It is to be noted that, the Kano State Shari'a Courts Law 2000, which is a law made by the Kano State House of Assembly, made specific provisions for practice and procedure. Section 6(1) of the law has provided that an appeal against the decision of a Shari'a Court shall be filed within 30 days to the Upper Shari'a Court. Right of Appeal were also provided in Jigawa, Katsina

[142] Section 10(2) of Jigawa State Law is in pari material with section 7 of Kano State Law.
[143] In Zamfara State Law unlike in Kano, Katsina and Jigawa States Laws, it is the Grand Kadi in consultation with the State Council of Ulamas that have power to make rules and regulations for practice and procedure of the Shari'a Courts in strict compliance with Islamic Law.
[144] By section 279 of the CFRN 1999 and section 7 of the Kano state Shari'a Court Law 2000.
[145] The Grand Kadi of Jigawa State pursuant to section 279 of the constitution and section 10(2) of the Shari'a Court Law 2000 enacted Shari'a Courts (Civil Procedure Rules) 2006.

and Zamfara States Laws[146]. A Shari'a Court shall sit in an open place where members of the public shall have access to hear its proceedings[147]. However, subsection (2) of the said law has provided an exception, where the court may sit in private in the following cases: "(a) where a juvenile is involved, and (b) Where the exclusion of the public is desirable in the interest of justice".

Furthermore, a Shari'a court has power to transfer a matter either before or during trial before judgment to any other competent Shari'a court and the latter court shall take over the matter and act accordingly[148].

The Shari'a court has power to summon persons within the state (Kano) to appear before it for the purpose of giving

[146] Section 39, 32 and 41 respectively; in these laws, time within which an appeal can be filed is not limited. In the Jigawa State Shari'a Courts Law, there is confusion between section 39(1) 40 subsection (1) and (2) of the same section. Section 40(1) provides that an appeal shall lie from the decisions or order of the Higher Shari'a Court setting in its original or appellate jurisdiction in all civil proceedings to the Upper Shari'a Court. While section 40(2) provides that: unless otherwise expressly provided by the Constitution Appeal from the Higher Shari'a Court and Upper Shari'a shall lie to the Shari'a Court of Appeal. It is the opinion of this researcher that it is not possible for an appeal from the decision of a higher Sharia Court to lie with the Upper Shari'a Court and Shari'a Court of Appeal at the same time.

[147] See section 10(1) of the Kano state Shari'a Courts Law 2000. See also sections 10(4), 11 and 7(iv) of Jigawa, Katsina and Zamfara States Laws respectively, have provided for the conduct of hearing cases exceptional circumstances.

[148] See section 15 of the Kano State Shari'a Courts Law 2000. Sections 19 of both Katsina and Zamfara States Laws, while in Jigawa State Law it is the powers of Chief Inspector to transfer a case that is before one Shari'a Court to another on the application of a party to the case or on his own (i.e the Chief Inspector) and report such transfer to the Grand Kadi.

evidence[149]. The other procedural sections in the law[150] are; power of court to take independent corroborative evidence[151]. And the procedure of taking evidence of a witness outside jurisdiction strictly in accordance with Islamic procedure[152].

2.7 Rules Of Shari'a Courts In Nigeria

The statutes creating courts make specific provision for practice and procedure. The procedural provisions may not be exhaustive in the statute that is why appropriate authority is conferred alongside powers, by the statutes that create the courts to make procedural rules applicable to the courts. The 1999 Constitution is the law that created the Shari'a Court of Appeal of FCT[153] and the Shari'a Court of Appeal for any state that requires it[154]. However it is the same Constitution that empowers the Grand Kadi of FCT and that of a state to make rules regulating the practice and procedure of the Shari'a Court Appeal[155]. For example, the Kano State Shari'a Courts (Civil Procedure) Rules, 2000, made by the Grand Kadi of

[149] See section 19 of the Kano State Shari'a Courts Law 2000.
[150] i.e. Kano State Shari'a Courts Law 2000.
[151] See section 70 of the Kano state Shari'a Court Law 2000.
[152] Which is provided by the section 21(1) and (2) of the Kano State Shari'a Courts law 2000.
[153] by virtue of section 260 of the CFRN 1999.
[154] Pursuant to section 275 of the CFRN 1999.
[155] see section 264 and 279 of the CFRN 1999, it is to be noted that the rule is subject to the Act and law of the National Assembly and State Houses of Assembly.

Kano state came into effect due to the power granted to him by the Constitution[156] and laws made by the Kano State House of Assembly[157]. The Zamfara State Establishment of Shari'ah Courts Law 1999 under Section 7(ii) it is the Chief Judge of the State, in consultation with the State Council of Ulama that have the power to make rules and regulations for practice and procedure of Shari'a Courts in strict compliance with Islamic Law. But in the preamble of the Zamfara State Shari'a Courts Civil Procedure Rules, 2003 it was indicated that it is the Grand Kadi of the State that issued the rules. Unless the Establishment of Shari'ah Courts Law 1999 is amended, the Grand Kadi of Zamfara State lacks the requite power to enact the Zamfara State Sharia Courts Civil Procedure Rules, 2003. In other words the Rules has no valid law supporting it. The Islamic civil procedure rules made by the Grand Kadi deals with procedures in some specific matters not contained in the statutes creating courts. Such matters usually are: the filing of cases; service of court processes; the conduct of trial; appeals; interlocutory applications, etc. it is to be noted that such Shari'a courts

[156] pursuant to section 279 of the CFRN 1999.
[157] i.e. section 7 of the Kano State Shari'a Courts Law 2000. See also sections 7(ii) of the Bauchi State Shari'a Court Law 2001; 10(2), and 9 of the Jigawa and Katsina States Laws.

(Civil Procedure) rules are subjected to 1999 Constitution, an Act of National Assembly[158] and the law of the State House of Assembly[159].

An example of rules of Islamic civil procedure applicable to Shari'a courts in Nigeria are:-

1. Shari'a Courts (Civil Procedure) rules,[160]
2. Shari'a Court of Appeal Rules[161].

2.8 Decisions Of Superior Courts On Islamic Law Practice And Procedure.

Judicial decisions of Superior Courts on rules of Islamic civil procedure in Nigeria are also a source of Islamic civil procedure. Where a decision of a superior Court is in consonance with Islamic law, same is binding on lower Courts to follow. It is to be noted that a lower Court is only bound by the majority decisions of superior Court. The decisions of superior Courts on Islamic procedure in decided cases can be relied upon by lower Courts. For instance on

[158] in the case of rules made by the Grand Kadi of FCT.
[159] Where the rules are made by Grand Kadi of a state.
[160] 2001 of Bauchi State, 2006 of Jigawa State, 2008 of Katsina State and 2003 of Zamfara State.
[161] Cap 550 LFN 1990.

proof of paternity under Islamic law, Supreme Court per Uthman Muhammed J.S.C (as he then was) in the case of Jatau V Mailafia stated thus:-

> A child's paternity or affinity is not considered through physical resemblance but by consideration of the period within which the child is born after consummation of the marriage of his parents. The consensus of opinion in the Maliki school is that if a child is born within 6 months of consummation of marriage, the child is affiliated to the husband .....[162]

Once a case relating to paternity (which has similar facts) comes before any lower court, the lower court can rely on this decided case of the Supreme Court without going into detailed consensus opinion of the Maliki School. Or the decided cases can be cited along side the classical works of Maliki School of jurisprudence. Relying on decided case on Islamic procedure alone is not the best. A judgment is supposed to compose so many things, decision, reason for the decision, authority relied upon for the decision. Citing judicial authority alone may not contain all these things. Secondly, allowing this will open a floodgate for appointing

[162] (1998) 1 NWLR (Pt. 535) P.682 at 689 paras C – D.

incompetent persons as judges; thirdly, it will make judges lazy.

Relying on decided case on Islamic procedure alone although not the best, saves the necessity of citing numerous classical Arabic texts authorized by Maliki School jurists

CHAPTER THREE

Commencement Of Action

3.0 Introduction

The holy Qur'an encourages the reconciliation of disputing parties: If the reconciliation process fails, the option left to an aggrieved party is to institute an action in court, so that the dispute can be adjudicated upon. Islamic law requires that before commencement of trial, the judge shall ensure he has power (jurisdiction) to entertain the dispute. It is also paramount for the judge to identify the type of claim brought before him and its subject matter in order to decide the proper plaintiff and who is the defendant between the parties. Proper identification of the party's position will assist the judge to know on whom the burden of proof lies. The judge must ensure that the summons sent to the person sued (defendant) to appear before him (the judge) has reached the defendant. Civil action in Islamic law is commenced by way of complaint.[163] Having laid the above foundation, the chapter will proceed to consider/discuss the following aspects: jurisdiction, parties, service of court processes and claims.

[163] Ibn Farhun, (2005) Tabsiratul Hukkam. Al-Maktabatu al-Azhariyyah Litturasi, Cairo, Egypt P. 9; Order 2 Rule 2 of Kano State Sharia courts (Civil Procedure) Rules 2000.

3.1 Jurisdiction[164]

Power of court or judge to entertain an action depends on the subject matter in dispute and parties involved in the suit. Subject matter can either be landed property (fixed assets), chattels or money. [165] Defendant can be resident (Muqim) or a traveler (Musafir). The popular view of the Maliki School is that, a non traveler can only be sued at his domicile notwithstanding where the subject matter is situated. In the case of the traveler, he is to be sued where ever he is found, irrespective of where the subject matter of the litigation is situated.[166] This is because the traveler has no place of residence or domicile.

However, Ibn Al-Majishun differed from the popular opinion of the Maliki School in respect of landed property; he said for instance if a resident of Madina owned a house (fixed property) in Makkah, and a person domiciled in Makkah made a claim of ownership over the house; action would be instituted in Makkah. That is where the subject matter is situated. Then the judge in Makkah should take down the

[164] Is the power of a judge or Court to entertain an action.
[165] Al-Kafi, M.Y (2000), Ihkamul Ahkam, Sharh Tuhufatul Hukkam. Darul Fikr, Beirut, Lebanon. P. 13
[166] Ibid; al-Tasuli, A.A (1996) Bahjah fi Sharhit-Tuhfah. Darul Fikr, Beirut, Lebanon. Vol 1 PP. 122-123.

witnesses' testimony and all other evidences of ownership the plaintiff will rely on to prove his case. There after the judge should summon the owner of the house (the man in Madina, who is the defendant) to appear before the judge in person or through duly appointed representative to defend the action. This is also the opinion of Sahnun and Ibn Kinana.[167]

Furthermore, Mutraf and Asbagh did not agree with the opinion of Ibn al-Majishun. The view offered by them, is in line with the popular opinion of the Maliki School; i.e the action in the illustration cited by Ibn Majishun should be instituted (in Madina) where the defendant is residing. Mutraf and Asbagh went further to relax the rule that action must always be instituted at the defendant's place of abode. To them, the plaintiff is entitled to commence the action, by lodging a complaint before a judge in his domiciled area (i.e Makkah in the case of Ibn al-Majishun's hypothesis). The judge in the plaintiff's town shall take down the plaintiff's claim and evidences. Thereafter, the judge should transmit the record of proceedings to the judge of the defendant's place of residence, who should, in turn, verify the

[167] Ibn Farhun, op. cit. pp. 99-100.

authenticity of the record of proceedings transmitted to him. Once the later judge is satisfied with the genuineness of the transmitted record of proceedings he is bound to act on it. The defendant shall be summoned by the judge and caused to make his defence if any. If the defendant has no defence, judgment should be entered against him.[168]

Mutraf and Asbagh states further, where the plaintiff decides to institute an action at the defendant's place of residence and (the plaintiff) informs the court that his witnesses are residing in his home town (i.e. plaintiff's home town). The judge of the defendant's home town should write to the judge of the plaintiff's home town to take down the testimonies of the said witnesses on his behalf and transmit the record of proceedings to him. However, Mutraf and Asbagh state that, in the hypothesis given by Ibn al-Majishun, if the defendant visited Makkah (i.e. the place where the subject matter is situated and residence of the plaintiff) the plaintiff can institute the action in Makkah.[169]

[168] Ibid.
[169] Ibid.

It is permitted to have more than one court in a town.[170] This was for example practiced in big Muslim cities where the population density was very high and therefore a single court could not cope up with the demands of the people.[171] Where there is more than one court in a town, each judge should be given his own jurisdiction and power i.e. to state whether a judge should only try civil or criminal cases or both.[172] A Judge may have power to entertain all kinds of cases in the part of a town or area he resides. He can execute judgments in the area of his jurisdiction between parties that are domiciled there and persons that come into his area of jurisdiction.[173]

Where a judge is appointed to oversee or exercise jurisdiction over a whole town, he can sit in one part of the town, or in the area he resides; or in his house or one of his houses to adjudicate matters instituted before him. Where a matter is brought to a judge in his mosque or house; such case must be heard there in. The judge is not permitted to

[170] Al-Mawardi, A.A (2006) Al-Ahkam as-Sultaniyyah wa-Wilayat Addiniyya. Darul Hadith, Cairo, Egypt p. 123.
[171] Mahmud, A.B. op. cit p. 127
[172] Ibid.
[173] Al-Mawurdi, op. cit p. 123

conduct the hearing of the case in any other place.[174] The jurisdiction of a judge to entertain a matter may also be limited to an amount of claim. Abdullahi Al-Zubairi was reported to have stated that: "Appointment of judges by rulers in the Friday mosque has been a practice of long standing; such judges are called mosque judges. Their jurisdictions used to be confined to a claim not more than 200 Dirhams or twenty Gold pieces." [175]

Moreover, a judge can be given unlimited jurisdiction or general powers to entertain disputes; and some issues for public interests. The judge that has general or unlimited jurisdiction is empowered by law to entertain ten matters as follows:[176]

1. To determine cases either through reconciling litigants or by delivering a verdict and force the litigants to comply with it.[177]

[174] Ibid.
[175] Ibid.
[176] As stated by Mawurdi in the Ahkamu as –Sultaniyyah.
[177] Al-Mawurdi, op. cit. p.119

2. The judge has power to retrieve right from wrongdoer, and hand it over to the person wronged; after the person wronged has proven his claim.[178]
3. For the purpose of wealth protection and executing contracts, the judge has power to act as guardian for an infant, insane, imbecile and bankrupt person.[179]
4. The judge has power to manage and control trusts.[180]
5. The judge has power to control and manage bequests.[181]
6. The judge has power to give out an orphan in marriage.[182]
7. The judge has power to execute rights. If the right sought to be executed is that of Allah, the judge shall execute it completely (without waiver) once the right stands proved before the judge. If it is rights of man to be executed, the judge shall execute the right on the claim of the person entitled to it.[183]
8. The judge has power to try matters pertaining to public interest brought to him by an aggrieved person. He is also empowered to inquire and identify such matters of public

[178] Ibid.
[179] Ibid.p.120
[180] Ibid.
[181] Ibid. p. p. 121
[182] Ibid, Imam Abu-Hanifa is of the opinion that such power is out side his jurisdiction.
[183] Ibid.

interest suo moto i.e. without a complainant and determine or settle it.[184]

9. The judge has power to supervise and control auxiliary staff of his court. Where he discovers one of the staff is wanting in character, he can change him with another or employ additional workers to assist the staff found wanting.[185]

10. The judge has the inherent powers to ensure equality between the parties that appear before him and deliver judgment with justice. [186]. He should also not follow his personal interest as enjoined by Allah (SWT) thus:

> O Dawud! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (and justice): nor follow that the lusts (of thy heart), for they will mislead thee from the path of God: for those who wander astray from the path of God, is a penalty grievous, for that they forget the day of account.[187]

In the historic letter written by Khalifa Umar (R.A) to his judge, Abu Musa al-Ash'ari he states the importance of doing justice between litigants: "....For establishing justice

[184] Ibid, Imam Abu-Hanifa is of the view that, the judge should only settle such kind of matters where there is a complainant or aggrieved person.
[185] Ibid.
[186] Ibid.
[187] Q 38:26

in the courts of law God will grant you a rich reward and give you a rich reputation."[188]

In Nigeria jurisdiction of courts is a creation of law. Shari'a courts owe their jurisdiction to the state laws establishing them.[189] Shari'a Courts have jurisdiction to hear and determine civil matters and causes where all the parties are Muslims.[190] Where one of the parties is a non-Muslim, the court has no jurisdiction unless the non-Muslim party gives a written consent. Territorial jurisdiction of Shari'a Courts is limited to a specified territory.[191]

In Kano state the territorial jurisdiction of Shari'a courts is limited to specific local government areas. While the upper Shari'a court is empowered to assume jurisdiction in any matter or dispute that occurs within territorial boundaries of Kano state[192].

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[188] Al-Zuhaily, W. op. cit. p. 5929

[189] For example S. 5 of Kano State Shari'ah Courts Law. 2000. Similar provisions were also made in sections 5(1) of Bauchi, Jigawa, katsina and Zamfara States Shari'a Courts Laws 2001, 2000, 2000 and 1999 respectively.

[190] Sections 5(2) of Kano state Shari'ah courts Law. 2000.

[191] For instance column I and II of schedule (paragraph 2(1) and (2) of the Shari'a Courts (establishment and Territorial jurisdiction) order 2000 (of Kano state).

[192] See Column II Paragraph 2(1) and (2) of the Kano State Sharia Courts (Establishment and Territorial Jurisdiction) Order 2000.

The jurisdiction of Shari'ah Court of Appeal of a State is provided under section 277 of the 1999 constitution.[193] The section provides thus:

> The Shari'ah Court of Appeal of a state shall in addition to such other jurisdictions as may be conferred upon it by law of a state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

From the above constitutional provision, it is clear that the Shari'a Court of Appeal has both appellate and supervisory jurisdiction; the jurisdiction is limited to proceedings involving questions of Islamic personal law. This was the interpretation made in the case of Usman v Umaru[194] by the Supreme Court of Nigeria. In the case of Magaji V Matari,[195] the Supreme Court reiterated its earlier position that the jurisdiction of a Shari'a Court of Appeal is limited to issues covers any dispute over marriages contracted in accordance with Islamic law (Nikah), its dissolution, guardianship of

[193] See also section 260 CFRN 1999.
[194] (1992) 7 SCNJ P. 388
[195] (2000) 5 SCNJ P. 140

children, (Hadanat), endowment made by Muslim individuals or organizations which are not registered under the Perpetual Succession Act (Waqf), gifts made by a Muslim (Hibah) and (Meerath).[196] Therefore where subject matter of a claim of plaintiff at the court is simply and purely a matter of declaration of title to land or sale of landed property is quite unconnected with Islamic personal law. The Shari'a Court of Appeal lacks jurisdiction to entertain any appeal arising therefrom, like wise High courts have no power to entertain appeals bordering on questions of Islamic personal law.

In the case of Muhamad Jafaru V Hajiya Habiba Dakata,[197] Court of Appeal held that, the Shari'a Court of Appeal is the only court saddled with the jurisdiction to hear and determine appeals on Islamic personal law not the High Court. The facts of this case were that one Habiba Dawakin Dakata instituted an action against Malam Ja'afaru and Zuwaira Fanisau, praying the trial (Upper Area) Court No. 2 Kano to divide and share farmland they inherited in possession of Malam Ja'afaru. The trial court granted the

[196] Ambali, M.A (2003) The Practice of Muslim Family Law in Nigeria. Tamaza Publishing Company, (Zaria) Nigeria. PP. 21-22
[197] (2007)3 SLR (Pt IV) P.34

reliefs sought by the plaintiff. The defendants became aggrieved with the decision of the trial court and filed an appeal before the High Court of justice, Kano State. The latter court affirmed the judgment of the trial court. The duo (defendants) dissatisfied with the decision of the High Court further lodged an appeal before Court of Appeal, Kaduna Division. The Court of Appeal held that, the decision of Kano State High Court was given without jurisdiction.

The Court of Appeal is constitutionally empowered to the exclusion of all other courts to entertain an appeal as of right in any civil proceedings from the decisions of a Shari'a Court of Appeal with respect to any question of Islamic personal law which the Shari'a court of Appeal is competent to decide.[198] Any right of Appeal to the Court of Appeal from the decisions of a Shari'a Court of Appeal conferred by section 244 of the Constitution shall be:-

a) Exercisable at the instance of a party there to (i.e. to the case) or, with the leave of the Shari'ah Court of Appeal or of

[198] Section 244 (1) of the CFRN 1999.

the Court of Appeal, at the instance of any other person having interest in the matter and;[199]

b) Exercise in accordance with an Act of the National Assembly and Rules of Court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.

When Court of Appeal is to exercise jurisdiction on matters of Islamic law it shall sit with judges learned in Islamic law.[200]

Section 230 of the 1999 Constitution establishes the Supreme Court of Nigeria. The court shall have jurisdiction to the exclusion of any other court in Nigeria, to hear and determine appeals emanating from the court of Appeal in civil proceedings involving questions of Islamic personal law.[201] The decision of the Supreme Court in civil proceedings on questions of Islamic personal law is final and is not appealable to any other court, body or person.[202]

3.2 Parties

[199] Section 244 (2) of the CFRN 1999.
[200] Section 237(2) (b) of the CFRN 1999.
[201] Section 233(2) of the CFRN 1999.
[202] Section 235 of the CFRN 1999.

One complexity in Islamic law procedure is the task of distinguishing Al-Madda'iy, the plaintiff, from Al-Mudda'a alayhi, the defendant. It does not follow in Islamic law that he who goes to court to lodge a complaint is necessarily al-Mudda'iy (plaintiff) while the person against whom complaint is lodged is automatically Al-Mudda'a alayhi (defendant). A court that is not sure who is the plaintiff and who is the defendant, cannot escape miscarriage of justice in its decision.[203] Anybody that has the knowledge to distinguish the plaintiff from the defendant has discovered the gate to just decision,[204] impliedly, a judge who fails to identify proper position of parties has missed the path of justice. This is because he would not know who to saddle with the onus of proof. Identification of plaintiff/defendant constitutes a herculean task for courts of first instance applying Islamic law.[205] A trial judge of Civil Area Court Gombe faced this herculean task in the case of Danjuma V Baaji,[206] Court of Appeal held interalia that the trial judge did not discharge his primary duty at the onset, to

[203] Ambali, M.A, Op. cit. p. 104
[204] Al-Azhari, A.G (1995) Alfawakihud Dawani: Commentary on Risala. Mustafa al-Babi Al-Halabi and sons press, Cairo, Egypt p.298 Vol II.
[205] Ambali, M.A op. cit. p. 105
[206] (2000) 7 NWLR Pt. 665 p. 396

determine who was the plaintiff and the defendant among the parties that appeared before him. Failure on the part of this trial judge to properly identify the position of parties led him to wrongly place the burden of proof on the defendant. The wrong placement of the burden of proof, led Coomassie JCA (as he then was) to comment as follows:

> I cannot understand how the trial court first ordered the defendant (and not the plaintiff) to prove his case. Hajja Baaji never took the matter to the court. The facts as stated in the record of proceedings do not show that Hajja Baaji could be a plaintiff. After the statement of the claimant the defendant (Hajja Baaji) merely denied the claim. Instead of the judge to order the claimant to adduce evidence in proof of his claim by calling the required witnesses that court directed the defendant to call witnesses which was done by the defendant……this is wrong....[207].

Jurists have defined who is the plaintiff and defendant in Islamic law. According to al-Qarrafi, a plaintiff (al-Madda'iy) is the party whose claim runs counter to common sense

[207] at page 402 Paras C – E

(urf) and it has no support of root (asl). While the defendant (al-Mudda'a Alayhi) is the party whose claim has the support of logic (urf) and root (asl).[208]

Ibn Shass has defined the plaintiff, as the person or party whose averment lacks support of truthfulness, or he is the person whose claim is weak among the parties before judge; or his claim is attached with something that makes it weak. For instance a plaintiff is a person who brought claim which is unnatural and against common sense.

The defendant is the other person who has the support of logic.[209] In a case where one of the parties comes with a claim which is in consonance with logic while the other party comes with a claim that is contrary to common sense; the former should be the defendant while the latter is the plaintiff. Likewise whoever brought a claim that has nothing to support it, he is the plaintiff. For example, 'A' brings an action that 'X' is in possession of his chattel. By the reasonable man test (urf) 'X' has a better case and therefore

[208] Ibn Farhan. Op. cit. pp. 121
[209] Ibid

should not be burdened with the task of proving his possession.

Moreover, Ibn Habib has summarized the definitions of the afore-mentioned jurists thus: a plaintiff is the party whose claim has no basis while the defendant is the party who has the support of custom (urf) or root (asl)[210].

According to Abu Umar Ibn Abdul Barr, to determine who is a plaintiff and the defendant in a case, judge should consider who is to take or collect and who is to give out. Generally the person to take or collect is always the plaintiff while the party given out (right) is the defendant.[211]

The famous jurist Sa'id Ibn al-Musayyib states that parties to civil dispute are the: person who makes a claim and the person who disputes the claim. The former is the plaintiff while the latter is the defendant.[212] A plaintiff is the person whose claim has no basis to support its authenticity or

[210] Ibid
[211] Ibid p. 123
[212] Al- Tasuli, A.A op. cit Vol I p. 113

truthfulness. Where a judge could not identify the proper standing of parties, the party that instituted the action should be allowed to state his claim first, since he is the one who filed the suit and, based on that action, the other party was summoned to the court. Where there is no clarity as to who brought the other party to court, the judge should make a poll between the parties.[213]

Asl (root) and urf (custom) are presumptions of law[214]. According to Ibn Abdissalam custom (urf) is natural evidence. While the root (asl) is the basis or foundation on which a claim is based or placed. The word asl is applied in personal matters and by it, is meant that ordinary state of relations between any two persons taken at random, between whom, as a general rule, there is no obligation. If then one party pleads that something has occurred derogatory to this normal state, such as he who pleads that he is a creditor, he has against him the presumption resulting from asl; he will be the plaintiff and will have to bring forward proof. This proof of the existence of an

[213] Al- Azhariy, S.A (nd) Jawahiril Iklil Sharhi Mukhtasar Khalil Darul Fikr, Beirut, Lebanon Vol II pp. 225 – 226
[214] As stated in rules 20 and 21 of Tuhufah

obligation once adduced, if the other party pleads a cause of extinction, the latter will have to bring forward proof in support.

The word urf contains an analogous idea but applies to chattels thus where both husband and wife are claiming ownership of utensils, mortar and pestle or mirror, it is more reasonable to suppose that these chattels belong to the wife and thus she becomes defendant and the husband plaintiff, for she has the support of custom (urf) while husband lacks the evidential backing of custom (urf),[215]. In these circumstances though the wife may bring the action to court, still the burden of the proof will not be on her, but on the husband. In other words, the wife is the defendant notwithstanding she is the party that instituted the suit, while the husband is the plaintiff although he is the party taken to court or sued[216].

According to Kadi Ambali, apart from asl and urf presumptions of law, Muslim jurists have designed another

[215] Ibid p. 7
[216] Ibid

method to guide the court to distinguish proper standing of parties in court. The first method is to identify a party that has Right of withdrawal. A complainant is the party who demands a certain right due to him from the defendant. It is he whose silence means withdrawal and the suit automatically terminates. But the defendant is he whose silence does not terminate the suit. Rather the force of law shall be invoked to make him reply.[217]

Another key to distinguish the plaintiff from the defendant is for the court to ask itself, who out of the parties, is seeking right or redress, and from whom are the rights being sought. The former is the plaintiff; he moves and urges the court to exercise the power in his favour to secure for him his rights from the defendant. He should therefore convince the court by putting up cogent reasons why he is entitled to the judgment. The latter is the defendant. He is at an advantage because the right is in his possession. However, there is an exception to this general rule. For instance an orphan demanding the return of his property from the trustees is not considered as plaintiff on whom the

[217] Ambali, M.A. Op Cit P. 106

onus of proof lies. He is a defendant if the trustee asserts that he had returned the property to the orphan.[218] Although the orphan is seeking his rights from the trustees; the latter is to prove that he has handed over the property to the orphan because, basically, the law requires him to call witnesses when ever he wants to hand over the entrusted property of orphans to him. The Holy Qur'an States thus: "And test the understanding of the orphans until they attain age of marriage, then, if you perceive in them mature judgment, deliver to them their property... when you deliver to them their property, then call witnesses in their presence"[219]

It is therefore assumed that the property is in the care of the trustee till he satisfies the requirements of the law.

Another formula of distinguishing parties to civil dispute is, affirmative claims. The theory Sa'id bn al-Mussayib, is that he whose claim is in the affirmative form should be taken as the plaintiff. His argument is that proofs are brought to

[218] Ibid
[219] Q4:7

establish what is positive, that is, he who asserts must prove. It is illogical to demand proof for what does not exist, i.e. negative. For instance, A claims that B owes him a sum of money and B denies it. The onus of proof lies on A and not on B. However, this general principle has an exception. A, a woman, who alleges that her husband B, with whom she resides, fails to maintain her is a plaintiff, even though her claim is not in the affirmative form. The man B who denies such allegation is a defendant even though his claim is in an affirmative form. The reason is clear. The law assumes that a wife under the roof of her husband is maintained by him. So the urf favours him. It is her claim that runs counter to the presumption of regularity. She is therefore saddled with the onus of proof. But if they live in different towns or she resides outside the house in which he lives, he is the plaintiff who has the burden to establish that he maintains her, irrespective of who initiated the action.[220]

Kadi Ambali concludes that, the big challenge of the trial court is to know which of these procedures of law is applicable in any given claim. It has to fully understand the

[220] Ambali, M.A op. cit. p. 107

claim, its bases and the relationship of the two contending parties to the subject of claims to determine on whom to place the burden to proof and who is at the receiving end.[221]

It does not follow in Islamic law that a party who institutes an action in court automatically becomes a plaintiff and the person sued is always the defendant. Under Islamic law and procedure, a litigant can file a claim as a plaintiff and after a thorough examination which a judge is mandated to do, the plaintiff may turn out to be a defendant. [222] In the case of Shatacche V Balarabe, [223] court of Appeal observed as follows:

> Under Islamic law and procedure, the trial court is empowered to alter the status of the parties to an action. Thus, once a case has been accepted by a trial judge, it is the duty of the judge to conduct preliminary investigation in order to determine who is the claimant/ plaintiff and the defendant. It is not a matter of course to say that whoever initiates or institutes action becomes the plaintiff and the other party a defendant ..... It is visible that "A" appears in court as the

[221] Ibid
[222] Danbaba V. Sale (2004) All FWLR (Pt 226) P. 1915
[223] (2002) 10 NWLR (Pt. 775) P. 227

> complainant/plaintiff and "B" as the defendant after preliminary investigations by the trial judge of the matter "B" the defendant may become the claimant and the initial claimant "A" becomes the defendant. Consequently the person who appeared as the defendant may be asked to prove his case as the plaintiff. Determining the nature of the plaintiff and the defendant enhances the judgment of the court**.**

Coomasie J.C.A (as he then was) in Mandara V Amin,[224] held that: ".... under Islamic law procedure, it is the judge, based on the dictates of Shari'a that decides who is to be the plaintiff and which of the two parties is to be called the defendant."

The Supreme Court, in the case of Jundun V. Abuna,[225] per A.B Wali, J.S.C. (as he then was) put the principle more succinctly when he stated inter-alia;

> Under the Shari'a procedural law, it is not always necessary that a litigant who complaints first before the court shall always be the plaintiff, it is the judge based on the dictates of the facts of the case, that decides who is to be the plaintiff. The judge has to determine from what is most reasonable and

[224] (2004) All FWLR (pt. 239) p. 1022
[225] (2000) 10 SCNJ p. 14 at p. 20

> in conforming with the normal state of things, which of the two parties is to be cited as the defendant**.**

By way of emphasis, the first responsibility or duty of the judge is to determine between parties who is the plaintiff and who is the defendant. The plaintiff is the party stripped of advantage in terms of possession, circumstances and convention. The defendant is presumed stronger and thus the burden of proof lies upon the plaintiff to produce evidence. The plaintiff is the party who claims a fact, and the defendant is the party who denies that fact. The plaintiff could also be the party who sues and the defendant is the party who is sued.

3.3 Service Of Court Processes

It becomes imperative on the plaintiff or claimant to cause the defendant to be served with court process. This is the only way the defendant may become aware of the suit

against him in court; and be able to put up a defence if he intends to do so. To secure the attendance of a defendant to court, the court must invite him and such shall be by process of court duly served on him.

Where defendant is residing within the jurisdiction of the court and the plaintiff has offered cogent and satisfactory explanation to his claim or his case has disclosed a reasonable cause of action; or the plaintiff's case is *prima facie*. The defendant shall be summoned to appear before the court. However, a judge has discretion to summon the defendant even where the plaintiff does not offer satisfactory explanation to his claim[226]

However, if a defendant is residing in a town or location that is about twelve miles away from the Court, a summons should be sent to him, inviting him to appear before the court, or a messenger be send to him if, the path or road to the defendant's location or town is safe. But where the defendant is living in a far away town and the road leading to the town is not safe, such defendant should not be

[226] Daura U.M Op Cit P.11

summoned to appear in court, but rather a letter be sent to the judge of the defendant's home town; the content of the letter is to state the nature of the claim, and urge the judge of the defendant's town to entertain the suit in accordance with the law. If the truthfulness of the claim is established, judgment should be given accordingly. Where the judge cannot understand or appreciate the complaint, he should reconcile the parties. But if the judge cannot appreciate the complaint and cannot reconcile the parties, the receiving judge shall request the judge of the plaintiff's home town to direct the defendant to appear at a specified place, date and time to respond to the plaintiff's claim.[227]

Moreover, if the defendant summoned to appear before the court refuses to honour the summons or hides in his house or somewhere else, the judge should order the summons to be pasted at a conspicuous place where the defendant lives. The defendant's place of abode or business dear to him can also be sealed up to compel the defendant to attend the sitting of the court. The sealing should be done in such a way if the defendant opens the place sealed it would be

[227] Ibid.

noticeable or recognizable that the defendant has accessed the place and he shall be punished. [228]

The foregoing explains how Court processes may be served on the defendant. Under Islamic Law, the service includes both personal and substituted. However, the practice in Nigeria is the addition to general reference made to application of rules of practice and procedure under Makili Law, Sharia Courts are also governed by statutory laws on how to effect both personal and substituted service of process. For instance, Section 15 of the Shari'a Court Law, 2000 of Jigawa State provides for procedure of personal/substituted service.[229] Service shall be effected by handing the summons or its copy to the person to be served.[230] But where personal service cannot be effected the Shari'a Courts (Civil Procedure) Rules allow for substituted service. The substituted service may be effected after the court is satisfied that it is necessary so to do.[231] The modes of substituted service are: by delivery to an agent; or by

[228] Ibid
[229] Order 3 rule 1 of the Shari'a Courts (Civil Procedure) Rules of the Jigawa State of Nigeria 2006, similar provision can be found in Order 3 Rule 1 of Kano State Shariah Courts (Civil Procedure) Rules 2000. See also Order 3(3), 3(2) and 3(2) of Bauchi. Zamfara and Katsina States Rules respectively.
[230] Order 3 Rule 1 of the Kano and Jigawa State Shari'a Courts (Civil Procedure) Rules.
[231] Order 3 Rule 4 of Jigawa States Shariah Courts (Civil Procedure) Rules 2006.

advertisement in the state gazette or in any Newspaper circulating within the Jurisdiction, or notice put up at court house or some other place of public resort of the district, or at the usual or last known place of abode or business of the person to be served; or by affixing summons at the premises which is the usual or last known place of abode or business of the person to be served.

The plaintiff is the person to pay the cost or fees of summoning the defendant to appear in court. But the defendant would bear such cost or fees if he obstinately refuses to pay a debt owed to the plaintiff and the non-payment makes plaintiff to institute an action. When the defendant appears in court, would be ordered to settle the cost incurred by the plaintiff in summoning him. It should be noted that shouldering the cost or fees of summoning the defendant by either of the parties would be made if court bailiff is not being paid salary from treasury. But if the bailiff is on salary, neither the plaintiff nor the defendant should bear the expenses.[232]

[232] Daura U.M Op Cit P.11-12

3.4 Claim

The subject matter of litigation must satisfy two conditions: the claim must be specific and supported by full explanation. Any claim that fails to satisfy the two conditions would not be accepted by court. For instance, in a monetary claim, plaintiff must state the exact amount of the money. But if he is not sure as to the exact amount of the money the defendant is owing him; his claim shall not be heard at all. Likewise, if the plaintiff is doubtful, whether the defendant owes him or not, the court would not entertain the claim.[233]

The plaintiff must explain the circumstances as to how the claim arose. The reason for such explanations is to assist the court in knowing whether the basis of the claim is legal or not. For example in a monetary claim that involves wine or gambling, such claim would not be accepted in court.[234]

[233] Ibid p.7
[234] Ibid

A Clear, distinct and unambiguous claim is the basis or foundation upon which principle of Islamic procedural law rests. The plaintiff ought to claim some thing known and defined in number, amount kind and structure.[235] Abubakar Bashir Wali (J.C.A. as he then was) in the case of Mafolatu V Alamu,[236] held: "It is fundamental in Islamic law that every claim must be stated in clear terms or clear statements and in the case of land, its clear boundaries and locations must be stated"

Islamic law emphasizes clarity and precision of claim. That is why its procedure stipulates that the defendant and court should interrogate the plaintiff who fails to make them have a vivid picture of his claim and its basis.[237] In other words if the plaintiff did not give the basis of his claims, the judge and the defendant shall demand explanation from the plaintiff.[238]

[235] Biri V Mairuwa (1996) 8 NWLR (Pt. 467) p. 452
[236] Unreported sued No CV/K/818/84.
[237] Ambali, M.A op. cit. p. 102
[238] Al-Azhari, S.A op. cit. p. 226

However, where a claim is one that relates to a deceased person, the plaintiff must show or prove to the court the essentials (Mujibat) to establish his legal standing to sue as well as prove that he is among the legal heirs of the deceased person sought to represent his estate. The court shall not proceed unless the plaintiff establishes his locus, for instance.[239] He claims a farm land of his Grandfather; He must establish the death of the Grandfather and his legal heirs which must include the plaintiff's father. It is necessary for the judge to ensure that all heirs are present before the court in person or by proxy.

Moreover, if the plaintiff's father is alive he must prove that he is duly appointed to represent his father on any issue of his grandfather to give him the stand or alternatively; if the plaintiff father is deceased, the court shall not entertain the claim like in the situation of his grandfather unless he proves to the court essential elements that give him the right to sue on behalf of the estate of his late father by establishing; Death of his father and legal heirs of his

[239] Al-Tasuli, A.A op. cit. pp 264 – 265

father. At this point the plaintiff having established his legal standing has the capacity to prosecute the claim.

CHAPTER FOUR

Hearing And Determination Of Islamic Civil Actions

4.0 Introduction

In hearing of Islamic civil actions it is the duty of the plaintiff to prove all material claims made by him against the defendant. The proof must be in accordance with the rules of Islamic law of evidence. For the purpose of proving or defending a case in an Islamic civil action, the parties must bring forward the required number of witnesses demanded by the Islamic law to prove or defend their cases before the court. It is paramount to make it clear from the on set that the alkali/kadi (judge) shall not give verdict on any matter before him without listening to the entire claim and proof. However a judge should base his judgment strictly upon what he learnt from the evidence of witnesses. It is not permissible for a judge to give judgment not based on evidence. Once a court delivers its decision on a matter, it has the jurisdiction to invoke its coercive powers to give effect to the judgment by ensuring that the party in whose favour the judgment was given has the benefit of the judgment. With this brief introduction, the chapter will

proceed to consider, among others, commencement of hearing.

4.1.0 **COMMENCEMENT OF HEARING**

Islamic law requires that before the beginning of a trial the judge shall determine the type of claim brought before him and its subject matter in order to decide who infact is the plaintiff, and who is the defendant between the parties, so as to know on whom the burden of proof lies[240]. It is also the requirement of Islamic law that the judge must treat the parties on equal terms in sitting, talking, and hearing in paying attention to them[241]. Parties are therefore equal under the Shariah. Religion, faith, tribal belonging, accumulation and ownership of wealth and leadership status cannot confer any preferential treatment before justice. Allah the most High says: **"**And let not the hatred of others to you make you swerve to wrong and depart from justice. Be just; that is next to piety; and fear God. For God is well acquainted with all that ye do**"[242].**

[240] Mahamud A.B. Op.Cit. P.103.
[241] Ibid P.104.
[242] Q:8.

It was reported that a woman once complained against Khalifah Ma'mun's son, named, Abbas. The Khalifah ordered the judge to make his son stand with the woman and then take down their respective statements[243]. However a judge should treat parties equally even if one is a believer in Islam and the other is not. Khalifah Umar (RA) in the famous letter he sent to Abu- Musa Al- Ash'ari warned judges to maintain strict balance among litigants. The admonition tallies with the Qur'anic injunction to Prophet Dawud (A.S) in the Qur'an thus: "David, we make you a regent on the earth so dispense justice among the people with apt sense of justice..."[244]

Equal treatment of the parties under the Shariah includes the principle of promptness and precedence in dispensing justice according to the dictates and nature of the case as well as the parties involved. Sharia courts are required, in ordinary circumstances, to allow the order of the dates the suits are filed to determine the order of attending to them but expediency and meaningful justice demand that certain

[243] Ullah,A.M.(1990) The Administration of justice in Islam. kitab Bhavan,(New-Delhi) India.p.14.
[244] Q38:26.

cases are given priority over others that had been filed before them because of their special characteristics[245].

A case involving a person who is not based in the town where the court operates, and has to travel from outside the town to attend the court should be attended before a case of parties that are resident in the town where the court is situated. Following the same principle, a case whose bone of contention is perishable or could become valueless or obsolete, if the case has to take its ordinary order, should be given priority over other cases before it, to ensure that the judicial efforts are not exercise in futility. Other suits that merit special attention are those involving the interest of orphans and disputes arising from Wasiyyah(will) are deservingly given prompt and priority attention[246].

A suit is initiated by lodging a complaint by a claimant or plaintiff personally or through his authorized representative orally or in writing before judge. If the plaintiff states his

[245] Ambali A.M. OP.cit. p.97. In practice Shari'a Courts in Nigeria are indulging senior legal practitioners to call their cases out of turn. However, the Courts also use to entertain cases in which there are representation by Counsel before hearing other matters.
[246] Ibid.

claim which is cogent and in accordance with the law, the judge will order the defendant to respond to the plaintiff's claim[247]. If the defendant admits the plaintiff's claim, judgment shall be entered against him and in favour of the plaintiff. However, where the defendant denies the claim, the judge would then call upon the plaintiff to bring evidence to prove his case. If witnesses were brought and their testimonies establish the claim without any objection by the defendant as to their competency to testify, judgment should be given in favour of the plaintiff based on the evidence of the witnesses[248]. However where the plaintiff fails to bring witnesses or the evidence of the witnesses did not stand, the defendant would be directed to subscribe to an oath that the plaintiff's claim is not true. If the defendant swears, the claim would be dismissed, but if he refuses to take the oath, the oath shall be reversed to the plaintiff and if the plaintiff swears, the right he is claiming would be given to him[249].

[247] Daura U.M. op.Cit.P.18 and Order 2(1) and (2) of Kano, Jigawa, bauchi, Katsina and Zamfara States Rules.
[248] Ibid.
[249] Ibid.

Moreover where the defendant refuses to respond to the claim either by admitting or denying it, the judge shall compel him to respond. If he persists in refusing to reply, he shall be put into prison. If however, the refusal to reply continues, judgment shall be given to the plaintiff without asking him (the plaintiff) to subscribe to an oath[250]. Furthermore, the plaintiff may file a written statement of claim in court. The content of the statement of claim includes the complaint, explanations on how the claim came into existence and that the plaintiff seeks the defendant to reply to the claim. Such written statement of claim is referred to as Attaukif or Makal[251].

Where the written statement of claim is complex, a copy of the written claim must be given to the defendant and the defendant shall be given enough time to carefully study and understand the claim, so that he can defend the claim instituted against him[252].

[250] Ibid pp18-19.
[251] Ibid P.19.
[252] Ibid P.20.

But where the defendant applies for an adjournment to study the claim that is not complex, the judge should look at the reasons adduced by the defendant; if the reason is cogent, the application for the adjournment should be granted. But where the reason by the defendant for the adjournment is not convincing but rather is a delay tactic; he shall be compelled to respond to the claim immediately[253].

The Tuhufah, puts it, thus: "But if the document needs some consideration; the thing to do is to copy it and ask for time to study it. But if the defendant should ask for an adjournment over something which is clear and easy, such a request should be turned down. According to another view, the request should be granted"[254].

Where a claim is complex with various attachments, its presentation through written statement will give a clear, vivid picture and details of the attachment will be most appropriate. However if the plaintiff's claim involves a huge amount of money, it is compulsory to put it in written form; for this makes judgment more precise and prevents

[253] Ibid.
[254] Ibid.

disputes from arising in future[255]. But where a claim is simple and straight forward, it is more appropriate not to put the statement of claim in writing. For most atimes, a verbal statement of claim is clearer than a written statement of claim[256].

4.2.0 **Means Of Proof**

Proof is important under Islamic law, without it claim can not be established in the court. In the same manner the nature of claim plays a vital role in determining which of the parties is to bear the burden of proof, it is also a key to deciding the type of evidence demanded by law from the plaintiff[257]. Means of proof is a name of that which explains or clarifies a claim or right. Means of proof is not limited to evidence of two or four witnesses or even the evidence of a single witness[258]. The proof of Zina (adultery or fornication) requires the evidence of four competent witnesses which should be unanimous about details of the act[259]. The Sharia requires the testimony of two unimpeachable male

[255] Ibid P.21.
[256] Ibid.
[257] Ambali, M.A. op.Cit.p.108.
[258] Ibn al-Qayyim,A.(1996) Turuq al-Hukumiyyah Fis-siyasatish-Shariyyah. Almakatab Al- Tijjaniyyah publishers,(Makkah)Saudi Arabia.P17.
[259] Daura U.M Op. Cit. P.54.

witnesses in all claims involving: Personal status; the claim of consanguinity (Liabb), marital status, claims involving Hadd and claims involving Qisas. All matters relating to property and wealth are proved by means of two male or one male and two female witnesses[260]. The evidence of two male witnesses is required to prove all the cases of dispute on issues peculiar to women folk[261].

Moreover the testimony of an expert is allowed in Islamic law in relation to some scientific, technical, or professional matter by persons qualified to speak with some amount of authority by reasons of their special training, skill, mastery or familiarity with the subject matter in question. The opinion of such a person is valid and admissible[262]. Means of proof in civil disputes are: testimony, confession (or admission) circumstantial evidence, evidence by experts oath and personal knowledge of the judge[263].

4.2.1 **Admission**

[260] Ibid.
[261] Ibid.
[262] Garba Maina v Hajiya Falta & Al-Abana (unreported) suit no Bos/sca/cv/73/2003.
[263] Anwarullah (2006) The Islamic law of Evidence. Khitab Bhavan,(New-Delhi), India.p.17.

Admission (Iqrar) Means voluntary declaration or acknowledgement made by a competent Muslim for the avowal of the right of another, which binds him upon fulfillment of some necessary conditions[264]. In other words Admission is a statement made by a person acknowledging the right of another person upon himself[265]. It is only when the statement of claim is free of any form of ambiguity and the basis of claim is made known to the defendant that the stage is ripe for admission by the defendant[266]. The principle of admission (iqrar) emanates from the Holy Qur-an thus: "Let him who incurs the liability dictate but let him fear His lord and not diminish aught what he owes**"[267].**

In another verse, the Qur'an provides: **"**O ye, who believe, be maintainers of justice, bear witness for Allah, even though it is against your own selves**"[268].**

The Prophet (SAW) is reported to have said in the following Hadith: state the truth even if it is against your self[269].

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[264] Kausani v Kausani(2003) SLR P.49.
[265] Ibn Abidin, M. A. (1982)Radd Al-Muhtar.Maktabah Majidiyah, (Quetta), Pakistan, p.55.
[266] Ambali, M.A. Op.cit.P.102.
[267] Q 2: 282.
[268] Q 4: 135.

The Holy Prophet (SAW) considered admission or confession a conclusive proof in many cases and implemented Hadd on the basis of admission or confession. The Prophet (SAW) executed Ma'iz Ibn Malik on the account of his admission or confession[270]. It has been related on the authority of Jabir ibn Abdillah who said that a man from the tribe of Banu Aslam came to the Holy Prophet (SAW) and confessed or admitted to have committed Zina and gave testimony against himself four times. The Prophet then ordered him to be stoned to death[271].

The person who confesses or admits must be Mukallaf, i.e., a responsible person who is adult and sane. Thus admission by a minor, insane, sleeping person, intoxicated person etc. is not admissible. It is based on the Hadith of the holy Prophet [S.A.W] who said; "Three persons have been exempted: (i)the minor until he attains puberty,(ii)the

[269] Al-Bukhariy.
[270] Ibn-Qudama,M.(1972)Al-Mugni.Dar-Al-Kutub-Al-Arabia,(Beirut), Lebanon. Vol.x p.171.
[271] Al-Bukhari, M.I. (1938) al-Sahih. Karkhanah Tijarat Kutub, Karachi, Vol.II, P.176.

insane until he recovers and(iii)the sleeping person until he awakes"[272].

However the person, who makes the admission, must at the time of making it, be a free agent without any pressure or compulsion. In other words admission of liability under duress is invalid and legally ineffective. It has been reported from the holy Prophet (S.A.W) thus: "My Ummah has been exempted from (the liability) of the action done by mistake, forgetfulness or for which they have been forced to do"[273].

Further more, where the person who admits the liability is not in control of his senses, or is minor or is interdicted (Mahjur) judgement will not be entered in favour of the complainant[274]. It is pertinent at this juncture to point out that the admission of a competent person (to admit liability) who is drunk is binding on him to face the full wrath of the law in the following cases: Qisas and Hadd cases i.e conviction for murder and hurts, or any offence for which

[272] Al-Sana`ani,M. I.(1938) Subulul-Salam Sharh Bulugh Al-Maram. Dar al-fikr(,Beirut)Lebanon.vol.iv.p.78.
[273] Ibn Athir, M.M. (1980) Jami' Al-Usul min Ahadith al-Rasul. Dar al-Ihya al-Turath al-Arabi,(Beirut),Lebanon. Vol.IV.p.136.
[274] Ambali, M.A. op.cit. p. 103.

the Sharia provides a specific or prescribed punishment; setting his slave free and; releasing his wife from marital obligation[275].

The risk of liability under the influence of alcohol does not affect other people's property or interest under his care or custody; neither does it make contracts entered into while he was under the influence of alcohol binding nor valid. As stated in the Sirajus salik: "Intoxication does not make admission of liability in respect of contract binding. However it (intoxication) makes a person liable for the sins he committed, his slave that he sets free, his wife whom he releases from marital obligations and criminal offences he commits"[276]

Another condition which must exist before admission or confession of a person is accepted under the sharia is that: the person who confesses or admits must be capable of self expression. According to Imam Malik, al-Shafi'i and Ahmad the confession or admission of a deaf and dumb person is

[275] Ibid.
[276] Assayid,U.A. (1982) Sirajus salik, Sharhu As-halul masalik. Darul Fikr,(Beirut), Lebanon. Vol. ii p.162.

admissible provided he or she can write his or her confession or admission or his or her signs are intelligible. The admission of writing, signature or seal shall be considered the admission of the writer or executant's of the document. Jurists concur that the confession or admission of a blind person is admissible in all matters.[277]

Moreover a person making admission must be free from state of anger (ghadab). He should not worried or be anxious. It was reported that a companion approached the holy Prophet (S.A.W.) for advice. The messenger of Allah admonished him not get angry. The Holy prophet repeated "do not get angry" many times[278].

Where a competent person makes an admission in favour of another not related to him, such admission should be accepted as true and correct. But if the admission is in favour of a person that can inherit the maker and the admission was made when the maker was healthy, jurists have offered two opinions thus: according to the scholars of Madina, the admission is not valid because there is

[277] Al –San'ani, op. cit. Vol. iv, p. 8.
[278] Reported in Muslim.

suspicion (Taulij). But for the Egyptian scholars, such admission is valid, if it was made at the time when it maker is in healthy condition.[279]

An admission by a maker, who is seriously sick in favour of a person that is neither his friend nor relation, is valid. But where the admission was made in favour of a friend or relation, the admission is void[280]. If a person seriously sick makes an admission in favour of his issue and there is apparent reason to believe it, such admission should be accepted as valid[281]. A sick husband that makes admission in favour of his wife that he seriously loves, and there is no reason to indicate truthfulness of the admission; for instance, it is known he is indebted to the wife, or it was proved that he sold a property owned by the wife; the admission would not be accepted[282]. But if there is glaring reason which indicates the husband's indebtedness to the wife, the admission shall be accepted[283]. If the husband's admission was in favour of a wife that is not known to be

[279] Daura,U.M.op.cit.p.512. Ibn Hajjaj, M. (1930) Sahih Muslim Karkhanah, Karachi.
[280] Ibid p.513.
[281] Ibid p.514.
[282] Ibid p. 515.
[283] Ibid p. 516.

his favourite, the admission is valid and effect should be given to it. Where a person in sickness makes an admission that he is indebted to one of his heirs not his wife, or son; for instance, where the maker of the admission says: he owes his mother while his son is alive, the admission is valid. But where the admission was made in favour of a person that can inherit the admission maker, and he does not have a son or daughter; two views were credited to Imam Malik (RA) thus: the admission shall not be validated and the other view is: It is permissible to affirm the admission[284].

4.2.2. (i) **Essentials Of Admission:**

The first essential element of admission is the formula i.e. the method, form or procedure for making admission. Admission should always be direct and not based on a future event; it must be in clear and precise words without any ambiguity. Ordinarily admission is orally made. The oral admission may be reduced into writing. Admission put into written form is thus secured. It can easily be taken to court to establish or prove the facts admitted therein. The

[284] Ibid P. 517.

Prophet (SAW) is reported to have stated that: It is better to write down your wills as soon as you make up your mind[285].

Movement of a part of the body or gesture by a dumb person is sufficient admission on condition that, it is well understood by majority of the audience[286]. However, silence generally does not constitute admission if the person can speak. It is accepted, though, as an indication of admission by a virgin woman in the acceptance of a husband and the dowry[287].

Secondly, place of admission is another essential element of admission. An admission of a crime should be made in court not outside Court. If made outside the court; it must further be repeated in Court[288]. However Ibn Asim in the Tuhufah states that admission in civil matters can be made outside court in the presence of witnesses[289].

[285] Ibn Farhun, op. cit p. 4.
[286] Abubakar. A.(2008) Islamic Law the practice and procedure in Nigerian Courts. Espee printing and advertising, (Kaduna), Nigeria. P. 126.
[287] Ibn Farhun, op. cit p. 4.
[288] Abubakar,A. op.cit. p.127.
[289] Daura,M.U. op. cit.p.518.

The third element is the acknowledger (or Muqirr) i.e. the person who admits liability is an essential element; without him the admission would not have emanated. He should be Mukallaf i.e. a responsible person who is adult and sane. The admission of the acknowledger must be free from suspicion[290]. Admission of liability does not qualify the plaintiff for judgment automatically. Muqirr, as the defendant who admits liability is referred to in Shari'a, needs to satisfy certain conditions to make the admission of liability valid[291]. The person in whose favour admission is made is part of the 3rd element of admission. The admission of the Muqirr entitles the Muqirr lahu to claim the right from the admission maker.

Then, the final constituent or essential of admission is the subject matter of admission. The subject matter must be lawful and customarily of use and valuable. It should be known and identified[292].

4.2.2 (ii) **Withdrawal Of Admission:**

[290] Ibid p.512.
[291] Ambali, M. A. op.cit. p.103.
[292] Abubakar, A. op.cit. p.128.

A person who makes admission in his full senses cannot withdraw it provided it involves other person's claim such as property, marriage, divorce and similar cases[293]. The same rule applies to blood rights/injuries. If a person confesses to a charge of theft; which is an act that relates to rights of Allah as well as the rights of human beings and then retracts the confession or admission, Hadd will not be implemented on him and he will be held responsible for the stolen property or its compensation[294]. However, if one of the opposing parties admits before a judge and the court takes a decision on the basis of the admission, that judgement is final. His denial does not help him; this is view of the majority. However, Ibn Jallab expressed a minority opinion that, if the judge remembers that he adjudicated and the party denies it, (the court decision or its accuracy) the judge's claim shall not be accepted without an evidence to support it[295].

4.3.0 **Evidence/Testimony**

[293] Mahmud,A.B. op.cit.p.96.
[294] Bahnasi, A.F. (1971) Nizariyyah Al-ithbat Fi al-fiqh al-jina'I al-Islami.Maktabah al-wai'al-Arabi,(Fujala),Egypt.p.189.
[295] Abubakar,A.op.cit.p.128.

Evidence is the true information in court of law about something perceived in order to establish a right or a claim in favour of or against another. It must always come from neutral source, i.e. a witness[296]. Evidence can also be defined as clear cut information based on the personal knowledge of the witness[297]. Al-ju'liy has defined Evidence to mean: information given by an upright competent witness to a judge in order to use it to adjudicate in a matter before his court[298]. In Islamic law, great importance has been given to Evidence. The Holy Qur'an says thus: **"**O ye who believe! Be steadfast witnesses for Allah in equity and let not hatred of any people seduce you that ye deal not justly"**[299]**

In another verse, it is stated as follows: **"**O ye who believe! Be ye staunch in justice, witnesses for Allah, even though it is against yourselves or your parents or your kindred**"[300].**

Concealment of evidence is a great sin. The Holy Qur'an says: "Don't conceal testimony. He who conceals it, his

[296] Ibid p.129.
[297] Ambali,M.A. op.cit. p.107
[298] Ju'aliy,A.U.(1982) Sirajussalik sharh As-halul Masalik.Darul-fikr,(Beirut),Lebanon.p.203.
[299] Q5:8.
[300] Q4:135.

heart is sinful."[301] When a case is brought before a court and the court requires evidence for its decision, it is compulsory for a witness in such case to give evidence before the court.

The Holy Prophet (S.A.W) has made it compulsory for the plaintiff /claimant to produce the proof (evidence) in support of his claim: burden of proof lies on the plaintiff and the oath is on the person who denies[302]. It has been reported on the authority of Wa'il ibn Hajar who said, a man from Hadramaut and a man from Kinda came to the Holy Prophet (SAW). The Hadrami said: "Oh Prophet! This man has wrongfully possessed my land." The Kindi said, "This land is my land and is in my possession. He has no right in it." The Holy Prophet (S.A.W) said to the Hadrami, "Do you have any proof." He said, "No". The Prophet said, "Then you have to accept his oath"[303].

[301] Q2:282.
[302] Al-Baihaqi, A. (1973) Al-Sunan Al-Kubra.Darul fikr,(Beirut),Lebanon, Vol. viii p.177.
[303] Ibn Qudama,M. (1972) Al-Mughni.Dar al-Kutub al-Arabi,(Beirut), vol.xii.p.100.

4.3.1. (i) **Competency Of Witnesses In Islamic Law And Procedure**.

This refers to the legal capacity of persons to be witnesses under Islamic law. Islamic law does not permit everyone to be a witness. To be eligible as a witness and give lawful testimony, there are laid down conditions that must be satisfied by such person. These conditions are as follows:

a. A witness must be adult and sane. This is the unanimous opinion of the jurists of all school of jurisprudence. Their reasons are based on the Hadith of the Holy prophet (S.A.W) which said: "Three persons have been exempted (from every kind of obligation), (i) the minor until he attains puberty, (ii) an insane until he recovers; and (iii) the sleeping person until he awakes".[304] Moreover, a witness must be a person that can understand things. An imbecile or person that can be easily confused cannot give evidence as he is likely to forget what he is supposed to testify on and that may lead to giving false evidence.[305]

[304] Ibid vol. ix p.65.
[305] Mahmud, A. B. op. cit. p.72; Daura, M. U. op. cit p.35.

b. Besides being adult and sane, the witness must be Adil (just): a person of irreproachable and good character and not be liable to suspicion. Allah said in the Holy Qur'an: ".... get two witnesses out of your own men...."[306]. A witness is a person who does not commit major sins and abstains from the minor ones and at the same time avoids anything that may bring disrepute to himself even if it is lawful[307]. According to the Shafi'i school, a just witness is a person who refrains from capital sins and does not persist in minor sins and thus models his conduct upon the respectable among his contemporaries and fellow country men[308]. A witness that is Adil (just) is generally considered as a reliable person in his community and he is not notorious.

c. Islam is also a condition for becoming a witness. Evidence of a non Muslim is not admissible in Islamic law of evidence and procedure. According to Imams Malik, al-Shafi'i, and Ahmad, the evidence of a non-

[306] Q2:282.
[307] Mahmud,A.B. op. cit. p.72;Daura,M.U. op.cit. pp.35-36.
[308] Al-Nawawi, A.(1958) Minhaj al-Talibin wa umdah al-muftiyyin.Matba'ah Abdul Hamid,(Cairo),Egypt p.141.

Muslim is not admissible for or against a Muslim nor for and against non- Muslim. They based their view on suratul Baqarah, verse 228: “And call to witness two (Adil) persons among you”. And a non-Muslim can’t be adil, because he is considered as non-reliable. But according to Imam Abu Hanifah, the evidence of a non-Muslim is admissible for and against a non Muslim. He bases his view on the reasoning that though they are not adil for Muslims but they may be reliable for one another. Moreover, the Holy Prophet (S.A.W) has accepted the evidence of Christians among themselves. This is also one view of Imam Ahmad, Ibn Taimiyyah and Ibn-al-Qayyim.[309]

If a non Muslim is mentioned as a witness and he later becomes a Muslim he may appear in court and give evidence. However, non-muslins are allowed to give expert opinion in court but such opinion cannot be regarded as evidence. In fact pagans or idol worshippers and Muslims who are not just, may be allowed to give their expert opinion

[309] Audah,A.(1978) Al-Tashri’ al-Jina’I al-Islami. Dar al-Kutub al-Arabi,(Beirut),Lebanon, vol. ii, pp405-406.

or evidence on condition of health regarding to something. Such opinion cannot be taken as evidence.[310]

Moreover, there are jurists that have accepted the evidence of non Muslims. Their reason is that; the caliber and number of witnesses varies from claim to claim; in the same manner, circumstances may dictate the types of witnesses required in any given cause or matter. For instance, the Qur'an 65:2, states: **"**Then when they are about to reach The limit of their prescribed term, Retain them with kindness, or part With them in a suitable manner, And call to witness two just persons From among you..."

According to the jurists, the above text refers to witnesses needed by Muslims who decide to rescind their decision to divorce their wives and recall them before the expiration of the waiting period. The scholars went further to say Qur'an 2:282 speaks of kinds or classes of witnesses Muslims require to enter into a loan contract. The verse states thus:

> O ye who believe! When you borrow one from another for a fixed period, then write it down and let a scribe

[310] Mahmud, A.B. op. cit. P.72.

> write it in your presence faithfully; and no scribe should refuse to write it, because Allah has taught him, so let him write. Let him who incurs liability dictate and should fear Allah his Lord and not diminish any thing therefrom. But if the person incurring the liability be of low understanding or be weak or be unable himself to dictate, then let someone who can guard his interest dictate with justice. And call two witnesses from among your men, and if two men are not available then a man and two women of such as you approve as witness ...

These jurists argue that the above Qur'anic injunctions restrict the witnesses to Muslims but there is no evidence in the verses or some where else to show that there is a universal restriction of witnesses in all matters and causes to Muslims[311]. With respect to the matter of adalah, the jurists opine that the honesty of a witness counts more than the apparent faith (of Islam) he professes in matters of evidence. The Qur'an does not say that all non-Muslims are dishonest: "Among the people of the book, there is he who, if thou trust him with a treasure, will return it to you..."[312]. However the scholars went further to cite Q5:106:

[311] Ambali, M.A. Op. cit.P.113.
[312] Q 3:75.

> O ye who believe, the right evidence among you, when death comes to one of You, at the time of making a will is of two just men from among you or two others not from among you in case you be journeying in the land and the calamity of death befalls you....

The above quoted verse, according to the scholars was directed to the people of Islamic faith and non Muslims. In other words non Muslims in the circumstances of the afore-mentioned verse can be witnesses. Imams Malik and al-Shafi'I state that, the verse (Q 5:106) has been abrogated[313]. But according to the jurists that support testimony of non Muslims the verse has not been abrogated. Ummul Mu'minin Aisha (RA) is reported to have said that, none of the verses in Suratul Ma'idah (chapter 5) was abrogated[314].

Moreover, Dr Anwarullah is of the opinion that, depriving non-Muslims of giving evidence for and against one another is not fit in the present circumstances. It will be in the interest of the present

[313] Sabiq, S. (1983) Fiqhus sunnah. Daul-fikr, (Beirut), Lebanon,4th Edition,vol. iii,pp.333-334.
[314] Muhammad, A.A. (nd) Tafsir Ayatul Ahkam. Muhammad Ali Sabih, (Cairo) Egypt, vol. iii, p.226.

day situation in Muslim countries to allow non Muslims to give evidence for and against one another in matters other than hudud. He went further to state that evidence of non Muslims may also be accepted for and against Muslims in matters other than hudud because there is no express verse of the Holy Qur'an and Hadith which prohibits the acceptability of the evidence of a non Muslim. On the contrary, according to Q5:106, the evidence of two non Muslims for a Muslim is acceptable in connection with his will at the point of his death during a journey when Muslims are not available there.[315]

Kadi Ambali also shares the same opinion with Dr Anwarullah. As he put it: "....that the multi religious nature of our society where Muslims and people of other faiths freely intermingle in all spheres of life can be logically reasoned as factors making the non Muslims acceptable as it was laid down in the Qur'an 5: 106 in

[315] Anwarullah, op.cit. p.22.

the circumstances of being on a journey, threat of death or other factors of necessity"[316].

Looking at the arguments of the jurists for and against admitting the testimony of a non Muslim, it is clear that in view of the changing times and circumstances, it is the opinion of this researcher that evidence of non Muslims in cases other than Hadud should be accepted in our Shari'a Courts most especially where credible Muslim witnesses are not available.

d. Another condition that must be satisfied by a witness before testifying in court is: freedom. A slave cannot be a witness[317] because he cannot hold sensitive positions such as the office of the judge, leading Muslims in daily prayers e.t.c. A slave cannot discharge any responsibility; he has no control of himself let alone to control another person[318]. But when he regains his freedom he can testify on what he witnessed when he was a slave, provided he did not testify on the issue

[316] Ambali, M.A. op, cit. p.113.
[317] Mahmud, A.B. op. cit. p.73.
[318] Daura, M. U. op. cit. p. 36.

before a judge and the evidence was rejected on the ground of slavery. Ibn al-Qasim is quoted to have said:

> If a minor, or a slave, or a Christian testified in the past, and the testimony was not accepted, and later on, the minor becomes of age, or the slave regains freedom or the Christian accepts Islam, if they testify again on the right of which the evidence was earlier rejected, their later testimony would still not be admissible.[319]

4.3.1. (ii) **Procedure Of Giving Evidence**

In the normal course of a civil trial the plaintiff is called upon to establish his claim by evidence. A party comes along with his witnesses to court but where securing the attendance of the witnesses appears to be difficult, the court's assistance is sought by issuing a summons to command the appearance of the witness at a fixed time and place to give evidence. On the hearing date when the case is mentioned, parties or their proxies appear and witnesses shall be called upon and be asked to stand in between the parties while other witnesses be asked to be out of court and out of hearing.

[319] Ibid p.45.

In case where the judge does not know the witness in person or he is in doubt about his credibility, the judge should commence taking evidence by recording the witness name, age, religion, his relatives, where he resides, the mosque where he prays, his natural make up whether he is deformed; e.t.c.[320].

The court shall remind the witness about God and inform court on what he knows, he saw, or perceived with any of his senses but not what he was told. Although, a witness is not required to swear before giving evidence; it is permitted to administer oath to a witness when the need to do so arises. Khalif Umar ibn Abdul- Aziz said: Administer justice in the light of what prevails in a society[321]. The Kano State Sharia Court of Appeal in the case of Estate of late Binta Yusuf Ahmad v Estate of late Yusuf Ahmad,[322]the court held that, there is nothing wrong for a court applying Islamic law to swear a witness before testifying. The court quote thus: "..... Ibn Farhum was reported to have said: a judge can compel a witness to take an oath.... If he doubt

[320] Ibn Farhun, op. cit. p. 207.
[321] Mahmud, A.B. op. cit. p.67.
[322] (2007) 2 Rsmnw p. 73.

his credibility....[323] In Al-Fiqhu al-Islam Wa Adillatuhu it was also stated: "witness oath is an oath that is subscribe by a witness before testifying in order for the judge to be sure of the truthfulness of his testimony",[324] to support its decision.

If a witness testifies and his testimony agrees with the statement of claim, the judge shall give the defendant the opportunity to cross examine him. Where the defendant discredits the testimony of a witness such evidence shall be rejected[325]. But if he fails either to impeach the witness or rebut his testimony then the evidence shall be admitted. The judge shall apply the same procedure to all witnesses; every witness of the plaintiff shall be cross examined except that the witness, who testifies as to the credibility of another witness, shall not be cross examined. The plaintiff shall be allowed to examine his own witnesses and the judge shall allow every witness to defend him self in reply to the cross examination[326].

[323] Alish, A.M. (nd) Fathu aliyi al-Maliki Fi al-Fatwa ala Mazhabi al-Imam Malik. Dar-al-fikr, Beirut, Vol.2 P.311.
[324] Zuhaily, W. (1989) Al-Fiqhu al-Islami Wa Adillatuhu. Dar al-Fikr, Beirut, Vol.6, P.600
[325] Order 11 Rule 6 of the Kano State Shari'a Courts (Civil Procedure) Rules, 2000.
[326] Ibid.

It should be noted that a defendant is expected to raise objection on any of the grounds under shari'a; such as the witness is an ascendant or descendant of the plaintiff; husband or wife to the plaintiff and any other person who as a result of giving the evidence will obtain some benefit, or avoid some loss.[327] Once the objection is raised, the court shall ask the witness whether the allegation is true or not. If the witness admits the allegation, the evidence shall be rejected. If the witness denies the allegation, the defendant shall bring two or more witnesses to impeach the credibility of the witness or his evidence so as to prove the allegation. The court shall continue to give such chance to the defendant until he is exhausted of all the defences and finally responds to the court that he has no further objection (Ta'ajiz) either on the witnesses or on their testimony before the court. The judge shall continue to call the plaintiff's witnesses to testify one after the other in the manner stated above until the plaintiff is exhausted of all evidence and says that he has no further witnesses to call to testify on his behalf. It is important to note that the

[327] Mahmud, A.B. op. cit. P.107.

above procedure of giving evidence is the same to be adhered to by every party who has the evidential burden shifted on him to prove his claim in matters of either claim of a right (Haqq) or a claim to establish a dispute of a right (istihqaq).[328]

4.4.0 **Documentary Evidence**

Document means any matter expressed or described upon any substance by means of letter, figures or marks, or by more than one of these means, intended to be used, or may be used for the purpose of recording the matter. According to Islamic law it includes any written, printed or inscribed material which gives information[329].

The basis of documentary evidence lies in the holy Qur'an where it states thus:

> O ye who believe! When you deal with each other in transactions involving future obligations in a fixed period of time reduce them to writing. Let a scribe write down faithfully as between the parties: Let not the scribe refuse to write: as God has taught him, so

[328] AT-Tasuli A.A. op. cit.98.
[329] Ibn-al-Qayyim,(1973) Turuq al-Hukmiyyah Fis-siyasatish-shar'iyyah. Matba'ah al-Muhammadiyyah, (Cairo), Egypt. Pp.204-213.

> let him write. Let him who incurs liability dictate, but let him fear his God, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully - - - - And be not loath to write every contractual provision, be it small or great, together with the time at which it falls due; this is more equitable in the sight of God, more reliable as evidence, and more likely to prevent you from having doubts (later)...[330]

What can be distilled from the meaning of the afore-mentioned verse is that in order to prevent doubts and disputes writing is enjoined and that whatever is in writing is suitable as evidence and may be adduced as proof of the existence of transactions; to identify the persons involved in the transaction; to establish the signature of any signatory to a document; to identify the handwriting of a maker of a document who is either dead or cannot be found and to create obligations[331]. According to the Zahiri School, Q2:282 has made documentation a requirement of every loan, or any form of deferred payment. This in their view is more conducive to the fulfillment of contracts and prevention of

[330] Q2:228.
[331] Abubakar A. op.cit. p. 180.

disputes among people[332]. In Islamic law, pen and writing are shown to be of immeasurable significance as Allah has sworn by them: ...by the Pen and by the record which men write"[333]. Furthermore, the Holy Qur'an has permitted the use of writing and documentation in freeing a slave[334].

Moreover, at the advent of Islam, the art of writing was very scarce and only few could read and write. As such the Prophet (S.A.W) encouraged early Muslims to learn the art, so much that he made it clear to many captives in the battle of Badr that any one of them who could teach ten of the young Muslims writing, he will be set free. This shows the significance Islam attaches to writing and documentation[335].

The Holy prophet (S.A.W) has sanctioned documentation or writing of a will or bequest (wasiyyah). Ibn Umar reported that, the Messenger of Allah (S.A.W) said: **"**It is not right for a Muslim who has property regarding which he must make

[332] Abu Zahra, M. (1958) Usul al- fiqh. Dar al-fikr al-Arabi, (Cairo) Egypt,p. 75.
[333] Q 68:1.
[334] Q 24:33.
[335] Abubakar, A. op. cit. p.179.

a will that he should sleep say, for two nights but that his will should be written down with him"[336].

Generally, early jurists put little weight on the documentary evidence and in its stead placed more emphasis on admission, oath and oral evidence as the means of proof, maintaining that evidence of handwriting/documentary evidence is a weak form of evidence which could only be relied upon when there are no other means. Later some Maliki jurists, accorded documentary evidence significance even though according to them is unreliable, as writings may be similar, they however accepted it saying: evidence of handwriting is admissible even if one may resemble the other[337]. They maintain that documentary evidence is secondary evidence that can only be resorted to in the absence of oral evidence. They observed that its application should be limited to property and monetary claims, cases of marriage, divorce, emancipation and wakf, and, as such, admissible in transactions but inadmissible in cases related to Hadd punishment[338]. An example is where a husband

[336] Ambali, M.A. op.cit. p.295.
[337] Ibn Farhun, op.cit.p.356.
[338] Kabara v kabara (2006) 3 SLR p.115.

writes his wife a letter of divorce, the letter is admissible in evidence unless denied by him; but if two witnesses give oral evidence identifying the writing to be that of the husband, he is bound by the content of the letter[339].

Muslim jurists have, over time, developed the use of documentary evidence, called alal-khatti. if an author recognizes and acknowledges any written document as his writing as well as his mark or signature but he forgets the content of the document, he shall be allowed to rely on what he wrote and to state to the court the content (as he knows it). This is on the condition that there is no sign of alteration or mutilation on it. If there are alterations, or mutilations or erasures he would not be allowed to offer it as testimony[340].

However, where a written piece of evidence whose author cannot appear in court due to unavoidable circumstances of death or travelling away from the jurisdiction of the court to a very far away place, such written evidence requires two upright witnesses to testify: to the traveler's or deceased person's writing; to his competence as a witness on the

[339] Abubakar, A. op. cit. p. 181.
[340] At-Tasuli, A.A. op.cit. p. 101.

issue at stake at the time the knowledge was acquired till he died or up to the time of the litigation, if he only travelled. They may be the same persons who identify the writing and certify the competence and they may be two separate persons[341].

Al-lakhmi regarded such evidence as a piece of evidence necessitated by the death or unavoidable absence of the author and the desire of justice to ensure that available evidence is not thrown away for any good reason. However, jurists have held divergent opinions on such evidence. Those who support it, cite the letter of Marwan Ibn Hakam to Muhammad Ibn Abubakar As-Siddiq(R.A), which was identified and worked upon by Uthman, Aliy, Talha, al-Zubair and a host of other companions of the Holy Prophet (S.A.W). Abdullahi Ibn Umar wrote his allegiance to Abdulmalik Ibn Marwan.[342]

Khalil in his Mukhtasar stipulated the terms of admissibility of such written pieces of evidence saying: that, the witness perfectly knows the author and guarantees his

[341] Ibid. p. 103.
[342] Ibn Farhun, op. cit. pp.359-360.

uprightness. He should also confirm that the author possesses the attributes of a competent witness at the time he acquired the knowledge of the evidence, the time he reduced it to writing and up to the time of his death[343]. Another category of written evidence is: the one written by the author voluntarily, admitting liability and later turns round to deny responsibility. This is written evidence produced against a defendant in whom there is no trace of coercion and he turns round to deny being the author. Or the author died and his heirs denied that he (the deceased) was the maker of the written Evidence. The complainant needs only two competent witnesses to confirm that the piece of evidence was written by the deceased author, or a living defendant that is denying the written evidence. The consensus view of jurists is that judgment will be entered in favour of the plaintiff. The minority view stresses that the Plaintiff shall be subjected to complementary oath to provide assurance. This is reasonable particularly in the case of a deceased person[344].

[343] Al-Azhari, S. A. op.cit.p.241.
[344] Ambali, M.A. op. cit.p.119.

Decision of a judge is akin to evidence, in another version it is said, there is distinction between judgment and evidence[345]. If a judge discovers a written judgment in his record, and he is sure that the decision was written down by him, not procuring evidence on the content of such judgment at the time of making it in another version, jurists are of the opinion that, the written judgment is equivalent to evidence; and the judge shall execute the decision; because forgetfulness is a defence in Islamic law, save there is doubt attached to that written judgment[346]. Once there is doubt in the judgment, it should not be executed because such judgment cannot be equivalent to evidence[347].

Moreover, if a person in his free will and in his right senses acknowledges indebtedness in his handwriting to another or confirms a trust given to him by another fellow, e.t.c. if afterwards he dies without paying back the debt or is unable to return the trust to its owner and his heirs challenge the writing; or the debtor during his life time denies that he never acknowledged such thing in writing,

[345] Tuhufah, Rule 127.
[346] Daura, M U op. cit. p. 4.
[347] Ibid.

the judge is to confirm the authenticity of the writing with two credible witnesses; if the judge is satisfied with the evidence of the witnesses, judgment should be entered against the maker without giving oath to the plaintiff. This is the popular opinion of the jurists because the evidence of the two competent witnesses of the handwriting is the same as testimony of two witnesses to an admission. But there are jurists that insist that the oath must be taken[348].

The current position over documentary evidence is that it has acquired the status of oral evidence since writing/ documents have become of common use in all official business functions and handwriting or signature. Experts are more available now than before. Further legislation has been made to strengthen the genuineness and authenticity of official documents duly certified as valid as oral evidence[349].

4.5.0 **Hearsay Evidence**

Hearsay evidence is called shahadatus-sama'i in Arabic. It is evidence whereby one or more witnesses relate what they

[348] Ibid p. 50.
[349] Abubakar, A. op. cit p. 186.

heard from the generality of people generally conveying the occurrence of a certain act which is common knowledge[350]. This evidence[351] transmits information about knowledge of a thing heard by a large number of people; reported information strongly indicates the existence of a fact.[352] According to the Tabsiratul Hukkam shahadatus-sama'i is evidence whereby two or four witnesses transmit or relate information they heard from different sources about the happening of an event. The witnesses cannot state with certainty from whom they heard the information because it is notorious.[353]

The general rule is that a witness should not give evidence in court unless he has actually directly seen the incidence himself and that he was sure of all that happened. The Holy Prophet (S.A.W) is reported to have said: **"**If you see a thing like the sun, give evidence on that and not otherwise**"[354].** Hearsay evidence is the weakest means of proof; due to the weakness of this type of proof, its admissibility is restricted

[350] Ibid p. 189.
[351] As stated by Ibn Rushid quoted in the Tabsirah.
[352] Ibn Farhum Op. Cit. PP. 345 – 346.
[353] Ibid PP.346 – 347.
[354] Al-Baihaqi, A. op. cit. vol. viii.p.132.

to a number of cases thus: Pregnancy, marriage, suckling waiting period (Iddah), inheritance, birth, becoming a Muslim or accepting Islamic faith, apostacy, attacking credibility of a witness, guardianship in marriage, adulthood, will, proof of ownership through prescription, endowment, Removal of leader, appointment of a judge, cruelty between spouses[355]. Other cases in which Islamic law has permitted the use of hearsay evidence are: trust property, death, testimony that person is a fool or imbecile, divorce, entering into business transactions, running away of a slave from his master, inability of a debtor to settle debts due to poverty, capturing of a Muslim by enemies at the battlefield, freeing of a slave, establishment of kinship, pledge and war booty[356].

4.5.1(i) **Conditions For The Admissibility Of Hearsay Evidence:**

The conditions under which hearsay evidence will be accepted in Islamic law are:

(a) It is the only evidence; there is no other evidence to confirm the case.

[355] Daura, M. A. op. cit. pp. 71-77.
[356] Mahmud, A. B. op. cit. pp. 88-92.

(b) The story must be widespread, the witness must state that the story has spread and he has heard it from reliable people, otherwise his evidence will not be accepted. If he mentions names of the people from whom he heard the story his testimony will not be accepted[357].

(c) Witnesses must not be less than two: the evidence of one person will not be acted upon. If two people testify that they heard a story and later about one hundred people from the same town testify that they are the elders from the same town and the case involves an old story[358]. However women are not competent to testify on hearsay evidence. In other words only men are allowed to testify. Persons who produce witnesses who give hearsay evidence must subscribe to an oath before their right is confirmed because of the weakness of the evidence. The witnesses must testify to what can be seen. If a plaintiff produces witnesses who testify to hearsay evidence and the defendant produces witnesses whose testimonies are not based on hearsay the court will accept the evidence of the witnesses produced by the defendant and

[357] Ibid p.88.
[358] Ibid.

disregard the testimony of those who base their evidence on hearsay[359].

4.6.0 **Expert Evidence**

Expert evidence is a means of proof in Islamic law of evidence and procedure. Expert evidence means, the testimony which is given in relation to some scientific technical or professional matter by experts to speak authoritatively by reason of their special training, skill or familiarity with the subject in question. Opinion of such a person is valid and admissible[360].

Opinion of experts or evidence has been recognized by the Qur'an and given due relevance in Islamic law: "We granted inspiration: if you realize this not, ask of those who have knowledge"[361].

The Sunnah of the holy Prophet (SAW) has also recognized expert evidence. It has been related on the authority of Aisha (RA) who said that one day the holy Prophet(SAW)

[359] Ibid.
[360] Garba Maina V Hajiya Falta & Al Abana(unreported) suit No BOS/SCA/CV/73/2003.
[361] Q 16:43.

came to her and said with extreme happiness, “Oh Aisha, don’t you see that Mujazzaz al-Mudlaji came and saw Usmah and Zaid lying being covered with a sheet in a position that their heads were covered but their legs were not covered and said these legs are from one another, Mujazzaz al- Mudlaji was an expert of lineages”[362].

Khalifah Umar practically introduced the testimony of experts in suits involving question of techniques. Experts of the particular sciences or arts in question were called to give testimony in court. For instance, Huti’ah wrote against Zabarqan B. Badr a satirical couplet, in which, however, the verse in dispute was not clear. Zabarqan lodged a complaint in the court of Khalifah Umar. It was a case of poetical technique, and a poetical terminology and the terms of expression were different from those of common speech. Khalifah Umar, therefore invited Hassan Ibn Thabit, a poet of great distinction and eminence, to give evidence, and delivered judgment in accordance with his expert opinion[363].

[362] Al-Bukhari, M.I. (2004) Sahih Bukhari. Mul’assatul Mukhtar Company, Cairo, Vol.3; PP.1503-1504.

[363] Ullah, A.M. op. cit. p.7; Nu’mani, S. (1939) al Faruq (English Translation by Zafar Ali Khan) Sheikh Muhammad Ashraf, (Lahore) Pakistan, vol. ii p.74.

It has been related in the Muwatta Malik on the authority of Abdullahi Ibn Abi Bakr who related from his father who related from Amrah bint Abdul-Rahman who said that a thief stole some fruits in the period of Khalifah Uthman. The Khalifah ordered that its value should be fixed by an expert. Thus its value was fixed at three dirhams equal to 12 dinars[364] (sic): $^1/_4$ dinar. Khalifah Uthman ordered the amputation of his hand[365].

However, jurists are of the opinion that when a judge faces much difficulty in some scientific, technical or professional matter he should seek the opinion of experts to determine the fact in issue. One expert is sufficient in any case, if more than one is not available[366]. The author of the Bahjah stipulates one or two experts also: one witness is enough to give expert opinion evidence[367]. The consensus in the Maliki School is that one witness suffices. The essence of two is to have the benefit of the second expert opinion. The testimony of an expert is viewed as valid and admissible

[364] Ibid.
[365] al-Sarkhasi, S. M. (1324) Al-Mabsut. Matba'ah al-Sa'adah,(Cairo), Egypt, vol. 9 p. 206.
[366] Anwarullah, op. cit. p. 81.
[367] At-Tasuli, A. A. op. cit. p. 113.

without regard to the sex of the expert[368]. However, non Muslims are allowed to give expert opinion in court but such opinion cannot be regarded as evidence. Pagans or idol worshippers and Muslims who are not just may be allowed to give their expert opinion or evidence on matters relating to health regarding something. Such opinion cannot be taken as evidence[369].

4.7.0 **Oath**

An oath plays a vital role in Islamic judicial proceedings and once taken by a party it is conclusive i.e. the party taking the oath is entitled to any judicial relief he is seeking and further evidence is unnecessary[370]. Oath has been defined as: "An utterance accompanied by invocation over a matter which will not be proved except by way of oath over past or future issue"[371]. Oath is a positive or solemn

[368] Ambali, M.A. op. cit. p.109.
[369] Al-Azhari, S.A. op. cit. p. 48.
[370] Umma V Bafullade (1997) 11 NWLR (pt 529) p.363.
[371] Othman, M.S. (2003) An Introduction to Islamic Law of evidence. Open Press publication. P. 56.

statement in the name of Allah to affirm the truth of a person's statement.

The origin of oath is traceable to the Hadith of the Prophet (S.A.W) that: it is the responsibility of one who makes an assertion to establish the claim, while oath is imposed only on whoever denies liability[372]. al-Bukhari and Muslim have narrated from Ash-hab ibn Qais, that there was a dispute between Ash-hab and another person pertaining to a well, they went to the Holy Prophet (S.A.W) for the settlement of the dispute. The Prophet (S.A.W) said: "Your witness or his oath". Ash-hab said: "O Messenger of Allah (my disputant) is fond of swearing without minding the consequences". The Prophet (S.A.W) warned that: Whoever swears in order to appropriate the property of a Muslim unduly, Allah will be angry with him in the hereafter[373].

Ibn Asim has stated that: the plaintiff is required to bring witnesses notwithstanding his character whether he is of good or bad character to testify for him. The defendant is

[372] As-Sundi, A.A. (1996) Sunanu Ibn Majah. Darul Ma'arifa, Beirut, Vol.3, 1st Edition, P.96.
[373] Sabiq, S. op. cit. p.448.

required to take an oath in the event of failure of the plaintiff to bring forth witnesses[374]. Thus if the defendant takes an oath, decree will be given in his favour, and if he refuses to take the oath then, according to Imam al-Shafi'i, the plaintiff will be required to take oath and if he takes it, the claim against the defendant will stand proven except in cases of hadd and qisas[375]. Litigants are not to be given oath indiscriminately. Islamic law of evidence and procedure has provided circumstances under which oath should not be administered to parties, where the plaintiff fails to produce witnesses to prove his claim; in claims that can only be proved by witnesses, the plaintiff's claim is to be dismissed, for instance, in a dispute on revocation of divorce against wife before finishing iddah, if the wife claims that she had already finished the iddah at the time of the purported revocation of the divorce, the husband's case should be dismissed, if he fails to support his claim by testimony of two credible men. The same legal principle

[374] Tuhufah Rules 24-25.
[375] Al-Nawawi, A. op. cit. p. 142.

applies to a wife, who claims divorce by her husband but fails to produce the evidence of two credible men[376].

In search of justice, Islamic law of evidence and procedure provides for various kinds of oath. Like the determination of who should be saddled with the burden of proof and the kind of evidence needed depends upon the nature of the statement of claims, likewise the nature of oath to be given to a party, depends on the nature of claim on the one side and the parties involved in the dispute on the other[377]. The first kind of oath is: Yamin al-Tuhmah. It is an oath to be administered on the defendant to exonerate himself from the allegation made against him by the complainant and the latter fails to produce witnesses to support the allegation. If the allegation is so strong and the accused/defendant denies it, he would be required to subscribe to an oath of exoneration. But if the allegation is mere suspicion or is not strong, oath would not be administered to the accused/defendant[378]. The circumstances that show the

[376] Dusuqi,(nd) Hashiyatud Dusuqi ala sharh al-kabir. Darul fikr,(Beirut), Lebanon, p.151-152.
[377] Ambali, M. A op. cit. p. 119; Daura, M.U op. cit. p.89.
[378] Daura M. U. op. cit. p 93.

strength of the suspicion is evidence that a sort of association occurs between the two parties. It is khultah[379].

However, where the allegation is so strong and the accused/defendant is ordered to subscribe to an oath of exoneration and he declines, such allegation stands proven, judgment should be delivered against him without asking the complainant to take oath. In the case of Adunni vs Atanda, the Shari'a Court of Appeal Ilorin held that, the allegation made by the plaintiff/appellant against the defendant/respondent is very strong. Hence, the court invoked Hadith 1470 Zarqani's Commentary of Imam Malik and import oath of exoneration (Yamin al-Tuhmah) on the defendant/respondent. He declined and he was held liable[380].

Yaminul qadai or oath of judgment; it is an oath to be given to the plaintiff who makes a claim against a deceased person, or absent party and he has proven his claim through witnesses, the court shall, in addition, order him to

[379] Al-Azhari, S. A. op. cit. p. 226.
[380] KWS/SCA/CV/3/84/. Judgment delivered on 10/08/84.

subscribe to an oath of judgment[381]. In the case of Mu'azu vs Amadu,[382] the plaintiff/appellant sued at the Lokoja Area court to claim a house from the defendant/respondent. The original owner of the house was a sister to the defendant /respondent and a wife to the plaintiff/appellant. The plaintiff/appellant claimed that his deceased wife and a sister to the plaintiff/respondent had made the house a gift hibah to him, before she died. He added that he had taken full control of the house before his wife died. The defendant/respondent challenged the gift and insisted that the house be part of the estate of her deceased sister. The Shari'a Court of Appeal found that the gift had been perfect as such it did not form part of the estate. However, since the claim of gift and its transfer was made against a deceased person, the plaintiff/appellant was caused to take the Yaminul qada'i (oath of judgment).

Oath of rebuttal is another kind of oath; it is referred to as Yaminul munkar. This is an oath that is given to the plaintiff in respect of a claim denied by the defendant and the plaintiff fails to produce witnesses to support his claim.

[381] Daura M. U. op. cit. p. 89.
[382] KWS/SCA/6/83 judgment delivered on 28/2/1984.

The court in this circumstance will ask the defendant to swear in order to ward off the plaintiff's claim[383]. If the defendant takes the oath that is the end of the plaintiff's case; the defendant would be exonerated from the liability of the claim. But if he declines to swear, the plaintiff will be required to take the oath, if he swears the defendant must settle the liability. However, if the plaintiff refuses to subscribe to the oath his case will be dismissed[384].

The last category or kind of oath is the complementary oath: (Yamin ma'a shahid). This kind of oath is to be given to the plaintiff where he makes a claim of right against the defendant and the defendant denies the claim. In this situation the plaintiff is only able to produce one competent witness whose testimony supports the claim. The plaintiff is to support or complement the testimony of the single witness with an oath[385]. In the case of Dantoro v Manager,[386] the plaintiff /respondent filed an action against the defendant/ appellant before an Area Court claiming the expenses he incurred in an unsuccessful

[383] Daura M. U op. cit. p. 89.
[384] Ibid p.95.
[385] 141. ibid p.92.
[386] KWS/SCA/APP/7/89.

attempt to marry the defendant/appellant. He listed thirty items of claim and called four witnesses. The trial court awarded some money against the defendant/appellant in favour of the plaintiff/respondent. The defendant disagreed with the judgment, she lodged an appeal before the Shari'a Court Appeal sitting in Lokoja. The court came to light that certain claims were half-established because they were supported with the evidence of one witness. The court then ordered the plaintiff/ respondent to support his half-proved claims with the oath of perfection or complimentary oath.

Oath under Islamic law of procedure is to be administered to persons capable of observing religious duties[387]. Jurists are divided in respect of an oath taken by an intoxicated person. This is as a result of the fact that his state of mind is impaired by alcohol. Jurists who consist of Rabi`ah, Laith, Daud Al-Zahiri and Al-Muzani are of the view that an intoxicated person's oath is not valid, because he lacks control over his mental faculty, and once the mind is incapacitated, it is like the person has become a lunatic[388]. On the contrary, the proponents of the validity of a drunken

[387] Othman, M. S. op. cit. p.99.
[388] Ibid p.100.

person's oath insist that, such oath is admissible provided the intoxicated person is a Muslim and a Mukallaf. The jurists cite a Qur'anic verse to support their view thus: **"**O you who believe do not come near prayers while in a state of intoxication, until you know your utterances**."**[389]

However, an adult person who is an imbecile, whether a slave or not, if he claims a right and brings one competent witness, oath should be offered to him and the right granted to him. The complementary oath would not be extended to such a time as he becomes rational (Rashid). But some jurists maintain that the oath should be postponed until he becomes rational. However, if he fails to take the oath it would be reversed to the plaintiff. This is the view of Ibn al-Qasim[390].

Moreover, where a minor is claiming a right against a deceased person or absent party, and the claim has been proven by witnesses, it will be required of him to fortify the proof with an oath. However, in view of his status as a minor, the oath will be stayed until he becomes adult. The

[389] Q. 4:43.
[390] Daura, M. U. op. cit. pp. 98-99.

property in contention will be taken away from the custody of the defendant and kept by the court. It will be handed back to him if he takes an oath on attaining adulthood. But if he declines, it will be returned to the defendant[391].

Where a minor's claim is proven by way of one witness only, and the defendant denies the claim, he will be required to subscribe to an oath of denial, after which the subject matter of the claim will be placed in the custody of a trusted person or public treasury (Baitulmal) for safe keeping until the child becomes adult. He will then complement the established proof with an oath so that he becomes entitled to the property. The judge should write down what transpired on the issue and call witnesses to attest to the proceedings, even if the judge is transferred or dies, or the witness dies, the case can, on the basis of the record of proceedings, be continued by the subsequent judge[392]. Also, where the defendant declines to take the oath; the subject matter will be given to the minor immediately.[393] If the minor becomes adult and refuses to subscribe to the oath,

[391] Ibid p. 99.
[392] Ibid p.100.
[393] Ibid.

the claim shall fail, and the subject matter of litigation will be returned to the defendant[394].

Where the party is to take an oath pertaining to a property that is up to a quarter ($^1/_4$) of a dinar or more in value, it is compulsory for him to subscribe to the oath in a Friday mosque except the claimant of the right consents to the oath being taken in any other place not the Friday mosque[395]. If the person to swear is male he should take the oath at any time the court deems appropriate. And if the party to subscribe to the oath is a female and she is allowed to go out of her house in the day time, the court can order her to swear at any time it deems fit[396]. But if the person to swear is a female that only goes out in the night, she should take the oath in the night if the subject matter of the claim is about one dinar or thereabout. Ibn Hajib subscribes to the oath being taken in a mosque even if the value of subject matter of litigation is a quarter ($^1/_4$) of dinar or more than that, this is the popular opinion of the jurists. Ibn al-Qasim has reported that, Imam Malik used to say: The

[394] Ibid.
[395] Ibid. p. 88.
[396] Ibid.

person to swear should take the oath in a mosque if the subject matter of litigation is up to a quarter of dinar or more than that. But if the subject matter is less than a quarter of a dinar, the oath should be administered in court or any other place[397]. And the oath taker should subscribe to the oath while standing not seated, facing al-Qibla[398].

If any person ordered to take an oath in a mosque refuses and says he would take the oath in a different place of his choice, such act is taken as a refusal to swear, and the oath would be reversed to the other party. But if the value of the subject matter of litigation is not much, oath can be taken any where[399].

The formula for oath taking is that, the person to swear is not allowed to swear by names, except by the names of Allah and His Main traits[400]. Jurists have developed various formulae on the Sigha of oath. When the Prophet (SAW) taught a Companion how to swear, he said to Him "swear

[397] Nowadays oath is not regularly subscribed in Mosque; the judges preferred to give the oath on a party inside the Court. This practice is contrary to the well established practice of Maliki School of Law.
[398] Ibid.
[399] Ibid.
[400] Muhammad, A. M. (2007) Minhaj Muslim English Translation. Dar Al-Katoob Al-illimiyah, (Beirut), Lebanon, p.409.

by Allah besides whom none is worthy of worship, that you owe him nothing."[401] Muslim jurists are Unanimous that the formula of an oath which establishes a claim or exonerates a defendant is: "swearing by Allah besides whom there is no deity worthy of worship", Imam Malik made no addition on this[402]. But Imam al-Shafi'i extended it further and added: "... the knower of covert and overt."[403]

4.8.0 **Procedure For Absent Parties**

The circumstances in which the application of the principle governing the absence of a party arise are many. They vary from the absence of the plaintiff to that of the defendant[404]. The absence of the plaintiff is easier to handle than that of the defendant. Kadi Ambali quotes Abdulkarim Zaidan in his work: Nizamul Qadai who quotes Al-Mawardi's Adabul Qadi thus:

> ... and the plaintiff does not come to court on the date fixed for hearing, the court shall not proceed on his/her matter. It shall leave it for him/her to come to

[401] Sabiq, S. Op.cit. P.450.
[402] Ibn Rushd, (nd) Bidayyatul Mujtahid wa Nihayatul Muqtasid. Darul fikr, (Beirut), Lebanon, vol.iii.p.349.
[403] Ibid.
[404] Ambali, M.A. op. cit. p. 138.

it. The basis of that is what the learned Jurist, Al-Mawardi, may God the most High, be pleased with him said: when a party who files a suit is called and he/she is absent, the call shall be repeated thrice and if he does not show up, the court proceeds to the next suit. If the former shows up before the beginning of the latter, he is attended to. But if the session has started, it will not stop the proceedings. The former has to wait. That emphasizes what is said that the plaintiff is he who shall not be compelled. However, it can be said that the state has to legislate on what to do in respect of abandoned claims beyond prescribed period of time.[405]

The Kano State Shari'a Court Civil (Procedure) Rules, 2000 provides the procedure to be followed in a situation where both parties do not appear on the day a cause is called for hearing or at any adjournment of such hearing. If neither party to the cause appears the court shall strike out the cause, unless the court sees good reason to the contrary. Any reason shall be recorded in the civil cause record

[405] Ibid.

book[406]. However, where the plaintiff abandons a suit filed, without reason, the suit shall be struck out unless the court sees reason to the contrary[407]. The Shari'a Court rules cited above regulate the procedure for absence of a plaintiff in the Shari'a Courts. The Shari'a Court of Appeal Rules[408] operates with slight difference, in the latter Rules it states: "If the appellant or his representative does not appear on the day fixed for hearing, the appeal shall be struck out on the application of the respondent"[409]

The apparent distinction between the Kano State Shari'a Courts (civil procedure) Rules, 2000 and the Shari'a Court of Appeal Rules governing the absence of the plaintiff is that, the former exempts cases with reasons, for the absence of the plaintiff, which must be recorded; and the latter stipulates that it is on the application of the respondent that the matter is to be struck out.

Moreover, where the absent party to proceedings is the defendant, the claim against him shall be heard and

[406] Order 9 rule (1).
[407] Order 9 rule (2).
[408] Cap 122 of the laws of the Federation of Nigeria 1963.
[409] Order 7 rule (1) (i).

determined provided the plaintiff has produced proof for his claim. Ibn Farhun cites Ibn Rushd to support this position, that the nearby absent party(defendant) who lives at a distance of one, two or three days journey from the court, will be summoned to court. The effect and consequences of his absence shall be explained to him. This is done in respect of all matters. He shall either appoint a representative or attend. Judgment is passed against him (provided the claim against him is proved). This is the procedure in the recovery of debts, claims of animals, consanguinity and all kinds of claims such as talaq (divorce), repudiation of marriage (faskh), and emancipation of slave and so on. The defendant is not allowed thereafter to put up any defence because he has no reason to do that[410]. Ibn Majishun is of the opinion that such claim should be heard and determined on the strength of the evidence brought by the plaintiff. However, the absent defendant shall be informed of the claim and proof in its support, including the list of the witnesses and their testimonies. Sahnun insists that the absent defendant, who

[410] Ibn Farhun, op. cit. pp.86-87.

belongs to this category, must be present in court before any thing is done[411].

The features that differentiate the classical Islamic procedural rule for absent party and similar procedure enunciated in Shari'a Courts (civil procedure) Rules is: the provision of I'zar, which is fundamental, is not provided in Shari'a Courts Civil Procedure Rules[412]. Another distinction between the procedural laws is that, in the classical procedure, the defendant would not be allowed to put up a defence later; while in the codified rules the absent defendant can apply to the court for the judgment to be set aside, on the condition that the defendant must show sufficient cause. Then he would be permitted to put up defence upon such terms as the court may deem fit[413]. Procedural rule for absent party provided by codified Sharia Courts rules tends to follow the civil law.

4.9.0 **I'zar**:

[411] Al-Azhari,S.A. op. cit.p.32.
[412] See order 9 rule (3)(i) of the Kano State Shari'a Courts (Civil Procedure) Rules 2000.
[413] Order 9 Rule (4) of the Kano State Shari'a Courts (Civil Procedure) Rules 2000.

I'zar is a pre-judgment plea which enables the parties to a case a final opportunity to go over their respective claims or ventilate their grounds before judgment[414]. Al-kafiy states that: before giving judgment a judge must establish the exhaustion of any possible defence (I'zar) by two unimpeachable witnesses that is the chosen course[415].

The procedure of I'zar must be conducted in the presence of two competent witnesses where a judge would ask the party: Do you have any other evidence or proof to give?[416]. The judge shall write down the party's response to the afore-mentioned question put to him[417].

However, if a judge delivered a judgment against defendant and after exhausting him of any possible defence (al-I'zar) by asking him: Do you have any other proof which you intend to bring? If the defendant (i.e the person that judgment is to be given against) brings other witnesses and claims that I`zar was not conducted in the suit and the

[414] Abubakar, A. op. cit. p.236.
[415] Al-Kafiy,M. (nd) Ihkamul Ahkam:Commentary on the Tuhufah. Darul-fikr,(Beirut), Lebanon, p.12.
[416] Daura, M.U. op. cit .p.27.
[417] Ibid.

plaintiff states that I`zar was made and the plaintiff produces two witnesses that testify to that fact (That the judge did subject the defendant to I'zar procedure in their presence) the court will not allow their credibility to be impeached[418]. In the event a judge did not exhaust the party through I'zar procedure, his judgment is null and void[419].

The Court of Appeal,[420] Kaduna division held that, the procedure adopted by City Area Court Birnin Kebbi is the correct position of Islamic law regarding procedure of I'zar. Before the judgment, the following dialogue ensued:

Court to the plaintiff: Do you have any more to say or evidence you wish to present to the court?

Answer: I have no more comment and I have no more evidence.

Court to the defendant: Do you have any more comment or evidence wish to present to this court?

[418] Ibid p.28.
[419] Sulaiman v Isyaku (1983)I sh. LRN p.150.
[420] In Bami v Majo(2006) 3 SLR (PT iii) P.108.

Defendant: I have no more evidence or comment, the three witnesses suffice. I have already told the court that the farm in dispute has been in the possession of our family from my grandfather descending to me. No one has ever claimed it. What happened in form of dialogue, stated Court of Appeal;[421] **"**after the close of the case of both parties is what is called in Islamic law as i'zar (sic)...**"**

However, due to the importance of izar in Islamic law of procedure, Shari'a Courts have evolved the practice of writing the word I'ZAR boldly with red biro in the record of proceedings before exhausting the parties.

4.10 **Judgment And Its Execution**

A judgment is a reasoned decision of the court which is delivered at the end of a trial after hearing the parties to a dispute. The cardinal principles of judgment under Islamic law, that is pillars of a judgment; without any one of which such judgment is invalid; are six in number thus: "The Judge, the Plaintiff, the Defendant, the Subject Matter in

[421] Per Coomassie J. C.A (as he then was) at p.112.

dispute, the applicable Law leading to the judgment and lastly the procedure by which such judgment is attained"[422].

Islamic law of procedure stipulates that, judgment must be based on clarity and the understanding of the intricacies in the dispute, facts, evidence or oath proffered before the judge:

> It is not lawful for the judge to pass judgment if the nature of the case is not very clear to him- - - it is unanimously agreed by jurists that a judge should base his judgment upon what he learnt from the evidence of witnesses- - - Imam Malik strongly forbids giving judgments not based on evidence of witnesses.[423]

A judge shall not rely on facts within his personal knowledge to deliver judgment. It is compulsory that judgment must be on proof proffered before him by testimony of witnesses and inferences drawn therefrom[424]. A

[422] Al-Kafiy, M. op. cit. p.8.
[423] Daura, M.U. op.cit.p.14.
[424] At-Tasuli, A.A op.cit. p.13.

judgment that is delivered on mere assumption is not valid, notwithstanding it turns out to be correct[425].

Moreover, where a party to a dispute strongly denies a claim and absconds before delivery of judgment because he is afraid of the outcome of the judgment, but he has produced his proof, and I'zar was conducted, judgment will be given even in the absence of that party. If he comes back later, he would not be heard. But if the absconding of the party was before he produces his proof; and a time frame was given to him to put forward the proof; the court waited for a long time, but he did not return, judgment should be delivered against him. If he comes back later, his proof may be accepted.[426]

However, under Islamic law of procedure, a judge has power to review his judgment. Khalifah Umar, in his famous letter to Abu-Musa Al-Ash'ari, stated thus: ".....If you give judgment yesterday and after such reconsideration you come to the correct opinion, you should not feel prevented by your first judgment from doing what is valid. It is better

[425] Daura, M.U. op.cit.p. 12.
[426] Ibid p 17.

to review the judgment than to persist in invalidity..."[427] In Nigeria once a Judge delivered a judgment he cannot be review it even if he erred. The error or mistake made by a Shari'a Court Judge can only be corrected or rectify through appeal process.[428]

But it is a condition that reasons upon which a judgment is reviewed be clearly stated.[429] The practice and procedure for review of judgment as stated in the Tabsirah, quoted by the Court of Appeal,[430] is thus:

> Ibn Habib said :Mutraf informed me and Ibn al-Majishun (reporting) from Malik may Allah bless him, and from other learned jurists of al-Madinah, about a judge who delivered judgment but later discovered a decision better than the one earlier delivered and he wants to revert to the better decision, and he is free to do so.....'

[427] Sabiq, S. op.cit. p.321.
[428] See Section 6(1), 32(1), 40(1), 41(1) and 40(1) of Kano, Jigawa, Katisna, Zamfara and Bauchi States Shari'a Courts Laws respectively.
[429] Al-Azhari, S. A. op. cit. p.229.
[430] In Mazadu v Garba (2006) 3 S.L.R p. 21.

However, if a judge delivered an erroneous judgment after trying to give a correct one, he cannot be asked to make good the consequences of his error. If the subject matter of the judgment is wealth, it should be returned back to the rightful owner(s). In the case where the wealth is spent or lost by the party to whom the judgment was erroneously given, that party should be asked to pay it back. If the judgment is on anything other than wealth such as cases of marriage, the erroneous judgment should be set aside.[431]

Under Islamic law of procedure a judge has the power to set aside the decision of another judge. According to Al-Qadhi Ismail, Abdul Malik has stated that a judge should not review the judgment of another judge; but where a record of proceedings had been transmitted to him, he can read or go through the judgment[432]. If the decision is manifestly unjust, for instance admitting the evidence of persons whose evidence is inadmissible, or right of pre-emption(Shuf'ah) is accorded to a neighbor; Or a paternal uncle and maternal aunty was given inheritance in the presence of father and mother respectively. In these

[431] Mahmud,A B. Op. cit.p.129.
[432] Ibn Farhun,op. cit.p.74.

situations, the judge that is reviewing the decisions of another judge has the power to set aside the judgments.[433] But where the judgment under review is not clear, in other words, the error is not manifest and injustice is not glaring, such judgment should not be set aside. According to Al-Qadhi Ismail, there is presumption of justice in judgment delivered by a court of law. Once there is no injustice in the judgment, it is not right for the Amir (leader) to allow another judge to set it aside.

To allow this type of judgment to be set aside, would be to put litigants into unnecessary hardship and the integrity of judiciary will be weakened in the eyes of the public.[434]

Furthermore, litigants that are not satisfied with a judgment can lodge an appeal against the decision in a Mazalim Court. The Court deals with complaints against the behavior or the judgment of the Qadhi (judge). Mazalim Court is empowered to give judgment and execute the same. The origin of the Court dates back to the time of Holy prophet (SAW). During that period he used to listen to the

[433] Ibid.
[434] Ibid.

people's complaints and delivered judgment on them. The Holy Prophet (SAW) had settled a complaint between al-Zubair ibn al-Awwam and one man from Madinah over a dispute of a canal.[435]

During the life time of four righteous companions, there was no well established Mazalim Court. It was during the time of Ali (RA) that a slightly organized Mazalim Court emerged, but even during that period there was no particular date set aside in listening to aggrieved parties' complaints.[436] During the dynasty of the Ummayads, Abdul Malik Ibn al-Marwan was the first ruler to fix a special day to entertain people's complaints. Umar Ibn Abdil-aziz was the first ruler to establish an organized Mazalim Court. He ensured that people who suffered the injustice of leaders were given back their due rights.[437]

It should be noted that, the process of review as provided in classical works of Islamic jurisprudence most especially for a judge to review his own decision cannot operate in

[435] Zuhaily,W.(2007) Fiqh al-islamiyya Wa Adillatahu.Darul fikr (Beirut) Lebanon, p.6252.
[436] Ibid p.6253.
[437] Ibid.

Nigeria. Justice I. T. Muhammad J.C.A. (as he then was), in the case of Alhaji Inuwa Dandago v. Sha'aibu Adamu & 2 0R,[438] states thus:

> I must state in passing that although review process...has been adequately provided under Islamic law, it is a pity that their full operation has been limited by some statutes..... The Islamic law judge (kadi) has to be cautious and alert that he operates, in our present dispensation, within procedural rules including the enabling statutes that create his court or other courts and spell out powers for the court's operation.[439]

Moreover, under Islamic law, courts have powers to enforce any judgment or order. Execution is distinguishable from findings and judgment. Finding is the first phase. The second phase is judgment, and the final phase is execution[440]. The position of the law is that where a court arrives at a just decision, that decision has to be executed without any reservation.[441] Thus in Islamic law, court orders are to be executed by the court itself, since an

[438] Unreported Appeal No CA/k/94/01 delivered by the Court of Appeal Kaduna division on 5th day of June, 2006.
[439] Ibid p.10.
[440] Abubakar, A. op. cit. p.259 quoted fathul Aliyi Al-Maliki.
[441] Al-kafiy,M.op. cit.p.33.

unenforced or unenforceable judgment or order does not and cannot meet the end of justice.[442] Consequently, if a judge makes an order and ceases to be in office, his successor is obliged to execute the said judgment.[443]

[442] Alabi v Kareem kws/ca/cv/m/il/06/2006 Ruling delivered by Shari'a Court of Appeal, Illorin judicial division on16th November, 2006.
[443] Al-kafiy, M.op. cit.p.23.

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CHAPTER FIVE

Conclusion

5.0 Summary

Islamic Civil Procedure Rules have been made with the purpose of achieving the common objective of justice and equality in settlement of disputes which are indispensable in human society. Without the procedural rules, anarchy and confusion is bound to be the order of the day. In this research, the theoretical and practical aspects of the Islamic civil procedure in Nigeria were discussed and analysed.

In the thesis, principles of Islamic Civil procedure Rules enunciated in the classical texts with reference to Shari'a Courts Civil Procedure Rules of some states in Nigeria, particularly Jigawa and Kano States were discussed, analysed and arranged into chapters.

From time immemorial individuals used to depend on the might of their strength – jungle justice; later on Islamic law stipulated or provided procedure through which aggrieved persons can present their claims and prove same in order to get remedy. In chapter one, statement of the problem was

discussed. Objectives, scope and methodology of the research were also discussed. The chapter contained analysis of the literatures utilized in conducting the research. Finally, the chapter dwelt on the justification of the research.

In chapter two, sources of Islamic Civil Procedure in Nigeria were discussed. The chapter started the discourse with the Qur'an as the basis of Islamic procedural rules. The thesis also analysed the general procedural rules stipulated by the Qur'an. Sunnah as a source of Islamic procedure was also analysed. Under this chapter classical and contemporary works of Islamic jurisprudence as sources of Islamic procedure were discussed. The contributions made by jurists in shaping procedural rules were analysed. Other sources of Islamic procedure discussed in the research are: 1999 constitution, various enabling statutes, rules of Courts and decisions of superior courts on Islamic law practice and procedure.

The third chapter of the research analysed the steps to be taken in commencement of action before a court. The

power of court or jurisdiction to determine a matter was also discussed. An insight was also given on parties to civil action, service of court processes as well as claim and its nature in an action.

Chapter four of the research dealt with hearing and determination of Islamic civil actions. The chapter analysed the commencement of hearing in civil disputes. The nature of the evidence required to sustain an action and prove a claim was among the issues the research under this chapter analysed. Finally, the chapter wound up the discourse with discussion on judgment and its execution.

5.1.0 Observations

Below are the observations made in this research:-

1. There is no clear distinction between substantive and procedural law in Islamic law and most of the texts on the subject are written in classical Arabic and technical in nature.

2. Shari'a Courts in Nigeria allow senior lawyers to call their cases out of turn notwithstanding the expedient nature of other cases on the cause list. This practice shows that the courts are not treating parties appearing before them equally as enunciated by the Islamic law of practice and procedure.

3. There is a lack of proper understanding and appreciation of Islamic procedural rules among the lower courts judges. The case of Danjuwa V Ba'aji[444] is a clear cut example of this problem. The Trial Civil Area Court judge Gombe decided a case without determining who is the Plaintiff and the Defendant among parties to the dispute. The record of proceedings showed that Sani Danjuwa was the one who instituted the claim against Hajja Baaji claiming ownership of a land in her possession, Hajja Baaji denied the claim. Hajja Baaji was asked by the trial civil Area Court Judge to call witnesses.

[444] (2000) 7 NWLR (Part 665) P. 396.

However, the court did not state that Hajja Baaji was turned into Plaintiff and the facts of the case did not disclose that Hajja Baaji could be a plaintiff. Hajja Baaji complied with the Court **Order and called witnesses, Sani Danjuwa was not asked to respond or cross examine the witnesses called. Court of Appeal held that the procedure adopted by the trial Court and accepted by the Upper Area Court and Shari'a Court of Appeal was clearly and fundamentally wrong. The Court of Appeal allowed the appeal and set aside the judgment and orders of the trial court that were affirmed by the two lower courts.**

Moreover, the Emir's Court of Hadejia[445] fell into error of wrongly applying the Maliki principle that reject the defence of notorious hoodlums and bandits in the face of overwhelming evidence. In Guri's case, the accused was sentenced to death upon a charge of homicide and armed robbery. The Court refused to allow him (the accused) to enter a

[445] In Guri V Hadejia N.A (1959) 4 F.S.C., 44.

defence. According to the court where there is evidence against an accused, his right to enter a defence is lost. This decision of Hadejia Emir's Court was wrong. It is clear that the trial court misunderstood the point and ended up misapplying the law[446]. The error was in misreading of the text of the Tabsiratul Hukkam, (the authority cited by the trial Court) and the trial Court's relying on the opinion of assessors who obviously did not understand the position well, and holding that the Maliki principle that jettisons the defence of notorious hoodlums and bandits in the face of overwhelming evidence also applies to scanty evidence, which was the case in Guri's matter[447] This is certainly not the position stated in the Tabsirah. The correct position of the law is that under Maliki jurisprudence where there is overbearing evidence against a person known to take offences such as Salaba (i.e Hirabah), hooliganism, such evidence having been received from victims of their offences who are honourable witnesses and who testify to the acts of

[446] Uthman, M.B. The Law of Hiraba: Its Application and contemporary Laws in Nigeria. Journal of Islamic and Comparative Law. Vol.26 pp. 282 – 284.
[447] Ibid.

homicide, or where a lady clutches a man and screams rape and there is clear evidence of her being defiled – all these cases are to be enforced without allowing the offender to enter into his defence. This is the position strongly advanced by Ibn Farhun in the Tabsirah. He (Ibn Farhun) argues that, it is the opinion of eminent Malikis such as Ahmed Ibn Mutraf, Ishaq Ibn Ibrahim and even Malik himself.[448]

Another example on this point, is the case of Nafi'u Sulaiman V Fati Sabo,[449] where Respondent/Plaintiff sued the Appellant/ Defendant before Upper Shari'a Court Gaya,[450] she stated her claim thus: "I am suing Nafi'u my (former) husband who divorced me one year ago. I am six months pregnant now but he denied the pregnancy".

The Appellant/Defendant responded to the claim in the following words: "I heard her claim, but it is not true, what I know is that I married her, but we separated one

[448] Ibid.
[449] (2007) 2 RSMNW p.13.
[450] Kano State.

year ago. Our separation is three years now. The pregnancy is not mine"

The trial Court delivered its decision in favour of the Respondent/Plaintiff and held that the pregnancy belonged to the Appellant/ Defendant. Dissatisfied with the judgment, Nafi'u Sulaiman filed an Appeal before Kano State Shari'a Court of Appeal. The Appellate Court set aside the decision of the trial Upper Shari'a Court and ordered for a re-trial before another Court.[451] Among the reasons stated by the Appellate Court in setting aside the trial (Upper Shari'a) Court's judgment is that the claim of the Respondent/Plaintiff is not clear. The Court asked: "Does she (the Respondent/Plaintiff) mean that after Nafi'u (the Appellant/Defendant) had divorced her by one year, then six months later she got the pregnancy: or that at the time of the divorce she was pregnant but did not disclose it until after six months?" The Appellate Court observed, the trial court failed to investigate the issue so that the claim of the Respondent/Plaintiff will become clearer. This is the

[451] Upper Shari'a Court Kofar Kudu, Kano.

reason why the Respondent/Plaintiff's claim is incomplete because it lacks full explanation".[452] The Shari'a Court of Appeal further observed that the trial court should not have heard the Respondent/Plaintiff until her claim is certain and definite as stated in: Sirajus Saliki: Commentary On Ashalul Masaliki[453]: "Plaintiff shall not be heard until he made a claim on thing that is known clearly on its description and specification".

This researcher observed that, the trial court did not appreciate the significance of the clarity of Plaintiff's claim in the standing of his case before Court under Islamic law of procedure. Had the judge appreciated that, he would not have proceeded to determine the case in haste.

Lastly, the judgment of Dawakin Tofa Shari'a Court in Hajara Chiromawa V. Alh. Uba Dawanau,[454] is another decision that exposes lack of proper understanding and

[452] Daura, U.M. Cit P.7.
[453] Vol. 2, P.198.
[454] Unreported case N0.KCV/79/10 judgment delivered on 9th day of August, 2010.

appreciation of Islamic procedure Rules among lower (Shari'a) Courts judges. Hajara Chiromawa sued Alh. Uba Dawanau claiming two farmlands and one house (claimed to be) owned by her late father in possession of Alh. Uba Dawanau for the period of fifty years. After the plaintiff (Hajara Chiromawa) had stated her claim the trial judge ordered her to bring witnesses without asking the Defendant (Alh. Uba Dawanau) to react to the claim. Furthermore, the Defendant was not allowed to cross examine the witnesses. However, after the Plaintiff has closed her case, the trial Judge at page 8 of the record of proceedings asked the Defendant whether the Plaintiff's claim is true or not. The Defendant denied the claim. The Defendant made lengthy explanations on the properties in dispute, and called his biological mother in support of his defence. The court entered its decision against the Defendant. The procedure adopted by the trial Court is clearly wrong. The Court ought to allow the defendant to react to the plaintiff's claim before proceeding to hear the plaintiff's witnesses.[455]

[455] Daura, U.M. Op. Cit. pp 8-9.

4. Most of the legal practitioners that are appearing in Sharia cases are not adequately conversant with Islamic procedural rules. In the case of Chief Inspector of Shari'a Courts of Zamfara State V Alh. Dahiru Ibrahim,[456] where one of the grounds of appeal against the decision of Upper Shari'a Court I Gusau before Zamfara State Shari'a Court of Appeal is that, the trial Court did not support its decision with any legal authority (Nass). Counsel to the Respondent in replying, argued, that there is no any law (under Islamic Procedure) which makes it compulsory for a (Shari'a) judge to support his decision with an authority (Nass). This submission of the counsel is not correct; under Islamic law and procedure a judge must support his judgment with (Nass) authority – Wal ahkamu Innama tuwradu bin nusuwsi la bil hadasi wat takhmiyn: "Judgment is been delivered base on (Nusus) (legal authorities) not with speculation."[457] The submission made by the counsel shows that he is not adequately conversant with Islamic procedural rules.

[456] (2007) 2 RSMNW P.29.
[457] At-Tasuli, A. A. Op Cit. Vol.I p.328.

It is trite under Islamic law and procedure, plaintiff is to state his claim (Da'awa) and the defendant to react to it either by admitting or denying the claim. Neither the plaintiff nor the defendant is required to swear with the Holy Qur'an before stating and reacting to the claim respectively.[458] Strangely in the case of Maigari V Bida,[459] counsel to the Appellants, as defendants before trial Area Court Agaie[460], applied that: "both the plaintiff and the defendant.... Should all be sworn with the Holy Koran (Sic) (Qur'an) so that this will ease the proceedings and avoid unnecessary delay." The trial court rightly refused to administer the oath as requested by the counsel.[461] It is the view of this researcher Counsel that is conversant with Islamic Procedural Rules would not make this kind application before Shari'a Court.

[458] Daura, U.M. Op. Cit pp. 7-9.
[459] (2002) 1 NWLR (Part 747) P.138.
[460] Niger State.
[461] The application of the counsel indicated that he is not conversant with Islamic Procedural Law.

However, the cases of Fatimami V Binami,[462] and Soda V Kuringa[463] are suits that shows insufficient knowledge of Islamic procedural Rules by the counsel that appeared in the two cases. In Fatimami's case, counsel to the Appellant attacked the decision of Shari'a Court Ngazai on the ground that the Court lacks power to give effect to reconciliation reached by parties to the suit (Husband and Wife) through their guardians (spouses parents). The counsel submitted that once a case is filed before (Sharia) Court, the issue of parties to reconcile their disputes before the Court does not even arise. The Sharia Court of Appeal of Borno State disagrees with the Counsel's argument.

The appellate court held that the trial court was right in given effect to the (sulh) reconciliation made by the parties through their guardians before it. The appellate court support its decision by citing: Al-Mughni of Ibn

[462] (2007) 2 RSMNW p.48.

[463] (1992) 8 NWLR (part 261) p.632; where counsel argued that in a suit of inheritance that involves many heirs, one of the heirs cannot file a case to claim his portion of the estate without consent of the other heirs. Court of Appeal held that: Consent of other heirs is not needed before one of them files a suit seeking for his share from the properties of the estate of the deceased to be inherited. The Court cite Q4:7 "Men shall have a share in what parents and kinsfolk leave behind, and women shall have a share in what parents and kinsfolk leave behind, whether it be title of much a share ordained (by Allah)".

Qudama[464] and Abu Bakr Ibn Hassan al-Kashnawi's Ashalul Madariki.[465] The author of Tuhufatul Hukkam has also stated that once parties agreed on reconciliation (sulh) they cannot later on resile, Court should force them to abide by the terms of the reconciliation.[466] The aforementioned classical authorities are pointing to the fact that the counsel's submission before Sharia Court Ngazai is not correct.

Furthermore, from some of the decisions delivered by judges that are common law trained lawyers (on Islamic procedural rules) it can be discerned that the judges are not conversant with Islamic procedural rules. This assertion can be seen in the case of Jalo Guri V Hadejia N.A.[467] Where Federal Supreme Court[468], assumed that the wrong decision of Emir's Court of Hadejia is the correct position of Maliki principle that jettisons the defence of notorious hoodlums and bandits in the face of overwhelming evidence also applies to a case with

[464] Vol. 9 pp.638 – 642.
[465] Vol. 2 pp.131 – 132.
[466] Daura, U.M. Op. Cit. p.141.
[467] (1959) 4 F.S.C., 44.
[468] Obviously presided over by Justices that are common law trained lawyers.

scanty evidence which was the case in Guri's matter.[469] The error (of the trial court) was in the misreading of the text of the Tabsiratul Hukkam, (the authority cited by the trial Court) and the trial court's relying on the opinion of assessors who obviously did not understand the position well. The Federal Supreme Court failed to find the true position of the law and simply assumed the declaration of the trial court to be the correct position of the Malikis, even though they must have known that (the trial court's) conclusion was absurd.[470] It was opined that ".... The appellate court, with all due should have read the words of the Tabsirah over again since it was the primary authority cited by the lower court. It is also likely that the members of the appellate court were not capable of comprehending the text of the Tabsirah as it is written in the Arabic script, not intelligible to many common law trained lawyers"[471].

[469] Uthman, M.B. Op Cit pp.282 – 284.
[470] Ibid.
[471] Ibid.

However, in the case of Chamberlain V Danfulani[472], the Kano State High Court, per Jones C.J. and Kalgo, J. held that the requirement of I'zar does not permit defence witnesses but only enjoins the court to make sure that the plaintiff has proved his case on all relevant issues. Hassan Gwarzo, Grand Kadi of Kano State, dissented and held when a judge intends to pass judgment against whom it is to be passed he will say to him, "have you got any remaining evidence that will repel what has been established against you" if a judge is to give judgment before I'zar, the judgment is void. Gwarzo supports his dissenting view with a passage from: Ihkamul Ahkam: Commentary On Tuhufah: "Before giving judgment a judge must establish the exhaustion of any possible defence (al-I'zar) by two unimpeachable witnesses; that is the chosen course".[473]

The majority decision of the two justices (that are common law trained lawyers) is not the correct position of Islamic Procedural Law. The dissenting opinion of Gwarzo is the right position of Islamic procedural rule.

[472] (1993) 1 Sh. L.R.N. 54.
[473] Al-Kafiy, M. Op. Cit. p.21.

The glaring reason for the disparity in the judgment of the court is that the judges that delivered the majority decision are not conversant with Islamic procedure.

5. Jurisdiction of Shari'a Courts of Appeal is limited to Islamic personal status. The limitation can be traced to the Shari'a Court of Appeal Law 1960 which came into effect on 30th of September, 1960. Section 11 of the law provides: "The Court will hear appeals on Muslim Marriage, inheritance, wills, waqaf, gift, guardianship of an infant, and questions regarding an infant, prodigal of person of unsound mind or guardianship of a Muslim who is physically infirm....."

However the jurisdiction of the Shari'a Court of Appeal under the 1979 Constitution was also confined to Islamic personal law matters.[474] At the Kaduna Division, the Court of Appeal in Fannami V Sarki,[475] held that the jurisdiction of the Shari'a Court of Appeal by virtue of section 242(2) of the 1979 Constitution of the Federal

[474] By section 242(2) of the 1979 Constitution.
[475] Unreported Appeal N0:CA/3/165/84 Judgment delivered on 30th January, 1985.

Republic of Nigeria does not extend to all civil disputes, but only to matters listed under section 242(2) of the Constitution. The listed matters include Muslim marriage, inheritance, guardianship of children, waqf and wills etc. The Court went further to state that any dispute outside section 242 (2) (a-d) is not within the Court jurisdiction to decide. This position was also reiterated by the same Court of Appeal in Muninga V Muninga,[476] per Adamu J.C.A where he stated: "... the jurisdiction of Shari'a Court of Appeal .... Under section 242(2) of the 1979 Constitution.... is restricted to cases where questions of Islamic personal law is involved (see paragraph (c) of the sub-section) which are specified as questions on wakf, gift, will or succession where the endower, donor, testator or deceased person is or was a Muslim".

Furthermore, section 2 of the Constitution (Suspension and Modification) (Amendment) Decree N0.26 of 1986 and the Constitution (suspension and Modification) Decree N0.107 of 1993 deleted the word "personal" from

[476] (1997) 11 NWLR (Part 527) p 1.

section 242 (2) of the 1979 constitution. The deletion, according to the Court of Appeal, did not expand the jurisdiction of Shari'a Courts of Appeal to entertain matters outside Islamic personal law.[477] The position, vis-à-vis the jurisdiction of the Shari'a Court of Appeal remains as it was before the said amendment by the deletion.[478]

Lastly, the jurisdiction of the Shari'a Court of Appeal under the 1999 Constitution is not different from what was provided in the previous legislations – the court can only hear matters on questions involving Islamic personal law. In interpreting section 277 of the 1999 Constitution,[479] the Court of Appeal, in Buba V Musa, per Tsamiya J.C.A. held:

> Section 277 (2) of the 1999 Constitution is unambiguous on a fair construction that the jurisdiction of the Shari'a Court of Appeal is confined to and limited to all questions of what is termed Islamic personal status, regarding the

[477] Gambo V. Tukuji (1987) 10 NWLR (Part 526) P.591 at P.599 per Coomassie J.C.A (as he then was).
[478] Ibid.
[479] Which is the section that provide the jurisdiction of Shari'a Court of Appeal of a State and which is in pari material with section 242 of the 1979 Constitution.

matters prescribed in sub-section 2 (a-c). Those subsections relate to marriage and its dissolution, family relationship and guardianship of infants. They also include wakf, gifts, will or succession where the endower, donor, testator or deceased person is a Muslim. Included is the determination of any question of Islamic personal law regarding an infant, prodigal, a person of unsound mind, or the maintenance or guardianship of a physically or mentally infirm Muslim.[480]

6. Many of the Shari'a Court Judges do not consult jurists in determining complex cases filed in their courts. This can be attested to the fact that most of the Shari'a Courts cases cited in this research were set aside on appeal based on wrong application of Islamic procedural rules. It is the opinion of this researcher, had it been the judges were in the habit of consulting jurists learned in Islamic Procedural law before giving their judgments in complicated cases, such decisions might not have been reversed by the Appellate Courts.

[480] (2007) 7 NWLR (Part 1032) P. 24.

7. By the combined effects of sections 231(3), 233(2)(a), 234 and 235 of the 1999 constitution, the Supreme court of Nigeria is the apex and final court in the hierarchy of courts in Nigeria. The decision of the court is binding on all courts throughout the federation (Shari'a Courts included). Even if the decision of the court is wrong, it is still valuable and binding on all courts. Surprisingly, courts with powers to exclusively determine appeals from the decisions of Court of Appeal on Islamic law; yet there is no provision for the appointment of justices learned in Islamic law among the justices of the court in the 1999 Constitution. In other words once a legal practitioner (with minimum of 15 years post call) is appointed as justice of the Supreme Court whether he is learned in Islamic law or not, the constitution has empowered him to preside over an appeal on matters involving questions of Islamic law or be part of the quorum to determine the appeal.

This is an absurdity and it clearly negates the principle of Islamic law of procedure. Under Islamic law there is no place for a person not learned in the law to decide or

participate in deciding cases involving Islamic law. As rightly pointed by the Court of Appeal in the case of Hussaini V. Bagade: "…. By its nature Islamic law abhors a judge not learned in its proceedings toiling with the sacred law……"[481]

8. It has been observed in this research that section 237(2)(b) of the 1999 Constitution stipulates that among the 49 Justices of the Court of Appeal not less than three shall be learned in Islamic personal law. The 1999 Constitution is silent about the faith of such Justices. Secondly section 238(3) has restricted the appointment of the Justices of Court of Appeal learned in Islamic law to legal practitioners only.

The hazard entailed in the lacuna created by the combined effects of these constitutional provisions is that a non-Muslim legal practitioner (who obtains a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council) can be appointed as justice of the Court of Appeal

[481] Unreported Appeal N0:CA/K/98/89.

learned in Islamic law. This is a clear negation of the guiding principle for the appointment of judges under Islamic law. The first qualification that a person must have before he can be appointed as a judge under sharia is that he must be Muslim[482]. A non-Muslim judge (just because he is learned in Islamic law) should not be expected to interpret and apply principles of Islamic law correctly due to his background. Justice Karibe Whyte J.S.C (as he then was) had stated that ''the religion of a person, his custom and the type of people with whom he mixes play a vital role in determining what interpretation of law will be given'' [483].

9. Many of the decisions of Shari'a cases at all levels of courts are not detailed in terms of buttressing issues with appropriate legal authorities.

10. Rules of court applicable to Sharia courts and Shari'a Courts of Appeal are full of lacunae; adequate rules of Islamic practice and procedure enunciated by Muslim

[482] Sabiq, S. Op. Cit. P.315 Vol. III.
[483] Whyte, K. Problems of interpretation and application of the provisions of the Constitution. Paper presented at All judges conference held at Ilorin between 8th – 16th March, 1982; quoted in Mahmud, A.B. Op. Cit. at P.45.

jurists have not been incorporated into them. For example, the procedural rules for absent defendant/respondent provided by orders 9 and 7 of the Kano State Sharia Courts (Civil Procedure) Rules, 2000 and Sharia Court of Appeal Rules, 1960 respectively are scanty; unlike the hukm alal gha'ib (Default judgment) exhaustively provided by Muslim jurists. Secondly the scanty rules for the absent defendant/respondent in the codified procedural rules are common law inclined.

Islamic law encourages arbitration and reconciliation between litigants. There is no such stipulated procedural rule in the Sharia Court of Appeal Rules. The Kano State Sharia Courts (Civil Procedure) Rules in orders 11 and 12 fail to include a dispute that appears complex and intricate to a judge among the circumstances under which parties should be called upon for reconciliation as enunciated by the jurists.

Finally, order 17(7) of the Kano State Sharia Courts (Civil Procedure) Rules prohibit attachment and sale of judgment debtors' dwelling, immovable property in

order to settle debt owed to a judgment creditor. This provision is quite absurd and is not in harmony with the intendment of the Shari'a of bringing people close to well being and moving them away from harm.

11. A judge of Shari'a Court in Nigeria has no power to review or revisit his decision made in error in order to correct it as provided by Islamic Law.

12. Accepting evidence of non-Muslims against Muslims in Shari'a Courts is still uncertain in Sharia Courts. It seems the courts are inclining to allowing non-Muslims to give evidence against Muslims even in Hudud cases which is contrary to the views of classical Muslim jurists.

13. Doctrine of judicial precedent is well entrenched into the practice and procedure of Shari'a Courts in Nigeria. Shari'a Courts were arranged in hierarchical Order. The decisions of higher Courts are binding on the lower Courts even if they are made in error. This doctrine or principle is in breach of Islamic law of procedure.

14. There is conflict within section 40 subsections (1) and (2) of the Jigawa State Shari'a Courts (Administration of Justice and certain consequential changes) Law 2000. The conflict is that, section 40(1) of the Law Empowered

the Upper Sharia Court to entertain an appeal from the decisions or Order of the Higher Sharia Court sitting in its original and appellate jurisdiction in all civil or criminal proceedings. While section 40(2) provides that an appeal shall lie to the Shari'a Court of Appeal from the decisions of Higher and Upper Sharia Courts.

5.2.0 Recommendations

From the preceding chapters, Islamic Civil Procedural rules were discussed and analysed. Based on the observations of this research, there are obstacles identified militating against the smooth application of Islamic civil procedural rules in Nigeria. Below are some of the proposed solutions to the enumerated problems:

1. The classical works of Islamic procedural rules should be translated into English and other local Nigerian languages. Translation of these reputable works would assist judges in appreciating the procedural laws; because most of the judges of Shari'a Courts are not literate enough in Arabic language. Translating the

classical works will also save the time of judges in searching for persons that can assist them in translating the works from Arabic to the language of the court. The translated works should be annotated. Annotating the translated classical works would serve as beacons of light or guide to judges in clearly understanding procedural principles enunciated by classical authors.

2. In this research it has been shown that judges under Islamic law are ordained to treat parties alike even if one of the parties is a Muslim and the other is not. As part of fair hearing under Islamic practice and procedure no case should be given preferential treatment because of the status of a party or his representative. It is the recommendation of this thesis that cases in Shari'a Courts should be listed/called based on expediency and demand of justice in accordance with the circumstances of a case; sticking to that would strengthen confidence in the Shari'a Courts system by litigants and promote application of a well

approved procedural principles enunciated by distinguished jurists.

3. Judicial Service Commissions should ensure that persons to be appointed judges of Shari'a Courts and other courts that are entertaining Islamic cases in Nigeria must be well versed in the science of Islamic jurisprudence and are capable of making independent research from classical works of Islamic jurisprudence. In addition to that, these judges should be able to understand the general Nigerian laws, and must be capable of reading and appreciating decisions of Superior Courts on Islamic law practice and procedure since the doctrine of judicial precedence is applicable to Shari'a Courts. Without clear understanding of classical procedural rules and general Nigerian laws; judgments of Shari'a Courts may be painfully set aside on appeal.

4. It is the suggestion of this researcher that the curriculum of the Nigerian Law School be reviewed and Islamic Law practice and procedure as an independent course be introduced and to be taught by legal practitioners that

are well experienced in the area. The importance of this suggestion is that it will assist Nigerian lawyers in learning the procedural rules and prepare them for the task awaiting them.

5. The provisions of section 262 and 277 of the 1999 Constitution limiting the jurisdiction of Sharia Court of Appeal of the Federal Capital Territory, Abuja and Shari'a Court of Appeal of a State to Islamic personal law be amended. The jurisdiction of the courts should be expanded to cover appellate jurisdiction involving questions on Islamic Law without any restriction.

6. Shari'a Court Judges should be encouraged to evolve the habit of consulting jurists learned in Islamic jurisprudence, and well experienced retired judges that are learned in Islamic law whenever a complex case is filed in their courts. If our judges develop the habit of consultation in difficult and complex cases the number of apparent erroneous cases that we constantly come across would drastically reduce. However, by consultation, Shari'a Court Judges will become more knowledgeable

and acquire practical skills of settling complex cases filed before them.

7. This researcher suggests the establishment of a Shari'a Division in the Supreme Court of Nigeria by the Constitution. The Justice of the division shall consist of lawyers and non-lawyers. Both of them must be Muslims and have obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council. In addition to that the Constitution should clearly stipulate that they must exhibit a sound appreciation of Islamic law prior to their appointments. Evidence of not less than fifteen years considerable experience in the practice of Islamic law shall also be part of the criteria of the appointment.

8. It is the suggestion of this research that Islamic faith must be the first qualification Justices of the Court of Appeal learned in Islamic law shall possess. Secondly, not less than twelve years considerable experience in the practice of Islamic law should also be inserted as part of the Constitutional requirement. However, restricting

appointment into the office of Justice of the Court of appeal learned in Islamic law to legal practitioners should be removed. A non lawyer with sound understanding of Islamic law should also be qualified to be appointed into the office. The non lawyer justice of the Court of Appeal learned in Islamic must have not less than thirteen years considerable experience in the practice of Islamic law (just like in the case of legal practitioners). However, both the lawyer and non – lawyer must obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council.

9. It is the suggestion of this research that judges in Shari'a cases shall strive to scout for legal authorities to buttress every pronouncement they made in their judgment to avoid their decisions being attacked on appeal. Islamic law of procedure is rich with juristic analysis; there is no reason for judgments of Shari'a Courts to be scanty.

10. Adequate provisions of Islamic procedural rules enunciated by classical jurists be incorporated into the Shari'a Courts Civil Procedure Rules of states.

11. The Shari'a Court Judges should be allowed to exercise powers to review judgment that was made glaringly in error in accordance with the laid down rules of Islamic Law. Laws should be enacted to that effect in Shari'a Courts Laws of various states.

12. Evidence of Non-Muslims should only be acceptable in civil cases where credible Muslim witnesses are not available in Shari'a Courts. In Hudud cases testimony of non-Muslims should not be admitted in evidence.

13. Law should be enacted into various Shari'a Courts laws to relax the strict application of judicial precedents in Shari'a cases. The decision of Higher Courts should only be binding on the lower court once the decision is not in conflict with the well established principles of Islamic law.

14. Section 40(2) of the Jigawa State Shari'a Courts (Administration of justice and certain consequential changes) Law 2000 should be repealed. Once the

subsection is deleted the confusion between subsection (1) and (2) of section 40 of the law will be laid to rest.

The recommendations put forth above by this research when closely looked at, will assist in promoting the application of Islamic Civil Procedure in Nigeria as developed by classical jurists. When every Islamic Procedural Rule is correctly applied in settling disputes, no doubt the aim of the Shari'a would have been achieved.

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