AN APPRAISAL OF THE DOCTRINE OF HAUZI IN ISLAMIC LAW

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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE - LLM

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JANUARY, 2021

DECLARATION

I hereby declare that this research "AN APPRAISAL OF THE DOCTRINE OF HAUZI IN ISLAMIC LAW" is my original research work. It has not been presented anywhere for the award of higher degree in any forms to the best of my knowledge. All sources and quotations have been duly acknowledged. The research work is to be presented to the faculty of law Ahmadu Bello University Zaria.

_____ _____

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CERTIFICATION

This dissertation titled "AN APPRAISAL OF THE DOCTRINE OF HAUZI IN ISLAMIC LAW" by AbubakarTijjaniSHEHU has been examined and approved as having met the requirements for the award of Master's Degree in Islamic Law (LLM)

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DEDICATION

This research work is dedicated to my beloved parents and family for their care and moral support.

ACKNOWLEDGEMENT

All Praise be to Almighty Allah who granted me the opportunity to accomplish my research work.

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LIST OF ABBREVIATIONS

L.P.E.L.R --- --- --- --- --- Law Pavilion Electronic Law Report

P.B.U.H. --- --- --- --- --- --- Peace be upon him

R.A. --- --- --- --- --- Radhiyallahu 'anhu

S.A.W. --- --- --- --- --- --- Sallallah'alayhiwasallam

S.C. --- --- --- --- --- --- Supreme Court

S.C.A. --- --- --- --- --- -Shari'a Court of Appeal

S.L.R. --- --- --- --- --- --- Sarauniya Law Report

GLOSSARY

AlMulkiyyah Ownership

As-Sukut ridhan Silence is consent

As'haar Relatives by Marriage

Adadiyat Things which are sold by tale

Aqad Contract

Al-Urf Custom (legal)

Ghayr manqul Immovable

Hadith Prophetic tradition

Hauz Prescription

Ibadhit a Sect from Shi'at

Manqul Movable

Makilat Things measured by capacity

Mauzunat Things measured by weight

Madhru'at Things which are estimated by linear Measurement

Marhala Point (of long journey)

Mawaali Relatives by emancipation

Mithli Similar (property)

Mirath Inheritance

Nasab Relationship

Muqaddrat Things which can be rated

Mursal Incompletely transmitted prophet

Tradition

Nisab Minimum amount payable for zakat

Nuqud Things which are used as Money

Qadhi	Judge
*Qarabah*Kinship	
Qimi	Dissimilar (property)
Urud	Goods
Shuf'a Pre-emtion	
Shawahidul-Hal	Circumstantial evidence
Wadh'ul yad	Possession by laying hand on Property
Yaminul Qadha	Judicial oath
Zakat	Alms

ABSTRACT

Hauzi is deemed as a principle that gives title to a holder of property for long period enjoying its benefit in his capacity as the owner. It is among the lawful means of acquiring ownership of property recognised by Islamic law. This research work An Appraisal of the doctrine of Hauzi in Islamic law is designed to examine the practice of Hauzi in the light of Maliki School of law in Sharia Courts. Some individual(s) are not fully aware of Hauzi. Also it seems that there are some conflicting crises among judges in application of Hauzi. Two methodologies were used in conducting the research doctrinal and empirical. The result obtained indicates that, the doctrine of Hauzi is being practiced in the light of Maliki School of law in the Sharia Courts. Also the level of awareness of Hauzi among individual(s) is very insignificant. Similarly, the conflicting crises among judges are; the defendant wont explains the cause of his/her possession, while the claimant presents evidences and witnesses before the court. It is recommended that, individual(s) should attend Sharia court's session as audience to enable them ascertain the practice of Maliki law particularly on Hauzi. It is also recommended that, judges should carefully examine the facts of a situation in any case in order to find out the truth of it, thus enable them strictly use the applicable law in their decision. It is further recommended that, Ulama' legal practitioners academicians students of law etc. should significantly contribute in developing awareness of legal matters among individual(s) in their various locality through discourse, public lectures, programs on legal matters in Medias etc. so that conflict on landed property may drastically be reduced.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Property of all individual(s) in Islamic society is among the things that has been considered sacred and safe by Sharia whether the individual(s) is Muslim or not. Therefore, every individual(s) has the right to acquire property and dispose it through lawful means for his personal use or for the benefit of other individual(s). So, whatever individual(s) acquires though lawful means is his private possession which neither the state nor anybody can justifiably claim, if he fulfilled certain obligations laid down by Sharia he therefore has the full right to protection. However, *Hauzi* is among the lawful means of acquisition of ownership of property recognized by Sharia, its concept is based on the principle of Sharia and it operates within such frame work that follows rules provided by Sharia.

The researcher decided to embark on research on this topic after he observed that, many individual(s) have little knowledge or lack awareness of the doctrine of *Hauzi* and the provision Sharia towards its operation. Thus, gives rise to conflicts among them on property they eventually end up in court. The researcher also observed that, most individual(s) presume that the doctrine of *Hauzi* does not operate with contention that no Law related to it in existence.This among other things develop the interest of the researcher towards conducting research in this area so that to expose the provision of Sharia on *Hauzi* and make it accessible and beneficial to other individual(s) whether the scope of learning will be widened.

1.2 Statement of the Problem

There are divergent opinions among the major Schools of jurisprudence on the applicability of the doctrine of *Hauzi*. Classical jurists from Shafi'i, Hanbali, and Zahiri Schools view that, the rules of *Hauzi* are not applicable, the claim of owner must be heard and his evidence must be accepted, no matter how long the period will be, his right will never be relinquished. Imam al-Shafi'i develops this argument further by stating that: ' Silence with prescription will not supersede the right'.[1] Maliki School and some contemporary jurists from Hanafi and Hanbali Schools in contrast view that, the rules of *Hauzi* are applicable. Thus, any individual(s) who sees somebody in physical possession of his property for long period but did not take any action to reclaim his property until after the period of *Hauzi* if he eventually claims it, his claim will not be heard and his evidence will not be accepted. Nevertheless, the differences still exist among these jurists on the minimum and maximum estoppel periods of *Hauzi*. Though, Maliki School is the applicable law in *Sharia* courts in northern Nigeria.

In addition to the above, people mostly are not fully aware of the doctrine of *Hauzi*, and those who were aware of it the level of their awareness as observed is very insignificant that, its impact cannot be seen or influence the application of the doctrine of *Hauzi*.

Another issue of concern is the operation and application of the doctrine of *Hauzi* in northern Nigeria, due to many factors such as lack of awareness of the people, dereliction from the judges among other things; make the operation of the doctrine of *Hauzi* somehow not applicable perfectly.Based on these, the study designs

[1] al-Shafi'i M.I.(1968) *al-Umm*,Vol.4,Beirut Lebanon ,Dar al-Sha'ab p57

to assess the operation and application of *Hauzi* in Kano State northern Nigeria under Maliki School of law.

1.3 Aim and Objectives

The main aim of this research is to review the provision of *Sharia* relating to the doctrine of *Hauzi* from the available materials in classical Arabic literature the of Maliki School with view to examine the extent of practicing the doctrine of *Hauzi* in the light of Maliki School in Kano State northern Nigeria.

The research will also examine the operation and application of the doctrine of *Hauzi* among some Sharia Courts in Kano State northern Nigeria, to determine the strict application of the doctrine of *Hauzi* under Maliki School of Law.

Similarly, the research will try to explore and analyze the level of people's awareness about the doctrine of *Hauzi* from the perspective of Maliki School in Kano State northern Nigeria, to determine the extent to which people perceive the doctrine of *Hauzi*.

1.4 Justification

The connection of the doctrine of *Hauzi* with property and the acquisitiveness of individuals give raise to conflicts amongst them, whereas incidents related to *Hauzi* have been seen happening every day in our society, and cases related to it are being filed in courts. Also, the doctrine of *Hauzi* has not been fortunate enough to be exclusively and extensively written in English language, unlike other principles e.g. Gift, Inheritance, Bequest, etc. which has been given preference, in the sense that most of these principles articulated by classical Arabic literature(s) have been extensively written in English language, while the doctrine of *Hauzi* has not been

given such preference. Therefore there is need to make a research like this so as to make the law more accessible /understandable to interested readers, students of law, legal practitioners etc. for easy application.

1.5 Scope of the research

This research will be limited to the principles of Islamic law of the doctrine of *Hauzi* in perspective of *Maliki* School. Thus, recourse will be made to other schools of jurisprudence for the purpose of comparison. It equally survey and appraises the applicable law in respect of cases pertaining to the doctrine of *Hauzi* and its application in some *Sharia* courts in Kano State and some parts of northern Nigeria in accordance with *Maliki* School of law.

1.6 Methodology

This research adopted survey design to appraise the doctrine of *Hauzi* in Islamic law. Two methodologies were adopted: one is doctrinal, the contextual study of available materials in classical Arabic literatures of Maliki School and some English textbooks written on Islamic Jurisprudence. The second methodology of this research adopted was empirical which is a descriptive survey designed to collect data through interview and questionnaire about practice and application of *Hauzi*.

1.7 Literature Review

The research enjoys a lot of literature even though most of the books that dealt with this concept extensively are written in Arabic language ranging from the fairly concise to the more elaborated. Moreover, recent books on *Hauzi* treated the subject matter in a simplified form than the earlier authorities in more or less summarized form without detailed discussion. As they mostly dedicated a chapter on the topic

which normally form part(s) of a book, non has been written to deal exclusively with the concept.

at-Tasuulii A.A,[2] a classical scholar of *Maliki* school discussed the concept of *Hauzi* extensively. But, the discussion was made in a chapter titled *at-Tabarru'at*, blending the discussion with other issues related to *tabarru*'.Therefore, there is need for a work that will deal exclusively with the concept in a simplified form.

al-Khurashi M.,[3] in his discussion on *Hauzi* in his book*al-khurashii alaa Mukhtasar sayyed Khalil* (a commentary on *Mukhtasar*) under a chapter title *ash-Shaadah wa ahkaamuhaa* he was able to elaborate the concept and highlight many aspects ofthe concept. But, the discussion is a mixture of issues related to rules of testimony and evidences in which the concept is part of it. Thus, a single write up that deals exclusively with the concept of *Hauzi* as elaborated and highlighted by the author is required.

al-Zuqaaqii[4] adopted the poetic approach highlighting the basic principle of *Hauzi* in few phrases and in a very concise manner under the issue of hearsay evidence. Being a prose, there is need to elaborate and explain more on the principle highlighted in few phrases by the author.

Sheikh al-Qaraafii[5] in his book *az-Zakiirah* made detailed discussion on the concept blending the discussion with the issues of right amongst neighbors. The discussion made by the author gave more emphasis on procedural aspect being the author treated the concept in a section under a chapter titled: *Kitaab ad-Da'aawaa* the

[2]at-Tasuulii A.A., (1951) *Al-Bahjah Fii Sharh At-Tulifah*Vol.2,Egypt Mustaphal – Baabii &sons, pp 252- 263
[3]al-khurashii M. (1317 A.H.) *al-khurashii alaa Mukhtasar Sayyidii Khalil*, vol.7 Egypt Daar al-Fikr ,pp 242-244
[4] az-Zuqaaqii A. Q. (nd) *Laamiyyatuz-Ziqaaq*, pp137-138
[5]al-qaraafii A. I. (1994)*az-Zakhiirah,*vol.11 Beirut Lebanon Daar al-Gharb al-Islaamii, pp12-15

book of legal proceeding. Thus, there is need of write up that deals exclusively with the concept in a simplified form.

Ibn Jazaa[6] author of the book *al-Qawaaniin al-Fiqhiyyah* discussed the concept of *Hauzi* as part of a chapter titled:the book of judgments and testimonies highlighting some aspects of the concept from the procedural perspective. The author summarized his discussion in few paragraphs with emphasis on role of witnesses in court decision.

Inanother book of *Maliki* school written by *al-Kinaani*[7] the author discussed *Hauzi* with other issues under a book titled preemption, entitlement, etc. in his discussion he was able to group people whom *Hauzi* can be applied among them in to four groups i.e. Father and child, relatives who are heirs, relatives by marriage affinity, and strangers partners and non-partners alike, with different estoppel period.

Ruxton F.H.[8] in his discussion on *Hauzi* in an English book known as *Maliki Law* a translation of one of the notable books of *Maliki* School of jurisprudence summarized the concept of *Hauzi* briefly under the title "Prescription", as part of a chapter titled "Evidence". The discussion was very concise. Hence, there is need for elaborating what has been briefly discussed by the author.

Contemporary writers have made contribution on this area of the research among the book of Abdurrahman A.S.[9] titled *Hiyaazatul – Ardh fii Nijeriyy*. Unlike other writers the author highlighted concept of *Hauzi* on landed property under

[6]Ibn Jazaa, M.A. (nd.) *al-Qawaanin al-Fiqhiyyah*, Daar al-Baydha al-Maghrib Daar al-Ma'arifah, pp261-262
[7]al-kinaanii I. S. (2011) *al-Aqad al-Munazzam lil-Hukkaam*, Cairo Egypt, Daar al-Afaaq al-Arabiyyah, pp 406-420
[8]Ruxton F.H. (2004)*Maliki Law*,(M. Khalil, Trans.). El-Naharprinting Press, Cairo, Egypt. pp 308 - 309
[9]Abdurrahman A.S. (1984) *Hayaazatul-Ardh Fii Naijeriya* ,Riyaadh KSA Daarul-Ulum, pp 111 – 113.

*Maliki*jurisprudence, in Northern part of Nigeria in few pages. Also, the author was able to illustrate the sources and method of acquiring property among Muslims, Non – Muslims, and Europeans, who colonized Nigeria in accordance with their system of law. The discussion made by the author was from the historical perspective not from the legal perspective.

Another contemporary writer is Orire. Abdulkadir[10] in his book *Shari'ah; a Misunderstood Legal System.* The author discussed the whole concept of *Hauzi* from the perspective of Malik School in a very concise manner, and in the mid of a chapter titled Islamic Civil practice and procedure. Hence, the discussion made by the writer needs elaboration and deal exclusively with the concept.

Abubakar A,[11] in his book *Islamic Law the Practice and Procedure in Nigerian Courts*, discussed the concept of *Hauzi*. He blended the discussion with issues of mortgage, pledge, gift, trust, purchase etc. The discussion was in a sub-topic prescription as part of a chapter titled *acceptable hearsay evidence*. The writer did not deal exclusively with the concept.

Mande A.A.[12] is another contemporary writer in his book *Taskar Alkalai akan Hukuncin Hauzi* discussed the concept of *Hauzi* extensively blending the discussion with many issues such as dowry, mortgage/pledge pre-emption, water canal for irrigation, pearls Slaves etc. The writer mainly adopted the view of *Maliki* School in discussing the whole concept. Though, the discussion was in elaborated form but, it limit the scope learning being the discussion is in his native language.

[10]Orire A. (2007) *Shari'ah; a misunderstood legal system,*Samaru Road, Zaria, Sankore Educational Publisher Ltd.. pp 320 -321

[11]Abubakar A.(nd) *Islamic Law the Practice and Procedure in Nigerian Courts*.Kano Adamu Abubakar & Co. Jama'a Chambers No.1A Civic Centre Rd.. pp 214-223.

[12]Mande A.A (nd) *Taskar Alkalai a Kan Hukuncin Hauzi*, GusauNear PHCN Office Zamfara State.Aba Printing Press,

al-Gharyaanii M. I. B.[13] in his book *al-Hiyaazah al-qaati'ah lin-nizaa wal-asaasas shar'i li'itibaarihaa*, discussed the concept in an elaborated form. The writer in his discussion perceives the as an instrument for resolving the conflict. While highlighting some aspect of the concept the writer was able to distinguish between the terms used in long time possession and the terms used in receiving gift or mortgage. Whereas, the former was termed *Hauzi/Hiyaazah*, the later is termed *al-Qabdhu* (receiving). The discussion seems to be a comparison with Positive Law.

Therefore, with great contributions of these authors on the topic, the research aims to extensively discuss the principles. And equally examine the application of such principles by the courts.

1.8 Organizational layout

In order to achieve the objective of this research, the dissertation is structured into six chapters. Each chapter tries to identify and address some problem areas on the doctrine of *Hauzi* in Islamic law.

Chapter one deals with the general introduction, identifying the statement of the problems, aims and objectives of the research, scope, justification/ significance of the research literature review, and organizational layout.

Chapter Two deals with Ownership and Acquisition property in Islam highlighting its Meanings, and classification, it equally discuss the ways of acquiring property, and gives an overview of some rules relating to acquisition of property.

Chapter Three discusses the concept of *Hauzi* in Islamic Jurisprudence, highlights its meaning, legality, conditions that constitute its effect on movable and immovable

[13].al-Giryani B.M. (2006)Al-Hiyaazah Al-qaati'ah Lin-nizaa … *alsatel Journal vol.14 No.50* pp 11-30

property, among blood relatives and non-blood relatives and gives an overview on estoppel period with exception to its general rules.

Chapter Four appraises *Hauzi* and analyzes information generated from the view of respondents of the questionnaire, presents the data and discuss the result.

Chapter Five reviews the decided cases, by examining some selected cases on *Hauzi* decided by *sharia* courts.

Chapter Six being the concluding chapter, contains summary of the whole work, findings, recommendations, and the concluding remarks.

CHAPTER TWO

OWNERSHIP AND ACQUISITION OF PROPERTY IN ISLAMIC LAW

2.1 Introduction

Ownership of property is the centre of any economic system, indeed the distinction between the two major economic systems i.e. capitalism and socialism revolves around issues of ownership. Thus, understanding the Islamic notion of ownership crucial to understanding Islam's reaction to world economic system. Islamic economic objectives agreed with some objectives served by secular economic systems particularly concerning regulating ownership right. Islamic Law strikes balance between maximizing individual and social benefits, where it protects the principle of private ownership and regulates it to ensure social benefits and allowing public properties such as crude oil and minerals tend to be considered owned by society as a whole, represented by government.

This chapter attempts to discuss the concept of ownership and its classification, it equally highlight the meaning of property and its classification as well as the means of acquiring ownership of property.

2.2 Definition

Ownership (*al-Mulkiyyah*) is defined as: an Islamic legal relationship between a human being and property, which renders the property specifically attached to him, and which gives the owner the right to use or deal in that property unless there is legal impediment to specific dealing.[14] Another definition of ownership defined it as: an

[14] Al-Zuhayli W. (2003), *al-Fiqh al-'Islami wa Adillatuh,* Damascus Syria, Dar al-Fikr, p417

exclusive association of the owned item with its owner, which gives the owner the right to use or deal in what he owns in any way that is not legally forbidden.[15]

From the above, it appears that individual who acquired ownership of a property is bound to freely use or deal in that property within the legal framework, also the right of ownership is restricted to him as owner other individuals are forbidden to use or deal in the same property without permission or any legal authorization.

2.3 Classification of ownership

Ownership of property is classified into three main classes, namely:

2.3.1 Absolute or permanent ownership

The absolute or permanent ownership of everything on the earth belong to Allah alone. The holy Qur'an says:

> 'To Allah belongth the dominion of the heavens and earth, Allah over hath power over all things' [16]

This indicates that, human being is the vicegerent of Allah on earth, it is then not acceptable to an individual to have permanent ownership, on simple ground that life itself is not permanent. Therefore permanent ownership is reserves to Allah as explained thus:

> 'To Him belong the dominion of the heaven and the earth, in the end, it is to Him that ye shall be brought back'[17]

Islam regards the owner of property as one who holds the property on behalf of the community in the capacity of a trustee or a representative not by his having absolute

[15] Ibid.
[16] Qur'an 3:189
[17] Qur'an 49:44

right of ownership. In short, absolute or permanent ownership of things (property included) belong to non but Allah.[18]

2.3.2 Public ownership

In Islamic Law, Public ownership simply mean that; all property and wealth belong to the community which grant rights of ownership or benefit of different things to its citizen. Some of the things of common utility are kept in the custody of the community, while other thing is given to the individual.[19] The division between things that belong to the community and those that belong to the individuals is based on the common good of society.

Thus, Islamic Law recognises the basic right of the individuals to property, but, at the same time it specifies certain things it considered not allowed for individual ownership. So that, no individual single or in association with others may possess them or monopolise them for his personal benefit against the common good.[20]

All such properties are declared as public property and this is deduced from the sayings of the holy prophet (SAW) *ubayd bin Hammad* says:

> 'I went to the Holy prophet (SAW) and asked for the grant of salty water in *Ma'arib*. He agreed, but, one of those present said: O messenger of Allah why are you entrusting him the treasure salt? After knowing the facts of the case, the Holy prophet (SAW) refused to grant me that salty water'.[21]

From this Hadith jurists deduced that all kinds of minerals e.g. gold, silver, Iron, coal, petroleum etc. should be public property, and no individual should own them for his personal benefit only.

[18]Bambale Y.Y. (2007), *Acquisition and transfer of Property in Islamic Law*, Lagos Malthous p4
[19] Ibid p5
[20]Ibid.
[21]al-Ash'as A.S.(ND), Sunanan Abi Dawood, Vol.3Egypt Dar al-Kitab al-'Arabi, Wizarat al-'Awqaf p139

In conclusion it is a general rules that, private ownership is permitted, while public ownership is an exception and adopt it only to limit the right to property. So that it does not grow to such extent as to endanger the good of society. This indicates that article of necessity which are used by community or project of great common value e.g. public works, currency, railways, hydroelectricity etc. should be owned and managed by the state for the benefit of the community, and cannot be entrusted to private ownership.[22]

2.3.3 Private ownership

Islamic Law recognises the right of private ownership through legal possession of all types of property, but, does not leave the individual entirely free to use the right in any way he likes. It shows that private ownership is allowed in principle, but, is subject to such limitation as will render it harmless. Hence unlawful ways of obtaining it by resorting to oppression, extortion, fraud, theft, etc. denounced unequivocal term the following Qur'anic verses and prophetic traditions shows: [23]

> 'And do not eat up your property among yourselves for vanities' [24]

The Holy prophet (SAW) condemned those who usurp other people property by false pretence in these words:

> 'Whoever usurps even one span of anyone's land (or property), his neck will be encircled with it down the seven earths on the day of judgment' [25]

[22]Bambale Y.Y. (2007), *Acquisition and transfer of Property in Islamic Law*,Lagos Malthous pp5-6
[23] Ibid.
[24]Qur'an 2:188
[25]al-'Asqalani H.I.(2003), *Bulug al-Muram min Adillati al-'Ahkam,*Egypt, Dar al-Manarah al-Mansoura p330

The above indicates that the significance of allowing the community to enact the necessary legislation to organise private ownership and to change it whenever the public interest demands it, cannot be overemphasized. Apart from the limitation above the right of private ownership is attested to by the Holy Qur'an;

> '.... to men allotted what they earn and to women what they earn…..' [26]

And a Hadith of the Prophet (SAW) strengthened it ;

> 'Whoever is killed while protecting his property then he is a martyr.'[27]

2.4 Rules relating to acquisition of private property

The general rule is that the absolute ownership belongs to Allah, human being is vicegerent of Allah but, he is allowed to have legal ownership.

Therefore, the rules governing private ownership are as follows: [28]

1. There should be the continual utilization of the property owned, in a rightful way for his own use and for the benefit of community. A Hadith says:

> "The person who seizes land belonging to nobody would cease to have any right to such land if he did not reasonably exploit it after three [3] years of possession"[29]

Base on this Hadith it is said that Caliph Umar Ibn Khattab (RA) have taken back some of the lands given to Bilal ibn Harith by the Prophet (SAW) on the ground that he did not utilize all the lands given to him. This indicates the reiteration of the right of private ownership.

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[26]Qur'an 4:32
[27]al-Bukhari M.I. (1987), *Sahih al-Bukhari Vol.2* Beruet Lebnon,Dar Ibn Kathir al-Yamamah p877
[28]Bambale Y.Y. (2007), *Acquisition and transfer of Property in Islamic Law*, Lagos Malthous pp 7-10
[29]Imam Malik(1982*)al-Muwatta,* England Diwan Press, p346

2.The owner private property must pay *zakat* (alms due) in proportion to the property owned if it is with him for a complete one year and has reached the *nisab* (the minimum amount for which *zakat* is payable).

3. The owner must make beneficial use of the property in the way of Allah i.e. in a gratuitous way for the benefit of community.as stated in the Holy Qur'an:

> The parable of those who spend their substance in the way of Allah is that of a grain of corn: it groweth seven
> ears and each ear hath a hundred grains. Allah giveth manifold increase to whom He pleaseth; and Allah careth
> for all and He knoweth all things.[30]

This is very significant, because it is through such, the Muslim community can prosper.

4. The owner of the property must not use it in a way that is harmful to the community. The Holy Qur'an and *Sunnah* strongly forbid the use ones property to cause harm to others

> Fight in the cause of Allah those who fight you but do not transgress limits; for Allah loveth not transgressors..[31]
>
> "Excess water is not withheld in order to prevent herbage from growing.[32]

5. The ownership of property should be acquired lawfully. Because acquiring it unlawfully destroys in the end. The Holy Qur'an says:

> O ye who believe! eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual good-will: nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful.[33]

[30]Qur'an 2:261
[31]Qur'an 2:190
[32]al-Siyuti A. (ND), *Tanwiri al-Hawalik Sharh ala Muwatta Malik,*Part2Egypt Mashhad al-Husayni, ,pp217-218

6. The owner of the property must use it in a moderate and balance way , without prodigality or parsimony. The Holy Qur'an says:

> Make not thy hand tied (like a niggard's) to thy neck nor stretch it forth to its utmost reach so that thou become blameworthy and destitute [34]

7. The property secured must be used in the best interest of owner, by effecting its proper control and distribution.

2.5 Acquisition of Property

Acquisition of ownership of property by individual(s) male/female is recognised by Islamic Law, and no limit impose on what an individual(s) may acquire or give away as long as it is within the law.

2.5.1 Definition

'Mal' is Arabic word for property, *Hanafi* defined as any good that individual(s) like naturally, and can save for some time. While *al-Shafi'i* defined it as anything with a value according to which it may be sold, and for which a transgressor must compensate the owner, to the exclusion of items discarded by all people.[35]

From the definitions above, it appears that, the definitions render physical objects or what is connected to it e.g. usufruct of leased property as valued property.

Some of the attributes of property are that; it must have some value i.e. it can be quantified in monetary terms, e.g. five naira. It must be a thing use of which is permitted. It must be possessed and capable of being held in reserve.

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[33]Qur'an 4:29
[34]Qur'an 17:29
[35]al-Zuhayli W.(2003), *al-Fiqh al-'Islami wa Adillatuh,* Vol.2Syria, Dar al-Fikr,Damascus p442

The last attribute as said is added by *Hanafi* School who did not regard the usufruct as property except the usufruct of leased property.[36]

However, not all things regarded as property which can be owned, for instance corpse, pig, wine, etc. because they are not clean and are forbidden to Muslims. But to non-Muslim would still possess the quality of property.[37]

2.5.2 Classification of property

The classification of property may take the following forms:

i) Movable (*manqul*) and

ii) Immovable (*ghayr manqul*)

2.5.2.1. Movable Property (*manqul*)

A movable property is one that can be moved or transferred from one place to another with ease and may be destroyed which can rarely happen to immovable property.[38] Movable property has the following characteristics

a) It is transferable
b) It is liable to destruction
c) It perishes in the act of usage

The movable property manifests itself in the following forms;

i*Makilat*, things which are ordinarily sold by measurement of capacity e.g. Wheat, rice, barley etc.

ii*Mauzunat*, things which are ordinarily sold by measurement of weight e.g. gold, silver, oil etc.

[36]Bambale Y.Y.(2007), *Islamic Law of commercial and industrial transactions,* Lagos, Malthouse p16
[37]Ibid.
[38]Bambale Y.Y.(2017),*Introduction of Islamic Law of Tort,*S/Gari Zaria, Enifab Print Media p114

iii*Adadiyat,* things which are sold by tale e.g. fruits, eggs etc.

iv*Madhru'at,* things which are estimated by linear measurement e.g. yard of cloth.

All articles with nature of the above forms are known as *Muqaddarat,* while gold and silver are also called *nuqud* price. There are other articles in the category of movable property known as *Urud* or good e.g. article of furniture and Animals.[39]

In addition to that, movable property is further classified into similar (*Mithli*) and dissimilar (*Qimi*). Article is said to belong to the class of similar if the like of it can be had in the market without there being differences between the two as people are apt to take into account in their dealings. If such articles are sold by weight, measure or capacity e.g. gold, silver, grain oil etc. they are called similar (*mithli*).

Conversely, articles such as land, houses, animals, furniture, clothes etc. which are not available in the market, or if it be available but with such difference between them as people are wont take into account in fixing the price then they are called dissimilar.(*Qimi*) those articles are not sold by weight, measure, or capacity. [40]

2.5.2.2 Immovable property (*Ghayr Manqul*)

Immovable property is such which cannot be moved or transferred from one place to another without damage or loss such as buildings, land, trees before they have been uprooted and cut down etc. properties like those are also called *aqar* landed property.[41]

2.6 Means of acquiring ownership of Property

There are several Islamic Legal means of acquiring ownership of property jurists stated the following among the lawful means for acquiring property

[39]Ibid.
[40]Ibid. p 115
[41]Ibid.

a) Contracts which obligates transfer of property from the owner to another person e.g. sale, gift etc.
b) Bequest
c) Inheritance
d) *Wadh'ul yad* Possession by lay hand on property.
e) Pre-emption
f) *Hauz* (statutes of limitation), a legal principle that defends the possessor from claim of an outsider, and vested title of ownership of the property in him.[42]

1) Contract; the Arabic word for contract is *Aqad*, means 'to tie' and the holy Qur'an says ;

O ye who believe! Fulfil (all) obligations.[43]

It is technically defined as the obligation which is the result of an offer given by one party and the acceptance given by the other party, in a way where its legal effect is expressed on thing contracted upon.[44] Contract is concluded with the following elements

a) The existence of two contracting parties who have the legal capacity
b) The consent of both contracting parties.
c) The relationship of speech of a contracting party with other party.
d) The appearance of the effect of tying the acceptance to the offer in the object.

[42] al-Sanhuri A.(1954), *Masadir al-Haq fi al-Fiqh al-Islami,* part 1Beirut Lebnon, Dar Ihya al-Turas al-'Arabi, pp49-50
[43] Qur'an 5:1
[44] Bambale Y.Y.(2007), *Islamic Law of commercial and industrial transactions,* Lagos,Malthousepp22-23

Contract will not come into existence unless the above elements are found in it.[45]

2) Gift is a contract initiated by an eligible party to transfer ownership of existent and deliverable properties to another without compensation. The properties may be known or unknown, but they must be conventionally given as gift, and the contract language must specify that it is a gift or a property transfer. The above definition is said to have excluded loans, non-valued properties, and undeliverable objects such as animal that may not be owned. Inheritance if the donor is alive and commutative contracts.[46] Islamic law permits the act gift, the holy Qur'an says;

> And give the women (on marriage) their dower as a free gift;…[47]

> It is not righteousness that ye turn your faces toward East or West; but it is righteousness to believe in Allah and the Last Day and the Angels and the Book and the Messengers; to spend of your substance out of love for Him for your kin for orphans for the needy for the wayfarer for those who ask and for the ransom of slaves; to be steadfast in prayer and practice regular charity; to fulfil the contracts which ye have made …[48]

3) Inheritance is one of the important areas of Islamic jurisprudence. As its rules and regulations had been categorically provided by both the Holy Qur'an and *Sunnah* of the Holy Prophet (SAW) for instance the Holy Qur'an says ;

> From what is left by parents and those nearest related there is a share for men and a share for women whether the property be small or large a determinate Share.[49]

The Holy Prophet (SAW) says;

> Give the shares ordained (by Allah) to their rightful heirs…[50]

[45]Ibid.
[46]al-Zuhayli W.(2003), *al-Fiqh al-'Islami wa Adillatuh,* Vol.2Syria, Dar al-Fikr,Damascus p539
[47]Qur'an 4:4
[48]Qur'an 2:177
[49]Qur'an 4:7

Inheritance is defined as knowledge about some rules of *shari'a* which guide us to who will inherit and who will not and what shares will go to the Heirs from the property of the deceased.[51]

The estate of the deceased could not be distributed to the heirs until after settling the rights related to the estate i.e. Funeral expenses, settlement of debts, settlement of bequest, then distribution of the residue to the entitled heirs[52]. For distributing the residue to the heirs, inheritance has some elements which are to be considered, the elements are; the deceased person, the Heirs, and the Estate. There are also some grounds of the inheritance the grounds are;

i) Blood relation, are the descendants and ascendance of the deceased person.

ii) Valid Marriage contract, it makes one of the spouses eligible to inherit other.

iii) Emancipation; a master who emancipated his slave is entitled to inherit the free slave in the absent of any other heirs of the deceased. Any one claims a share must establish that he/she possessed one of the above grounds of inheritance.[53]

In addition to the grounds of inheritance, there are some conditions that must be satisfied before one can have a share, the conditions are;

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[50]al-'Asqalani H.I.(2003), *Bulug al-Muram min Adillati al-'Ahkam,*Egypt, Dar al-Manarah al-Mansoura pp350-351

[51]Haider S. (2003), *al-Mirath,* Renala Khurd Pakistan al-Maktaba al-Muhammadia, p16

[52]Ibid. p17

[53]Ibid.pp20-21

a) Death of testator, the death must be actual or by declaration of a court in a case of missing person.
b) The survival of an Heir at the time of death of the testator.
c) There must be one of the grounds of inheritance.[54]

However a situation may arise where by a relative is barred to claim his right to inherit even though he might be dully fell within one of the grounds of inheritance. This is a situation where by a heir fell within one of the impediments to inheritance which are factors recognised by *Shari'a* as those acts if committed by a heir or he found himself in without his own act would bar him from inheriting his deceased relative, the impediments are;

1) Killing, an Heir who killed his relative will not inherit the deceased estate. As the Holy Prophet says;

> A killer does not receive (a share of the) inheritance (of the one he killed).[55]

2) Difference of religion, a Muslims will not inherit his non-Muslim relative as shown by the saying of the Holy Prophet ;

> A Muslim is not to inherit a disbeliever and a disbeliever is not to inherit a Muslim.[56]

3) Slavery, a slave cannot inherit his relative nor can his relative inherit him. a Hadith says;

> A slave does not possess anything, except the right to divorce [57]

[54]Haider S. (2003), Ibid. p23
[55]al-'Asqalani H.I.(2003), *Bulug al-Muram min Adillati al-'Ahkam,*Egypt, Dar al-Manarah al-Mansoura p354
[56]Ibid.p351
[57]Haider S. (2003), *al-Mirath,* Renala Khurd Pakistan,al-Maktaba al-Muhammadia, p29

It should be noted that a Heir who is impeded by one of the above discussed impediments to inheritance cannot affect or disturb the share of other heirs.[58]

4)*Wadh'u al-Yad* (possession of ownerless property) it is a means of acquiring ownership of property which is not owned by anybody, such as trees in the ownerless land, wild animals, fish in the water etc. *Wadh'u al-Yad* is characterised with the following;

a) It is the only means of establishing ownership of the property.

b) It takes place through taking physical possession of the property.

However, for claiming of such property there are some conditions that must be satisfied the conditions are;

1) That no other person should have owned that property.
2) That possession of the property must be taken with intent of acquiring ownership.

The acquiring ownership of such property can be through; Land reclamation, Hunting, Grass and Forests, Mining and treasure hunting etc.[59]

5) Pre-emption, the word *Shuf 'a* is Arabic word for pre-emption. It is defined as the right by which a co-owner in immovable property may redeem from a stranger, in consideration of compensating him, that part of the property which has been sold to him by another of the co-owners.[60]

The principle behind *Shuf 'a* is the expediency and desire to prevent the introduction of a stranger among the co-sharers and neighbours of a certain locality who are likely

[58] Ibid
[59] al-Zuhayli W.(2003), *al-Fiqh al-'Islami wa Adillatuh,* Vol.2Damascus Syria, Dar al-Fikr, pp433-435
[60] Ruxton F.H.(1914),*Maliki Law (M. Khalil Trans.),* London, p223

to cause inconvenience or vexation. If the law of *al-Shuf 'a* is not applied it is likely to damage the beauty and comfort of the inhabitants and their privacy in their enjoyment of their property right. Therefore, the right of *Shuf 'a* exists only in respect of immovable property e.g. land and what is attached to it like buildings, trees etc. So, *Shuf 'a* does not amount to the right of repurchase from the seller, but in reality it amount to the right of substitution which entitled the pre-emptor to stand in the shoes of the person who sells it.[61]

6) *Hauz / Hiyazah* (statute of limitation) is among the means of acquiring ownership of property. It is a principle that defends the possessor from claim of an outsider which may be laid against him, and render possession as title to ownership of the property. Islamic law recognises *Hauz* only as a reason for not legally consider a claim of property that has been in the possession of another for a long time, for the reasons of legal expediency and to avoid difficulties and suspicions regarding the distance past.[62]

2.7 Conclusion

In light of what have been discussed in this chapter, it appeared that a general rule is that the real owner of all things (properties) is Allah (SWT), human being is the vicegerent of Allah (SWT) on the earth. However human being is allowed to acquire ownership of the property through lawful means though his right to ownership of property is restrictive, so as to avoid inflicting harm on other individuals or public ownership as recognised by Islamic Law.

[61]Abdur Rahman I Doi(1984), *Shari'a The Islamic Law,* London UK,Ta Ha Publishers pp341-342
[62]al-Zuhayli W.(2003), *al-Fiqh al-'Islami wa Adillatuh,* Vol.2,Damascus Syria, Dar al-Fikrp433

CHAPTER THREE

THE CONCEPT OF HAUZI IN ISLAMIC JURISPRUDENCE

3.1 Introduction

The doctrine of *Hauzi* is considered among the lawful means of acquiring ownership of property. It gives title of property to the person who has been in physical possession of property of another for a long period without challenge from any individual(s). It equally gives him a defense against suit for the property. It is a Juristic rule recognized by *Sharia* which can be perceived as a mechanism for minimizing conflict among individuals. This chapter attempts to discuss the concept of *Hauzi* it defines *Hauzi* and highlights its legality. It also, explains the application of *Hauzi* on movable and immovable property among blood and non-blood relatives partners and non-partners. It equally states the estoppel period of *Hauzi* among blood and non-blood relatives. Lastly, it discusses some exceptions to the general rules of *Hauzi*.

3.2 Definition of Hauzi

The word *Hauzi* in Arabic is translated as prescription in English. Prescription is defined as way of acquiring property right, such as an easement, by long and continued use or enjoyment.[63]

Hauzi in Islamic Law is when a stranger established control over a property movable / immovable either by means of purchase, inheritance or gift and remains in physical possession for a period legally recognized acquires title over the property.[64]

[63] National Adult Literacy Agency(2003), *A Plain English Guide to Legal Terms*, Dublin Ireland, p51
[64]Abubakar A. (2008), *Islamic Law The practice and procedure in Nigerian courts*, Adamu Abubakar & Co. p214

This is what happened in the case of *Mati Tela and Lawan Maiyalle v Umaru Kwarago*[65]**.**Where the definition of *Hauzi* was categorically stated;

> 'The learned judge reiterated the general principle governing the Islamic law of prescription (*Hauzi). Hauzi,* in *shari'a*, connotes circumstances where a person takes legal ownership of a thing or property from another through undisturbed possession for a specified period of time. The period of undisturbed possession varies from one subject matter to another e.g. landed property, animal, clothe, etc. ....

3.3 Legality of Hauzi

In Islamic Law, *Hauzi* is allowed and made lawful, as it is one of the means of acquiring ownership of property. Thus, the legality can be seen in the incompletely transmitted *Hadithal-mursal* narrated on the authority of *Zayd bin 'Aslam* ' Whoever is in possession of the property of another for ten years becomes more worthy of that property'[66] Though the *Hadith* is *Mursal*, Jurists consider it as authentic, they accepted its text and deduced a Juristic principle which pointed out the effect of lapse of time on possessory action. The above *Hadith* has been considered as origin of the doctrine of *Hauzi* in the case of *Mati and Hajiya Binta v Haruna Yusuf* [67]where it was observed thus;

> The principle of Hauzi is said to have originated from the time of the holy Prophet. It was narrated from an authentic Hadith of the Prophet that says; "Whoever is in peaceful possession of a thing (Real property) for 10 years he becomes its owner" The learned judge continues: He who sees somebody in possession of his property, claiming and using the same as his own over a long period of time without objecting to it, that person in such possession becomes automatically the legal owner. If original owner subsequently institutes an action to reclaim the land, he loses his cause of action and any evidence in respect thereof would not be admissible.

From the case cited above it appeared that, the *Hadith* is the origin and legal basis of the doctrine of *Hauzi*.

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[65] (2006) 3 S.L.R. PT III P 203

[66]Abu-Dawood S.A. (1986) *al-marasil,* Beirut, Lebanon *Daar al-Qalam,* p.202

[67]*The selected judgements of justice*JCA on Shari'a Nig.Ltd.p.97 at p.107

In addition to that, jurists consider *al-'Urf* as supporting evidence for the application of *Hauzi,* whereas it illustrates the truth of the possessor, (hereinafter referred to as defendant) and equally illustrates the falsity of the real owner, (hereinafter referred to as the claimant).[68] Therefore *al-'Urf* testifies that defendant is the owner of the property, it equally testifies that, whoever sees another person in possession of his property with physical control and claim of ownership for a long period, and he was aware but remains silent without any preclusive until the period of long possession is over he forfeits his right to the property and his claim is belied by *al-'Urf*.[69]

However, from what have been discussed above, it appeared that, *Hauzi* can only be effectuated when the defendant has physical control over the property and claims ownership of the same. These are considered as significant elements in *Hauzi*. Being that, the effect of *Hauzi* is creating and destroying rights.

3.4 Conditions of Hauzi

The application of doctrine of *Hauzi* can be subject to the following general conditions:

1. The possessor (defendant) dedicates the property to himself.
2. He performs actions same as the real owner (claimant).
3. He takes long period.
4. There is no challenge from any individual(s) within the period.
5. The owner is present.
6. He is aware.
7. He is adult.
8. He is rational.

[68]Ibn Qayyim M.A. (nd),*at-Turuq al-Hukumiyyah,* cairo Egypt,*Matba'al-Madnii,* p128
[69]Ibn Abideen M. A. (1979),*Haashiyat Raddul-Mukhtar,* (2nd Ed) Vol.VII, Daar al-'Fikr p.485.

9. There is no preclusive that may preclude him from reclaiming his property.

Above are general conditions of *Hauzi* which are necessary to be fulfilled before it takes proper effect.

3.5 Hauzi in case of blood relatives

Blood relatives consist of brothers, paternal and maternal uncles, their children, parent's in-law, and sons' in-law, but the relatives who are very close among the aforementioned group of people are parents and children. The rules relating to the application of *Hauzi* in case of the above relatives will be discussed in the following paragraphs, starting with parents and children.

3.5.1 Hauzi in Case of Parents and children

The doctrine of *Hauzi* can be appliedbetween father and his child, grandfather and his grandchild, based on nature of actions performed in the property. Jurists classified such actions into two:

a. A child may acquire ownership of property belongs to his father by *Hauzi* when he has been in physical possession of the property by construction or demolition of building or by resuscitation of land. *Ibn Dinaar* states that:

Whatever a child physically possessed from the property belong to his father by performing actions such as planting, construction and resuscitation of the land, while the father is alive but he did not relocate him to another land until he died, and the child continues enjoying the same for a long period, the child is entitled to the property by *Hauz* if he claims ownership of the property. But if the father, while alive, relocates the child from one location of the land to another, the child's claim is not acceptable and the property still remains with the father.[70]

[70]al-Qaraafii A. I. (1994) *az-zakkhirah* , Vol. 2 Beirut Lebanon,Daar al-Arab al-Islaamii p 14

b. Also, the child may acquire ownership of property belongs to his father by *Hauzi* when he alienates the property trough sale, gift, alms, etc.as *Ibn Rushid* states that:

> There is no *Hauzi* between father and his child unless through something like gift of landed property given by one of them to a stranger while the owner was present remain silent without any preclusive, or something similar to that (act) which can't be done unless by the real owner in his property. If the owner eventually claims ownership of the property, his claim will not be accepted. This is deemed as a concurrence opinion among jurists.[71]

According to *Imam Malik*, any property sold or given to another person as alms or gift by the child in the presence of his father and the father remains silent without taking any action, if he eventually claims ownership of that property his claim is considered as cunning and deception…[72] So, the claim will not be accepted.

Ibn Rushid further explains that:

If the father (being the owner of the property) was present at the time or place of the sale agreement and remained silent until the transaction was concluded, he stayed silent after the sale for certain period of time without taking any action to recover his property, the sale is valid. But, he is entitled to the purchase price. If he did not collect the purchase price within a year after the sale, the child (being the seller) is entitled to the purchase price after he has taken an oath.[73]

In a situation where by the father was not aware of the sale until after it was concluded, he can reclaim his property, if he keeps silent again for one year he is only

[71] Elyash S . M. (1989), *Sharh al-Minhal al-Jalil* Vol.8, Beirut Lebanon, Dar al-Fikr, p576
[72] al-Abdari M.Y. (2009) *at-Taaj wal-Iklil ala Mukhtasaril-Khalil,*Vol.11 Dar al-Fikr p320
[73] El-yash S. M.(1989),*Minhul-Jalil,* Vol.8 Beirut Lebanon, Dar al-Fikr, p577

entitled to the purchase price, if he did not reclaim it until after the period of *Hauzi* he forfeited his right and the child is entitled to the purchase price.

Similarly, if the father was present at the time or place where the gift, alms…etc. concluded and remained silent he has nothing. But, if he was not present at the time or place of the gift, alms… etc. and it came to his notice later that, his property has been given out as gift, alms… etc. he is still entitled to ownership of the property. But, if he keeps silent again for one year, he will not be entitled to the property.[74]

However, any action performed by the child that constitutes living in a house, or cultivation of land belongs to the father, such action will not make him acquire the property by *Hauzi* as *Ibn Farhuun* explains: There is no difference among jurists that, *Hauzi* is not applied (between child and father) by living in a house or cultivation of land.[75]

From what have been discussed above, it is clear that, *Hauzi* between father and child takes effect only after meeting the following conditions:-

a. The actions performed by the child must be construction or demolition, of building (not for the purpose maintenance) resuscitation of land or by alienation through sale, gift, alms etc. of
b. The father remains silent without any preclusive. *As-sukuut ridhan* (Silence is consent)
c. The father is a live but, does not relocate the child from one location to another.

[74] Ibid.
[75] Ibn Farhuun, B. I (n.d.), *Tabsirat al-Hukkaam alaa Haamish Fathul aliyyil Malik* Vol.2, Daar al-Fikr, pp92 -93

d. The child claims ownership of the property before or after the death of the father.

e. The child spent longer period while in possession of the property such as50 years and above whereas all evidences have been lost and all sources of information have disappeared.[76]

When the child fulfilled the above conditions he may acquire title of the property by *Hauzi.*

3.5.2. Hauzi in Case of Blood Relatives Partners in Mirath

Relatives other than Father and child consist of brothers, paternal and maternal uncles, and their children *al-Ashaar* and *al-Mawaali* are also in their significance, they are the people who owned and share the property left by a deceased. *Hauzi* operates among the above group of people. The operation was based upon the types of actions performed by the possessor(defendant), length of period, and the peaceful coexistence or otherwise. On that basis, Jurists divided the actions that may amount to acquisition of property by *Hauzi* in to three categories:

I-Firstly: property can be acquired by *Hauzi* through living in a House, cultivating of farmland, for long and undisturbed period of time such as forty years and above.

II-Secondly: propertycan be acquired by *Hauzi* through construction or demolition of building, planting, or by renting the property and collecting the rental money by the possessor(defendant) within the period of time not less than ten years, the co-heirs were present and his actions came to their notice, In this situation the possessor(defendant) is considered as a stranger.

[76]Ibid. p99

III-Thirdly: property can also be acquired by *Hauzi* through sale, alms, gift, etc. In this situation, Jurists unanimously agreed that, the relatives are in the position of

Strangers regarding the effect of*Hauzi* .[77]

In line with above, Jurists further explain that, where the co-heir possessed a portion of land equal to his share of inheritance for more than forty years, he is entitled to ownership of that portion, but he will not be given any share from rest portion of the land. But, if he claims that, what he had possessed was belong to him, he still demands for his share from the remaining portions of the land, in this case his claim will not be accepted.

However, if other co-heirs contend that, they abandoned portion of the land that he had possessed for him in lieu of his share, they should take oath. Similarly, in a situation where by an heir had possessed a portion of land less than his share, the remaining share must be completed for him from the rest of the land. But, if the portion of land that he had possessed is more than his share, in this case he is entitled to the whole land. The portion equal to his share stands as his share, and he is entitled to the remaining portion of the land by *Hauzi*. Also, where every one of the co -heirs had possessed a portion of land, he has been cultivating and developing it until some of them died leaving the land behind them, whether distributed or undistributed, then his child occupied the same land. The heirs of the grandfather later complain and demanded for distribution, while the period lasted to the time in which all information about earlier distribution have been lost. In such a situation the land should remain as it was undistributed. *al-Qadiim yutraku alaa Qidami hi* the statement of the heirs, who demanded for distribution, could not accepted, unless if there is a witness even

[77]-al-Faasii M. A. (n.d.),*Sharh al- Mayyaarah* Vol.II Daar al-Fikr p170

by hearsay that, the land was not distributed before as result of peaceful coexistence among them, it will then be distributed. This was illustrated in the case of *Malami Balarabe v Alh. Sahabi Balarabe*[78] where the learned justice held that:

'Where the question of inheritance has not finally been disposed, the issue of *Hauzi* prescription does not arise. The trite law is that inheritance can't be defeated by *Hauzi* of any kind.'

Therefore, he whose share was located in a portion of the land that has already been possessed by building or cultivating is entitled to that potion as his share, and he whose built or cultivated land was located in the share of other co-heir, he should take oath that, his intent of building or cultivating the land was not for the purpose of distribution, at this juncture, option will be given to them, he whose share was located in the built or cultivated land should pay for the value of existing building or plants. otherwise, the co-heir with the building/plants should pay for the value of the land, unless if there was a cogent evidence that he had possessed the land undistributed or he refuses to take oath, then the other co-heir should take the oath and pay for the value of the building or plants, or he should be instructed by authority to either demolish the building or uproot the plants. But, where there was no cogent evidence or the co-heir refuse to take oath, then he whose share was located in that land should pay for the value of the existing building or plants to his co-heir as stated earlier.[79]

Apart from immovable property, the doctrine of *Hauzi* can also be applied on movable property such as Goods, Animals, Vehicles, Clothes, and Slaves (for domestic services or commercial purposes). This can be among relatives partners (co-

[78] (2006) 3 S.L.R. PART 1 p248 at p 251
[79] at-Tasuulii A. A.(1951), *al-Bahjah* Vol.2Egypt,Mustapha Babi&Sons p260

heirs) and non-partners.[80] Therefore when a person possessed a movable property and dedicated it to himself by enjoying its benefits for certain period of time he may acquire it by *Hauzi,* on the following conditions:-

a. That he had possessed the property and enjoys its benefit same as the real owner (claimant).
b. The real owner(claimant) was present
c. He was well aware of the situation.
d. He remained silent without any preclusive that may preclude him from reclaim of his property.[81]

When the above conditions have been fulfilled, the movable property can be acquired by *Hauzi.*

3.5.3. Hauzi in Case of Blood Relatives Non-Partners

Hauzi is also applicable to bloods relatives who are not partners. Its application was based upon the types of actions performed by the defendant, length of period, and the coexistence among them, i.e. lack of enmity/ misunderstanding or otherwise.

In this respect, where the actions performed by the defendant was constructions or demolitions of building, thelength of period can be determined by looking in to their coexistence whether or not they live with enmity/ misunderstanding. Where there is no enmity / misunderstanding among them the period should be more than ten years but, less than forty years. Where there is enmity/ misunderstanding they are

[80] ibn Salmuun, A. A. (2011) *al-Aqaa'id al-munazzam lil-Hukkaam*, Cairo Egypt Daar al-Aafaaqal-Arabiyyah, pp.417-418
[81] al-Faasii M.A.(nd), *Sharh Mayyara*, Vol.2 Dar al-Fikr p171

considered as strangers[82] where the period is 10 years. As in the case of Alh. *Umaru Haruna Mai- Aiki v Danladi Mai- Daji*[83] where the learned justice stated that:

> Since there is no allegation of enmity between the parties who are related by marriage the period of prescription should be by evidence of 40 years possession. The law provides thus; The possession of those related changes with changing situation of the subject of their disagreement. If it concerns a house or a farm the period of prescription must be over 40 years. But those engaged in any disagreement, even if they are related by blood the period within which one can obtain prescriptive right is 10 years.

In this regard,*Hauzi*cantake effect after meeting the following specific conditions:

a. Actions performed by the defendant must be construction or demolition of building.
b. Construction or demolition of the building was not for the purpose of maintenance.
c. The defendant claims ownership of the property.
d. The claimant was aware that he owned whole or part of the property.
e. The claimant remains silent without any preclusive.
f. While there was enmity and disagreement among them.

When the above specified conditions have been met the property may be acquired by *Hauzi.*

3.6 Hauzi in Case of Non-Blood Relatives (Strangers)

A strangeris a person who is not related to others by blood. *Hauzi* also operates between strangers partners and non-partners, its operation between partners differs from that of Non-partners.

3.6.1 Hauzi in case of Non-Blood relatives (Strangers) Partners

[82]El-Yash A. A.(nd), *Fathu al-Aliyyi al-Maliki* Vol.2 Dar al-Fikr, pp99-100
[83] (2006) 3 S.L.R.(PART 2) p 39 at p 45

Partners here are people who own a property and share its benefits. Movable and immovable property can be acquired by *Hauzi* among them. If a person who is a stranger (but partner) physically possessed a property and performs different of actions over the property such as cultivation or construction /demolition of building not for the purpose of maintenance for long period of time such as ten years and above while the real owner was present stood by but, did not take any action to recover his property, such a person acquires title of the property by *Hauzi*. This can be seen in the case of*Muhammadu Ori v Ummaru Dan Usman.*[84] Where the learned justice stated that:

> Under Islamic law, long possession has been held to be a shield against any claim of ownership of property in possession of another person. Thus, under Islamic law, where a person has been in undisputed possession of a landed property for a period of 10 years or more, while the true owner not related to him by blood stands by and does nothing to reclaim the property, he acquired title by prescription.

The above, shows that, the impact of partnership among the strangers has not been recognised in determining the estoppel period of *Hauzi*.

3.6.2 Hauzi in Case of Non-Blood relatives Strangers Not Partners

A person who is a stranger to the real owner if he physically possessed an immovable property such as farm land, house, etc. performed actions such as living in the house, construction, or demolition of building, cultivating, of the land, even by turning the land barren for a year and cultivating it another year, for long period such as10 years and above, while the real owner was present, and was aware but, remained silent without any preclusive that may precludes him from instituting legal action within

[84] (2006) 3 S.L.R. PART 2 p143 at p146

that period, such a person acquires the property by *Hauzi*, any claim from the claimant can not be accepted.[85] See*Muhammadu Ori v Ummaru Da Usman*[86]

However, there is no difference between strangers partners and non-partners, where the property is movable. Therefore, if a defendant has been in possession of a movable property like clothes, animals, goods, Slaves etc. and he has been using it for the period of 2 years and above in the presence of claimant, and he was aware but he did not take any action to reclaim his property without any preclusive, the defendant may acquire title of the property by *Hauzi* if the claimant eventually claim for the property his claim will not be accepted.[87]

3.7 Estoppels Period of Hauzi

Period of *Hauzi* is the minimum or maximum amount of time in which a defendant who possessed a property may spend before he becomes entitled to ownership of such property.

There are divergent opinions among *Maliki* Jurists in determining the estoppels period. According to *Imam Malik* the estoppels period could not be determined by the fixed years, but, determining the period is discretion of the Judge. *Rabi'ah* and some companion of *Malik* view that, the estoppels period can be determined by the fixed ten years.While *Ibn al-Qasim* determined it as seven to ten years. [88]

Determining the estoppels period of *Hauzi* depends upon the types of property, source ofpossession, and relationship between the defendant and the claimant.

[85]at-Tasuul A. A.(1951), *al-Bahjah* Vol.2,Egypt Muastapha Babi &Sonsp253
[86] SUPRA at p48
[87] Ibn Salmuun A.A. (2011), *al-Aqad al-Munazzam lil-Hukkam*, Cairo , Dar al-A'faq al-Arabiyyah, p418
[88]Elyash M. (1989), *Sharh Minh al-Jalil* Vol.8, Beirut Lebanon, Dar al-Fikr, p573

Regarding to the type of property that is movable / immovable, the estoppel period in movable is shorter i.e. one (1) year and above, while the estoppel period in immovable is longer i.e. ten (10) years and above. Concerning the source of possession, where the source of possession of the property is unknown the estoppel period starts from ten (10) months. But, where the source of possession of the property is known the estoppel period starts from ten (10) years, whether the property is movable or immovable. This rule was affirmed in the case of *Hakimi Boyi Ummaru v Aisha Bakoshi*[89] where the court of Appeal held that:

> It is trite in Islamic law that where a person has been in peaceful enjoyment or possession of land without challenge for ten years he thereby acquires a title by *Hauzi* (prescription) against any person who claims to be the true or original owner of such land and who stood by without taking any action to reclaim his land during that period. To put it more clearly, the law is that a person who sees somebody in the possession of his or her property and claiming and using the same as his own over a long period without any objection from (the true owner), loses his ownership and that other person in possession becomes the owner. The above statement of Islamic law is a general rule. It permits some exceptions. And two years on movable property such as animals, cloths, slaves etc.

Furthermore, with regard to relationship between the defendant who has been in possession of the property and the claimant, if they are related by blood the estoppels period of *Hauzi* between them range from forty (40) to fifty (50) years where there is no enmity / misunderstanding. But, if there is enmity / misunderstanding the estoppels period of *Hauzi* is ten (10) years and above. [90]Same as non-blood relations.

However, the estoppels period may be added up from that of deceased to that of heir. For instance, a deceased had been in possession of a property for the period of five (5) years before he died and his heir also possessed the same for another five (5) years, the heir may acquire the property by *Hauzi*. [91]

[89] (2006) 3 S.L.R. Part I at pp 98- 99
[90] at-Tasuuly, A. A. (1951), *al-Bahjah fi Sharh at-Tuhfah* vol.2,EgyptMustapha Babi&Sons, ,p260
[91] El-Yash M. A. (1989) *Sharh Minhal al-Jaliil*, Vol.8 Daar al-Fikr, p.573.

3.7.1 Estoppels' Period of Hauzi in case of Blood Relatives Partners and Non-Partners

Property, movable or immovable must be in physical possession of the person for certain period of time, before he acquired it by *Hauzi***.** The period can be determined by looking into the types of property, source ofpossession, and relationship between the defendant and the claimant as stated above.

The period of *Hauzi* in case of blood relatives differs, depending on the nature of actions performed by the person in possession of the property in dispute. If it was by living in a house or cultivation of farmland, the period is more than forty years, when there is no enmity / misunderstanding between them. Therefore, any of the relatives who have been in possession of property for that period, the claimant has no case against him. But, where there is enmity /misunderstanding or the property has been possessed and alienates by sale or by emancipation of a slave, or the action performed was demolition / construction of building, the period is ten years the same as non-blood relatives.[92]

However, proximity among the relatives plays a significant role in determining the estoppels period of *Hauzi*, the closer the relatives are, the longer the period is. Therefore, the estoppels period of *Hauzi* between father and his child range from ten years to forty years, depending on the situation. Though, the maximum period of *Hauzi* between them has not been determined by most of the jurists, instead, they described it as an extensive period, whereas all evidences have been lost, and all sources of information about the issue have disappeared. This is the predominantly view of jurists. Nevertheless, a great scholar *as-sheikh ad-Dardeer* has attempted to

[92]al-Faasii M.A. (nd),*Sharh Mayyarah*Vol.2 Dar al-Fikr pp169-170

determine the maximum estoppels period of *Hauzi* between father and his child in his commentary on *al-Khalils*' book, where he explains that, the maximum period of *Hauzi* between father and his child is sixty years[93]

Similarly, the estoppels period of *Hauz* among these blood relatives in case of movable property like animals, Slaves, Clothes, etc. is two years and above.[94] However, where the impact ofpossessioncauses immediate change or damage to the property for instance, when a person have sexual intercourse with a slave girl who was in possession, in this case, he acquired that slave girl by *Hauzi,* a situation as such does not need long period for*Hauzi* to take effect, where the claimant was aware, but did not take any action to reclaim his property in time, his claim will not be accepted. Because, it is a human's nature to gainsay the act of whoever caused damages to his property.[95]

While according to *Hanafi* School the minimum period of*Hauzi* is fifteen (15) years, and the maximum is thirty (30) years.[96]

From the above discussion, it can be understood that, the estoppels period of *Hauzi* on immovable property among blood relatives partners and non-partners according to *Maliki School* ranges from ten years with enmity among them, to forty or sixty years without enmity among them, depending upon proximity of the relationship, their coexistence, and actions performed by the defendant . The same rule applied in the case of *Alh. Mahmud Kabara v Aminu Sani Kabara*[97] where the learned justice held that the law is very clear and stated thus:

[93]al-Dasuqi M.A.(nd), *Hashiyah ala sharh al-Kabir lid-Dardir* Vol.4, Dar Ihya' al-Kutub al-'Arabi, p236
[94]at-Tasuulii A.A.(1951), *al-Bahjah*,Vol.2Egypt Mustapha Babi &Sons p252
[95]al-Faasii M.A. (nd) *Sharh Mayyarah*Vol.2 Dar al-Fikr p166
[96]Ibni abideen, M.A. (1966),*Takmilatu Hashiyah*,Vol.7 Dar al-Fikr,p485
[97] (2006) 3 S.L.R.PART1 p115 at p 122

> The longest period of prescription among them (relations) which bars the claim of the claimant is forty years or more. Any of the relations who take up possession for the above period or more, then the claimant shall have no case against him.

The estoppels period of*Hauzi* in movable property among the same group of people is effectively ten years, though; the decision may be left to the discretion of Judge when passing the judgment on the case.[98]

However, *Hauzi* in the case of living father and child is theoretically discussed by jurists, but practically is rare to be found. This may go back to the significance of kinship and parentage in the sight of *Sharia*. A *Hadith* of the Prophet (SAW) signals to that meaning:

> A man came to the Prophet (peace be upon him) and said: O Apostle of Allah, I have properties and children, and my father finishes my properties. He replied: you and your property belong to your father; your children come from the pleasantest of what you earn; so enjoy from the earning of your children [99]

3.7.2 Estoppels' Period of Hauzi in Case of Non-Blood Relatives (Strangers) partners and non-partners

The estoppels period of *Hauzi* in case of non-blood relations partners and non-partners in Islamic law is ten years, where the immovable property have been possessed with peaceful enjoyment, and without any preclusive in accordance with *Malik* School. Though a great scholar from *maliki* School *Ibn al-Qasim* opined that, eight / nine years are in the same rule of ten years for*Hauzi* to take effect.[100] See *Hakimi Boyi Ummaru v Aisha Bakoshi*[101] . Where the court of Appeal held that:

> It is trite in Islamic law that, where a person has been in peaceful enjoyment or possession of land without challenge for ten years he thereby acquires a title by *Hauzi*

[98] ibn Salmuun A.A.(2011),*al-Aqad al-Munazzam lil-Hukkam,*Cairo Dar al-'A'faq al-Arabiyyah, pp 417-418
[99]Abu-Dawood S.A.(1992),*Sunan, part.III at Mawsu'at as-Sunnah al-Kutubus-Sittah wa Shuruhiha* Vol. 9 Istanbul Turkey, Dar al-Da'awa/ Dar Suhnun , p801
[100]Ibid.
[101] SUPRA at p38

(prescription) against any person who claims to be the true or original owner of such land and who stood by without taking any action to reclaim his land during that period. To put it more clearly, the law is that a person who sees somebody in the possession of his or her property and claiming and using the same as his own over a long period without any objection from (the true owner), loses his ownership and that other person in possession becomes the owner. The above statement of Islamic law is a general rule. It permits some exceptions they are:

1. Cogent reasons are adduce for not complaining in time, for example blood relationship or fear of harm from authority.
2. The claimant is a minor.
3. The person in possession was put in possession by the claimant, either as free or paying tenant.
4. The person in possession was put in possession as a trustee.
5. The claimant is a relative or partner or co-proprietor to the person in possession.
6. In the case of a House the possessor was in permissive occupancy.

Again, where the claimant has not been in the town or village where the land is situated, or he is not residing with the person in possession of the property or where the claimant has travelled out or he was in a state of *incommunicado*, then the principle of *Hauzi* can not be used to deprive him/her of his/her property. It is also accepted by Islamic jurists in the famous texts that, where there is evidence that, the claimant is a female and has been in marriage bounds throughout the period of *Hauzi* and also that her Husband would not allow her to come out of the matrimonial home to pursue her case, or he will not allow his wife to sponsor or appoint a *wakil* i.e. representative to challenge the person in possession of the land, if she later comes out and claims ownership of the land, her claim will be entertained not withstanding that, the person claiming *Hauzi* has been undisturbed possession of the land for such a long period.

Similarly, the estoppels period of *Hauzi* in movable property among the same group of relatives is subject to variation. For instance, where the property in possession is an animal or a slave girl (for domestic services) the period of *Hauzi* is two years and above, on the other hand, if the property is a slave man or some goods the period is three years and above. *Sheikh Asbag* a classical jurist from *maliki* school further explains that, one year to two years are the estoppels period of*Hauzi* in clothes when it has been worn by the defendant who possessed it, two years to three years are the estoppels period of *Hauzi* on animals when it has been used or rode, and the slaves girl who has been employed as domestic servant inclusively. While for the slave man and other goods the estoppels period is more than three years. Thence, nothing

of*Hauzi* in movable property among the above relatives which its period extends to ten years, as it was in immovable property.[102]

Besides, where the claimant alleges that, he has been claiming for his property within the period of *Hauzi* either out of court or in the court, the acceptable view among jurists is that, only his claim before the court can be considered.

3.8 Exception to the general rules of Hauzi

Islamic law does not set strict limits to exception to the general rules of *Hauzi*. The matter should be left to the discretion of *Qadhi*, based on what have been presented to him by the claimant as a justifiable reason for the delay of his claim. In the following paragraphs most of exceptions to the general rules of *Hauzi* will be discussed. Though, some schools like *Hanaf, Shafi'i* etc. did not make any detailed explanation on the issue, therefore, most of the exceptions that will be discussed here are from *Maliki* School, which made extensive discussion on such issues.[103] Some cases are exempted either for the type of case involving the subject matter, or for the status of party in conflict. The type of cases involving the subject matter that may be exempted from the general rules of *Hauzi* includes:

3.8.1 Gift/Trust

Where the subject matter of conflict involved gift, trust, bequest, pledge, sale etc. there will be exception to the general rules of *Hauzi*, hence each one of the above is either part of gratuitous contracts or contracts of exchange, where the term *Hauzi* has no connection with rules of prescription and laps of time, it is rather connected with receiving the subject matter, the significance of *Hauzi* in this respect is to render the

[102] al- Abii S. A. (n.d.), *Jawahir al-Ikhlil* Vol.2 Daar Ihyaa al-Kutub al-Arabiyyah p 254
[103]Ahmad M.H.I.(2004) ,*ahkaamat-TaqaadumfilFiqhal-islaamii* , (Doctoral Thesis),Cairo University Egypt, p121

contracts valid, as *Ibn Jazaa* states: 'the condition for the validity of gift is *Hauzi*' i.e. receiving[104] trust, bequest, pledge, sale etc. are the same as the gift. This has been illustrated in the case of *Labbo Dan Hassan v Nani Mode & 2 ors.*[105] Where the learned justice was of the firm view that:

> Where an issue of pledge, mortgage, trust, etc. crept in to the principle of*Hauzi*, out of necessity, would have to change. Any of the above issues will then constitute an exception to the general rule. Where a defendant possessed a farm land or house and using same as his own with the knowledge of the true owner for ten or more years, such defendant acquired the title to that land by prescription popularly known in Islamic law as *Hauzi*. The plaintiff then will not be heard to complain. His claim on those facts will be dismissed. But, where the plaintiff in such situation was able to prove the existence of pledge to the defendant or trust and so on then that element will defeat the claim of *Hauzi* by the defendant. The learned justice further explained that it is under *shari'a* that where one of the exceptions as stated above applied *Hauzi* principle is defeated and there was no need to subscribe any kind of oath.

From the case cited above, it is clear that, where *Hauzi* crept in to the aforementioned issues, it could not be effective, and the issue of *Hauzi* is defeated. Where the case is exempted due to the status of one of the party in conflict includes:

3.8.2 Unawareness

Claimant's unawareness of the effect of *Hauzi* on property can either be a cause for exception to the general rules of *Hauzi* or otherwise, this can be perceived from the following angles.

a- Where the claimant was unaware that, he may forfeit his right of ownership to the property which has been in possession of another person after the period of *Hauzi*. Though, he was aware that his property has been in possession of another person, in this case, jurists disagreed that his unawareness can not be considered as legal excuse that make his claim acceptable, as *Shaykh ad-Dasuqi* states: ' What may precludes the claimant from claim are infancy,

[104]Ibn Jazaa M.A.(nd), *al-Qawanin al-Fiqhiyyah*, al-Maghreb, Dar al-Ma'arifah, p316
[105] (2006) 3 S.L.R. Part I at pp 17-18

mental deficiency etc. unlike his unawareness that he may forfeit his right of ownership after the period of *Hauzi*, therefore his evidence will not accepted'.[106]

b- Where the claimant was unaware that, the property which has been in possession of another person is his own property, though, he was aware that somebody has been in possession of a property. in such situation *Maliki* jurists stipulates that, for *Hauzi* to take proper effect, the claimant must be aware of his right of ownership to the property, and equally be aware that, the property which has been in possession of another person is his property, meeting one of the two stipulated conditions is not enough.[107] Since the burden of prove rest on the claimant.

c- Where the claimant was unaware that, his property has been possessed by another person, though he is aware that he has a property. In this case the claimant should prove his unawareness, being that he was present in the town where the property is located, if he could not prove his unawareness, his claim will not be accepted. Because it is considered that, he who was present should have to be aware unless he proves otherwise. [108]

3.8.3 Absence

Absence is another thing that can be considered as an exception to the general rules of *Hauzi.* The claimant who was away from where his property is located may has a justifiable excuse for his inactiveness to reclaim his property. Jurists agreed that absence can be an excuse that makes *Hauzi* ineffective. Here a question arises, is the distance of place only been considered as an excuse for the owner, or his unawareness

[106] ad-Dasuqi M.A.(nd), *Hashiya*, Vol. 4 Dar Ihya'al-Kutub, p234
[107] Ibn Farhun I.A.(nd), *Tabsiratul-Hukkam bi Hamish Fath al-Aliyil Maliki*, Vol.2 Dar al-Fikr, p95
[108] ad-Dasuqi M.A.(nd), *Hashiya*, Vol. 4 Dar Ihya'al-Kutub, p233

that his property was possessed by another person? In an attempt to answer the above question jurists classified absence in to three classes: proximity absence, intermediary absence, and prolong absence, in order to determine who will be considered as an absent person. Though, they estimated the distance by *marhala* in those days, each *marhala* is now estimated as 44.25Km two *marhala* (88.5km) are equal to a day journey.[109]

a- Proximity absence:This is where the claimant was in a place with distance of two to three days journey (177--265.5Km) away from his property. In such a situation, if somebody took possession of his property in his absence, while he was aware, but he did not take any action to reclaim his property up to the estoppels period of *Hauzi* despite the fact that there was adequate security on the road, he was capable to be present (come back) or to assign power of attorney, in this regard his claim will not be accepted and he forfeits his right to ownership of the property. But, if there was no adequate security on the road, or he proved his inability to be present, even though he was aware that somebody was in possession of his property in his absence. In this regard his claim will be accepted.

b- Intermediary absence: The real claimant could be in a place with distance of four to five days journey (354 -- 442.5) away from his property, and somebody took possession of his property in his absence. In such a situation, jurists have different points of view some jurists view that: he forfeits his right of ownership to the property if he did not take any action to reclaim his property before the estoppels period of *Hauzi*. Unless where he proves his in ability to be present or to make power of attorney. Other jurists view that: he will never forfeit his right of ownership to the property, even if he did not prove his inability to be present or to assigns power of

[109] *al-Mawsu'ah al-Fiqhiyyah al-Mu'asirah* (2003), www.islampedia.com

attorney. His excuse is justifiable, and his claim is accepted and even if he was aware of the situation.[110] This is pertaining the male claimant, but where the claimant is a female her absence for distance of a day journey will not interrupt her claim, a *Hadith* of the prophet (P. B.U. H) says: 'A woman should not travel for more than three days except with a *Dhi-Mahram* (i.e. a male person with whom she cannot marry at all e.g. her brother, father, grandfather, etc. or her own husband)'[111] for instance if the claimant is a female and has been in marriage bounds throughout the period of *Hauzi* and her Husband will not allow her to come out to claim her right of ownership of the property, or he will not allow her to have a representative who will challenge the defendant who has been in possession of her property, if she eventually come out and claims ownership of her property, her claim will be accepted.as illustrated in the case of *Hakimi Boyi Ummaru v Aisha Bakoshi*[112]

c-Prolong absence: this is where the claimant was in a place with distance of seven to eight days journey(619.5 – 708 km) away from his property. In this situation, his absence is considered as possible justification to him for his inability to be present or to make power of attorney, even though, he was aware that his property has been possessed by another person in his absence. In this regard, jurists unanimously agree that, prolonged absence as such, is considered as an excuse to the claimant for hearing and accepting his claim whenever he is present, as *Sheikh at-Tasuuli* categorically states that: Whether or not he was aware that another person has taken possession of his property and whether or not the claim of *Hauzi* by the defendant was as result of the act of construction or demolition of a building or utilization and residence whether or not, he proved his inability to be present or to make power of attorney. This is the

[110] at-Tasuul A. A.(1951),*al-Bahjah,* Vol.2Egypt Mustapha Babi &Sons. p259
[111] al-Bukhari M.I.(2009) *Sahih al-Bukhari* (2nd Ed) Egypt Dar al-Afaaq al-Arabiyya cairo p365
[112] Supra at p38

concurrence view of jurists.[113] Seethe case of *Hakim Boyi Ummaru v Aisha Bakoshi*[114] where this principle was illustrated.

From what has been discussed above, it can be stated that: claimant's unawareness, in intermediary and prolong absences, have been considered as a possible justification for defeating the application of *Hauzi*, while, the proximity absence has not been considered as possible justification for defeating *Hauzi*, instead of that, the claimant is considered as the one who is present, therefore, his claim will not be accepted.

However, the issue of absence discussed above is pertaining to the absence of claimant, But, the absence of defendant from the property he possessed is not only considered as a justifiable excuse to the claimant, but it was rather making *Hauzi* ineffective, the claimant can take his property back without instituting any legal action whenever he can.

3.8.4 Legal Incapacity

This is another status of a party in conflict that may exempt him from the general rules of *Hauzi*. Where the claimant who owned property can not reclaim his property due to some factors that may strip away his legal capacity, whether or not the factors are caused by human act or by the act of god such as fear, duress, insanity, mental deficiency, infancy etc. in this situation, *Hauzi* remains ineffective until such factor disappears. See *Hakim Boyi Ummaru v Aisha Bakoshi* [115]

I – Fear / duress: Study conducted on the issue of fear / duress in *Maliki* School of law indicates that, Islamic jurisprudence does not restrict the true extent of duress. Instead, it merged fear into the duress, and it equally expands the scope fear / duress by articulating its meaning in such a way that *Hauzi* can not be effective. *Shaykh al-*

[113] at-Tasuul A. A. (1951), *al-Bahjah*, Vol.2 Mustapha Babi &Sons.Egypt p259
[114] Supra at p38
[115] Supra at p 38

Hattab states that: ' Unless where the defendant was a usurper or the claimant fears the power of defendant, or the defendant is related to a person who has the authority'.[116]Thus, in the case of defendant. But, pertaining to the claimant *Shaykh ad-Dasuqi* states that: ' The fear, that is where the claimant fears of the defendant for his power or he is related to an influential person who has the authority '.[117]

From the above it is clear that, Islamic jurisprudence went to the extent that not only fear of the defendant, even by fear of an influential person to whom the defendant was related, and he can easily resort to him for his position of authority.

Similarly, the scope of meaning of fear / duress has been expanded by jurists where they used the term to imply different degree of fear/duress, ranging from the lowest degree of fear/duress where the claimant fears to reclaim his property from the defendant because he was heavenly indebted to him which he can not pay him back, thus, constraints him to remain silent against claim for his right, to the highest degree of fear/duress where the defendant was a usurper who uses excessive power to usurp people's property, or he is related to an influential person who is in a position of authority.[118]

II- Insanity, mental deficiency, infancy etc. The claimant who happen to be in a state of one of the above incapacities, is exempted from the general rules of *Hauzi*, therefore his right to ownership of the property will not be relinquished until the incapacity disappears. See *Hakim Boyi Ummaru v Aisha Bakoshi*.[119]*Maliki* School view that: where the property remains in possession of another after disappearance of the incapacity and the claimant realised that he has the right of ownership over the

[116]Ahmad M.H.I.(2004), *Ahkam al-Taqadum fi al-Fiqh al-'Islami,*(Doctoral Thesis),Egypt,Cairo University p141

[117] ad-Dasuqi M.A.(nd), *Hashiyah,* Vol.4Dar Ihya'al-Kutub al-'Arabiyyah pp235-238

[118]Ahmad M.H.I.(2004), *Ahkam al-Taqadum fi al-Fiqh al-'Islami,*(Doctoral Thesis),Egypt,Cairo University p142

[119]Supra at p38

property but, did not take any action to reclaim his property from the defendant within the period of *Hauzi*, he may forfeit his right of ownership whether or not he has a guardian or a trustee, unless if he did not realised that he has right over the property then he will not forfeit his right. *Hanafi* School on the other hand view that: *Hauzi* will not be effective where the incapacitated claimant has no guardian or trustee.[120]

However, there are some factors that have been considered as an exception to the general rules of *Hauzi*, by jurists, bankruptcy is among that factors. For instance, where the claimant was adjudged bankrupt and unable to reclaim his property from the defendant because he is indebted to him and fears that he may be threatened to pay back the debt which he can not pay off being the bankrupt, in this situation *Hauzi* can not be effective.

Moreover, jurists of *Ibadhit* sect consider apostasy as a factor that can defeat *Hauzi*, if a Muslim who has been in physical possession of a property belongs to another person for the period of *Hauzi*, changes his religion, he is not entitled to that property by *Hauzi*, unless where he repents and turned into Islam before the estoppel period of *Hauzi* then *Hauzi* can be effective. But change of religion by the claimant who owned property will not affect the defendant who has been in physical possession of the property. Though, the view of *Ibadhit* appears to be unique, because, the rules of *Hauzi* were not based upon religious tenet instead it was based upon *al-'Urf;* Legal practice and *Shawahid al-Hal* circumstantial evidence.[121]

Furthermore, there are some exceptional circumstances in which a claimant can be exempted from the general rules of *Hauzi* if he failed to reclaim his property, for instance, an outbreak of rioting and public disorder in the area where the parties in

[120]Ahmad M.H.I.(2004), *Ahkam al-Taqadum fi al-Fiqh al-'Islami,*(Doctoral Thesis),Cairo University Egypt,p144
[121]Ibid at p151

conflict live, or breakdown of means of communication, or collapse of private and public buildings in the area as result of flood, *force-ajeure,* the outbreak of war and declaration of martial law in the area, etc. the aforementioned situations are considered by *Sharia* as factors that may preclude the claimant from reclaiming his property from the one who possessed it.[122] This is seen as exceptional circumstances.

3.9 Conclusion

In light of what have been discussed in this chapter, it appears that, *Hauzi* allowed individual(s) whether blood relatives or non-blood relatives after a specific period of time and meeting certain conditions stipulated by *Sharia* to acquire title of the property which has been in his possession, or barring certain court actions against any individual(s) who holds the property after the period of *Hauzi*. It equally allows exceptions to the general rules.

[122] Ibid. at p152

CHAPTER FOUR

APPRAISAL OF HAUZI

4.1 Introduction

The chapter presents data analysis and presentation, summary of result and discussion of major findings. The data analyzed was the information generated from the view of the respondents of the questionnaire for appraisal of the doctrine of *Hauzi* in Maliki School of law. The results were discussed based on each research questions raised to guide the study.

Summary of Demographic Data

Table 4.1: Demographic data presentation based on designation of the respondents

S/No.	Designation	Frequency	Percentage
1	Judge	26	17.3 %
2	Court Registrar	44	29.3%
3	Legal Practitioner	50	33.3%
4	Scholar	30	20.1%
	Total	150	100%

Source: field work, 2019

Table 4.1 above present the participants in the study which involve 26 (17.3%) Judges, 44 (29.3%) court registrars,50(33.3%) Legal practitioners, and 30 (20.1%) Scholars all from Kano State, Nigeria.

4.2 Data Analysis

Answering Research Questions

Frequency and percentage was used to analyze data collected from the field in tabular form on the appraisal of the Doctrine of *Hauzi* in Islamic Law.

Research Question one: To what extent the doctrine of *Hauzi* is been practicing in the light of *Maliki* school in Kano State Northern Nigeria?

Table 4.2: Practicing the Doctrine of Hauzi in Kano State Northern Nigeria

S/No.	Items	Agree	Disagree
01	People who are physically in possession of property belong to another for long period claim ownership as in *Maliki* School of Law.	108 (72%)	42 (28%)
02	The real owner of the property was present and aware that his property was physically in possession of another as indicated in *Maliki* school of Law.	118 (78.67%)	32 (21.33%)
03	The real owner took action to reclaim his property when he realized that his property was physically in possession of another, considering the view of *Maliki* school of Law.	113 (75.33%)	37 (24.67%)
04	The Sharia Courts apply the doctrine of *Hauzi* against the real owner, as view in *Maliki* school of Law.	108 (72%)	42 (28%)
05	All the conditions of *Hauzi* stated in *Maliki* school are applied by Courts before ruling.	103 (68.67%)	47 (31.33%)

Source: field work, 2019

Table 4.2 above present the extent the doctrine of *Hauzi* is been practicing in the light of *Maliki* school in Kano state, northern Nigeria. Item one which says the real owner of the property used to be aware that his property is in physically in possession of another as indicated in *Maliki* school of law with the frequencies of 108 (72%)

recorded against agree response while the frequencies 42 (28%) recorded against disagree response. Item two which says people who are physically in possession of property belong to another for long period claim ownership as in *Maliki* school of law with the frequency of 118 (78.67%) recorded against agree response while the frequency of 32(21.33%) recorded against disagree response. Item three which says: The real owner took action to reclaim his property when he realized that his property was physically in possession of another, considering the view of *Maliki* school of Law, with the frequency of113 (75.33%) recorded against agree response while the frequency of37(24.67%) recorded against disagree response. Item four which says: The Sharia Courts apply the doctrine of *Hauzi* against the real owner, as view in *Maliki* school of Law, with frequency of 108 (72%) recorded against agree response while the frequency of 42(28%) recorded against disagree response. Item five which says: All the conditions of *Hauzi* stated in *Maliki* school are applied by Courts before ruling, with frequency of103 (68.67%) recorded against agree response while the frequency of47 (31.33%) recorded against disagree response. Therefore, the above presentation clearly shows that, the doctrine of *Hauzi* is been fully practicing in the light of *Maliki* school in Kano state northern Nigeria.

Research Question Two: What are the major conflicting crises in the application of *Hauzi* among Sharia courts Judges in Kano State?

Table 4.3: Conflicting Crises in the Application of *Hauzi*:

S/No.	Items	Agree	Disagree
1	The person who was physically in possession of the property explained the cause of his possession.	128 (85.33%)	22 (14.67)
2	The real owner of the property brought evidences and witnesses to support his	128	22

	claim before the Courts	(85.33%)	(14.67%)
3	The real owner presented a cogent reason as a preclusive that precluded him from reclaiming his property within the period of *Hauzi*.	108 (72%)	42 (28%)
4	The real owner accepted decision of the Court made against his claim without an appeal.	38 (25.33%)	112 (74.67%)
5	When the Court ruling defeated *Hauzi*, the person who was in physical possession of the property accepted the defeat.	88 (58.67%)	62 (41.33%)

Source: field work, 2019

Table 4.3 above present data collected on the major conflicting crises in the application of *Hauzi* among *Sharia* Courts' Judges in Kano State. Item one which says: The person who was physically in possession of the property explained the cause of his possession, with frequency of128 (85.33%) recorded against agree response while the frequency of22 (14.67) recorded against disagree response. Item two which says: The real owner of the property brought evidences and witnesses to support his claim before the Court, with frequency of128 (85.33%) recorded against agree response while the frequency of22 (14.67 %) recorded against disagree response. Item three which says: The real owner presented a cogent reason as a preclusive that precluded him from reclaiming his property within the period of *Hauzi*, with frequency of108 (72%) recorded against agree response while the frequency of42 (28%) recorded against disagree response. Item four which says: The real owner accepted decision of the Court made against his claim without an appeal, with frequency of38 (25.33%) recorded against agree response while the frequency of112 (74.67%) recorded against disagree response. Item five which says: When the Court ruling defeated *Hauzi*, the person who was in physical possession of the

property accepted the defeat, with frequency of88 (58.67%) recorded against agree response while the frequency of62 (41.33%) recorded against disagree response. Therefore the above analysis shows that, the major conflicting crises in the application of *Hauzi* among Sharia Courts' Judges in Kano state is that, the person who was physically in possession of the property did not explain the cause of his/her possession and also the real owner of the property brought evidence and witnesses to support his before the court.

Research Question Three: What is the level of awareness in the doctrine of *Hauzi* in the light of Maliki School among the people of Kano state, northern Nigeria?

Table 4.4:Level of Awareness in the Doctrine of *Hauzi* in the Light of Malik School in Kano State Northern Nigeria:

S/No.	Items	Agree	Disagree
1	I am aware about the doctrine of *Hauzi*	57 (38%)	93 (62%)
2	I am aware that, the doctrine of *Hauzi* confers title of property to the person who has been in physical possession of property for a long period without challenge from anybody.	42 (28%)	108 (72%)
3	I am aware that, in *Maliki* school of Law movable property can be acquired by *Hauzi* after the period of two (2) years.	62 (41.33%)	88 (58.67%)
4	I am also aware that, in *Maliki* school of Law immovable property can be acquired by *Hauzi* after the period of ten (10) years.	72 (48%)	78 (52%)
5	I am aware that, the real owner of property may forfeits his right to ownership of property, if he remains silent without cogent reason or challenge to the estoppel period of *Hauzi*.	57 (38%)	93 (62%)

Source: field work, 2019

Table 4.4 above presents the level of awareness in the doctrine of *Hauzi* in light of *Maliki* School among people of Kano state northern Nigeria. Item one which says: I am aware about the doctrine of *Hauzi* with frequency of57 (38%) recorded against agree response while the frequency of93 (62%) recorded against disagree response. Item two which says: I am aware that, the doctrine of *Hauzi* confers title of property to the person who has been in physical possession of property for a long period without challenge from anybody, with frequency of42 (28%) recorded against agree

response while the frequency of108 (72%) recorded against disagree response. Item three which says: I am aware that, in *Maliki* school of Law movable property can be acquired by *Hauzi* after the period of two (2) years, with frequency of62 (41.33%) recorded against agree response while the frequency of88 (58.67%) recorded against disagree response. Item four which says: I am also aware that, in *Maliki* school of Law immovable property can be acquired by *Hauzi* after the period of ten (10) years, with frequency of72 (48%) recorded against agree response while the frequency of78 (52%) recorded against disagree response. Item five which says: I am aware that, the real owner of property may forfeits his right to ownership of property, if he remains silent without cogent reason or challenge to the estoppel period of *Hauzi*, with frequency of57 (38%) recorded against agree response while the frequency of93 (62%) recorded against disagree response. Therefore the above analysis presents that, most of the people of Kano State are not aware of the doctrine of *Hauzi* in the light of *Maliki* School.

4.3 Summary of Result

The following are the summary of the research finding:

1. The doctrine of *Hauzi* is been fully practicing in the light of *Maliki* school in Kano state northern Nigeria.
2. The major conflicting crises in the application of *Hauzi* among Sharia Courts' Judges in Kano state is that, the person who was physically in possession of the property did not explain the cause of his/her possession and also the real owner of the property brought evidence and witnesses to support his claim before the court.

3. Most of the people in Kano State northern Nigeria are not aware of the doctrine of *Hauzi* in the light of *Maliki* School.

4.4 Discussion

The first result of the analyzed data affirmed that, the doctrine of *Hauzi* is being practice in Sharia Courts of Kano State and other parts of northern Nigeria. Contrary to presumptions of some individuals which say that the doctrine of *Hauzi* is not being practice. While it was observed that, among the cases decided by Sharia Court there are cases related to the doctrine of *Hauzi.* Also practicing of the doctrine of *Hauzi* in the light of Maliki School illustrates explicitly the profound impact of the school in the legal system of the country. Thus, the school was foremost among those considered the operation of the doctrine of *Hauzi* as it discusses the rules of *Hauzi* extensively.

The second result indicates a situation where judges can get into difficulty in administration of justice, since *Sharia* provides that the person who was physically in possession of the property will not be asked to explain the cause of his/her possession. *Ibn Abi Zamanayn*, *Ibn 'Attab,*and*Ibn Qattan* state that: The possessor will not be asked to explain the cause of his/her possession unless if he was known with usurpation.[123] Also evidences and witnesses presented by the real owner to support his/her claim will not be accepted after the period of *Hauzi*. *al-Faasii* states that: …if the real owner is present, is fully aware, and knew that the property in conflict is belong to him but, he did not take any action to reclaim it for long period without any preclusive such as fear and the like his claim will not be heard(accepted)…[124]

[123]al-Faasii M.A.(nd), *Mayyarah,* Vol.2 Dar al-Fikr, p166
[124]Ibid. p 165

The third result exposes the level of awareness about the doctrine of *Hauzi* among individuals in Kano State and other parts of northern Nigeria, the level of awareness tend to be very low. Thus, give rise to many conflicts associated with property among people which lead eventually to law suits in *Sharia* Courts especially in urban area.

4.5 Conclusion

The result of data analysis presented in this chapter indicates that, the doctrine of *Hauzi* is practiced in compliance with Maliki School of Law in Sharia Courts of Kano State and other parts northern Nigeria. It equally illustrates that, the level of awareness of the doctrine of *Hauzi* among individuals in Kano State is at level below what is expected which is insignificant.

CHAPTER FIVE

REVIEW OF DECIDED CASES

5.1 Introduction:

Cases are decided by courts after studying the facts in issues and the true extent of the evidences, proofs, and testimonies presented before it as a justification that may convince it in adjudicating the case. The decision made by the court on a case may agree and comply with provisions of law or otherwise.This chapter tries to examine some selected decided cases on the principles of *Hauzi* in Islamic law in order to find out whether the decisions of court in such cases are in compliance with the provision of Sharia in relation to the doctrine of *Hauzi* or otherwise, particularly *Maliki* school of law which makes extensive discussion on the issues of *Hauzi*, also the applicable law in Nigerai.

5.2 Some selected decided cases

I.*Alh. Mahmud Kabara v Aminu Sani Kabara*[125]

In that case the Plaintiff/Appellant, on behalf of himself and other heirs, sued the Defendant / Respondent and one another claiming amongst other things: two houses with respective Nos. as 267 and 293at kabara in kano and one motor vehicle. These were the properties left by one Sani Hota (father to the Plaintiff) who died in 1960 leaving behind two house wives, two children and a mother (the mother later died) before the suit was determined.

When the Trial Court put across to the Defendant the above claim, the 1st Defendant replied:-

[125] (2006) 3 S.L.R.Part I p 115

"They said M.Sani has died in 1960 and he has left one house at Kabara No.267 The said house which he has stated with registration No.394 Kabara 'A', The said house belongs to Muhammadu and Hadiza, it does not belong to M.Sani. About the subject matter of motor we do not know that Mallam has died and left behind a motor."

The 2nd Defendant agrees with the 1st Defendant's response.

On the contested portion of the claim, the Trial Court heard the matter to completion. The respondent called 8 witnesses; the appellant did not call any witness but counter-claimed that the (plot) house in dispute was given to them by Sani Hota (respondent's father) and he built it up. For this the Trial Court requested them to subscribe to an oath i.e. Mahmudu and one Hadiza. The Appellant swore. The Trial Court confirmed ownership of the house in dispute i.e. No.395 on the Appellant and the legal heirs of Hadiza the 2nd Defendant who, from all indication, did not appeal. The Court confirmed ownership of house No.267 on the heirs of Sani Hota including the respondent. The Trial Court dismissed the claim on the motor vehicle as there was no evidence to substantiate the claim.

Dissatisfied with the judgment, the Plaintiff (as Appellant) appealed to the Kano State Sharia Court of Appeal (SCA) . The SCA reviewed the record of proceeding placed before it including the grounds of appeal and additional explanations from the parties. The SCA allowed the appeal, set aside the Trial Court's Judgment and found that the Respondent could not establish the claim before the Trial Court and that the house No.395 was owned by the Appellant's father. It directed that both houses i.e. Nos.395 and 267 be shared amongst the heirs of late Sani Hota including the Appellant. It directed the Trial Court to effect the distribution. It directed as well that the buildings

claimed to have been done by Respondent be taken care of by the Trial Court as the *Hauzi* claimed by the Appellant was not established.

Dissatisfied, the Respondent appealed to the Court of Appeal. The Court allowed the appeal and held amongst other things that prescription *Hauzi* amongst blood relations. The law clearly states that "the period of prescription in case of close relation differs, depending on the case of ownership exercised by the person in possession of the landed property in dispute. Where it concerns occupation of a house or cultivation of a farmland the period applicable is forty years or more." This shows that where a relation takes possession of the property of another relation for a period of forty years or more, no right shall accrue to a claimant who happens to be present and is aware of the situation.

In the given situation, the Appellant had been in possession for forty-two years including the period when the Respondent's father was alive. Respondent's father never drove the Appellant a way, why then should the Respondent at this hour try to drive the Appellant a way from a place he had been in occupation for so long? The law can not allow Respondent to do so even if there is enmity or scuffle between him and the Appellant.

It further held that, on the period of prescription *Hauzi* amongst relations the law is very clear and state thus; The longest period of prescription amongst them (relations) which bars the claim of the claimant is forty years and above. Any of the relations who take up possession for the above period or more, then, the claimant shall have no case against him.

For the above reason, I find the decision of the court below not in conformity with the substantive and procedural laws applicable to landed property alleged to have been in

possession of a relation. This appeal has merit and must succeed. I restore and affirm the decision of the Trial Upper Area Court, Rijiyar Lemo, Kano, Kano State.

Examination of the case

The decision of the Court of Appeal in the case above stands as one of the rules of principle of *Hauzi* that operate amongst blood relatives. It is trite in *Sharia* that: *Hauzi* amongst blood relatives not father and his child e.g. brothers, sisters, uncles, aunts and their children, whether partners or not differs depending on the type of action performed by the occupant on the landed property in dispute. If it is by living in a house or cultivating of farm land the period is forty years or more. So, if one of the close relatives occupied a landed property for the above mentioned period the claimant has no right over it. In addition to the above if the action performed by the occupant is demolishing or construction of a structure e.g. house or giving out the property in question as lease and collects the rental money for himself in such situation the predominant opinion amongst jurists says the period is more than forty years. Though, there is a dissenting opinion which says the period is ten years, similar to that of *Hauzi* amongst strangers who are partners.[126] And same apply in the decision of the Court of Appeal in the case above. Therefore, from what have been examined in the case, it appeared that, the decision of the court is in compliance with the provision *Maliki* School of law regarding the application of *Hauzi* amongst blood relatives. It is also conformable to the provision of *Hanafi* School of law where the maximum period of a possessory action for not being heard is 36 years.[127]

II. *Alh. Umaru Haruna Mai-Aiki v Danladi Mai-Daji*[128]

[126]at-Tasuul A. A. (1951),*al-Bahjah*, Vol.2 Mustapha Babi &Sons.Egypt pp259-260
[127] Ibn Abideen M. A. (1979) Haashiyat Raddul-Mukhtar, (2nd Ed) Vol.VII, Daar al-'Fikr pp419-422.
[128] (2006) 4 S.L.R. part II supra at p43

The case is an appeal case. In allowing the appeal the Court of Appeal held amongst other things that; since there is no evidence of relationship between the parties, *Hauzi* is reduced to 10 years. What is mere loan defeats *Hauzi*, consequently, since there is evidence that the disputed land was granted to the respondent on loan by the appellant*Hauzi* does not apply.

The respondent fails to produce evidence in support of his 47 years possession of the disputed farm land. Also he could not counter the evidence that the disputed farm land was given to him on loan, a fact which also removes this transaction from the defense of *Hauzi*.

The learned justice held that the defense of *Hauzi* is inapplicable in this case. In consequence, the issue is resolved in favor of the Appellant.

Examination of the case

The decision of the Court of Appeal in the case above was based on some rules of the principle of *Hauzi*. Firstly where there is a close affinity between the defendant and the claimant e.g. by marriage, the period of *Hauzi* is 10 years or more. In *Sharia* strangers, relatives (who are not heirs), relatives by marriage, freed slaves and their masters, the period of *Hauzi* amongst them is 10 years or more in accordance to Maliki School.[129] Secondly in the decision of the case above *Hauzi* was defeated and inapplicable being that the defendant was put in to possession of the property as loan by the claimant. This is one of the exceptions to general rules of *Hauzi*, where a person in possession of property was put in possession of property as loan could not acquire the title of such property by *Hauzi*. Under the provision of Maliki School ten (10) years defeat claim of the claimant, unless if he produce an evidence that, the

[129]al-qaraafii A. I. (1994) *az-Zakhiirah,* vol.11 Beiruit Lebnon , Daar al-Gharb al-Islaamii, p14

defendant was either put in possession as a free or paying tenant or as a loan[130]. The decision of the court in this case is conformable with the provision of *Maliki* School of law in relation to taking possession of landed property through loan.

III.*Kada v Yawa*[131]

This is an appeal by Alhaji Garba Gidan Kada who as plaintiff at Kotorkoshi Area Court sued Alhaji Salihu Gidan Yawa claiming repossession of a farmland which was originally cultivated by one Kado, the plaintiff's father. The case went through Kotorkoshi Area Court, Gusau Upper Area Court, Sokoto State High Court, sitting at Gusau, and the Kaduna Division of the Court of Appeal, before it arrived on appeal to the Supreme Court. The appellant lost in all the four lower courts. The courts held that the respondent had acquired the farmland through *Hauzi* as he worked on it for 16 years without being challenged and also Kado's family had abandoned it for 40 years and been seeing the respondent working on it." Under Islamic law of *Hauzi* (prescription) ten years' peaceful enjoyment of possession of property without its being called in question bars all actions against the possessor unless he is the claimant's relative, partner or co-proprietor, or in the case of a house, the possessor was in permissive occupancy only. See Ruxton on *Maliki* law the translation of *Mukhtasar of Sidi Khalil*, at page 309". In the appeal before the Supreme Court the learned justice have affirmed the decision of the lower courts that the respondent has acquired title over the land through prescription *Hauzi* and the respondent must be made to take oath of *yaminul Qadha'i* (Oath of judgment) since the subject matter of the claim is affecting a deceased person's estate*107.*

[130]Ibid. p12
[131] (1998), LPELR-1642 (SC),www.lawpavilionpersonal.com/lawreport Feb. 2014

Examination of the case

The decision of the courts in the case above was based on principle of *Hauzi* in *Sharia*. It is clear that, in *Sharia* any person who sees some one in physical possession of his property performing different actions but he did not challenge him and remained silent for a long period of time e.g. 10 years or more, his right to the property is extinguished. Also cultivation of farmland for ten years defeats the claim of *Hauzi* against a stranger. Regarding the relatives if there is no enmity amongst them*Hauzi* takes effect after long period of time e.g. 50 years. In respect of partner or co-proprietor, same period of time is applicable.In case of a house where the defendant was in permissive occupancy *Matraf* a scholar from *Maliki* School said: if the origin of possession was by payment of tenancy, the right of claimant (original owner) will not be extinguished even if the period of *Hauzi* is very lengthy.[132] In line with the above view of *Matraf* the decision of the courts in the case above is in compliance with provision of *Sharia* especially *Maliki* School of law.

IV.*Mati Tela v Umaru Kwarago*[133]

The plaintiff sued the defendant at Kankia Area Court claiming a farmland at Kwarago which the plaintiff's father left behind after his death. The plaintiff was at the time of his father's death a child. After hearing the witnesses of both the plaintiff and the defendant, the trial court dismissed the plaintiff's claim. Dissatisfied with the decision of the trial court, the plaintiff appealed to the Upper Area Court Katsina. The Upper Area Court also dismissed the appeal. Dissatisfied further, the plaintiff appealed to the high Court Katsina. The high Court Katsina allowed the appeal and set aside the decision of Upper Area Court (i.e. dismissal of claim) and accepted the

[132]al-qaraafii A. I. (1994) *az-Zakhiirah*,vol.11 Beirut Lebanon Daar al-Gharb al-Islaamii, pp12-14
[133] (2006) 3 S.L.R. PART III supra at p17

appeal. It is from there that he filed his appeal in this court. The Court of Appeal dismissed the appeal on want of merit in the appeal.

The Court of Appeal based its decision on the general principle governing the Islamic law of prescription *Hauzi* which in *shari'a* connotes circumstances where a person takes legal ownership of a thing or property from another through undisturbed possession for a specified period of time. The period of undisturbed possession varies from one subject matter to another e.g. landed property, animals, clothes, etc. Other circumstances such as blood relationship (*Qarabah/Nasab*) determine the applicability of the period of *Hauzi*. In landed matters for instance undisturbed possession must be for a minimum of 10 or 40 years before it becomes effective between persons who are unrelated in blood inter se, and those related in blood respectively. The Court further held that there are certain factors which defeat *Hauzi* such as infancy/minority, loan, inheritance, deposit, trust, pledge, prolonged justifiable absence of claimant (e.g. claimant serving jail term for some time or on hospital bed) marital tie, fear of a powerful relation or ruler, etc. The Respondent claimed that he was a child when his father died. He was carried away by his cripple mother on a long absence on begging. These facts were proved by the witnesses called by the Respondent. Again, although PW4 came as a witness, he asserted that the farmlands were given to the Appellants parents as loan pending the arrival of the owner. This, he said was done in the presence of witnesses. The appellants did not deny. They only claimed inheritance. These three factors i.e. infancy, long period of justified absence from where the subject matter is situated and loan, can defeat any claim to *Hauzi*. Thus, even where the Appellants claimed inheritance it is the law that an heir can only inherit what was legally owned by his deceased relation. I therefore

agree with the lower court that the principle of long possession was wrongly applied by the trial and Upper Area Courts On this alone, i shall dismiss this appeal.

Exception to the rule of *Hauzi*:

The decision of the court in the case above contains some factors that defeat *Hauzi* which are the exceptions and have been stated in the case above as follows:

i. Infancy /minority of the claimant.
ii. Person in possession is put in possession as loan, deposit, trust, pledge, or inheritance.
iii. Prolonged justifiable absence of claimant (e.g. claimant serving jail term for some time or on hospital bed) marital tie.
iv. Fear of a powerful relation or ruler, etc.[134]

Examination of the case

These are some exceptions to the general rules in the operation of the doctrine of *Hauzi* as contained in the decision of the court in the case above. Regarding the first exception i.e. minor/ infant, in Sharia has no legal capacity. Thus, if somebody usurped the property of a minor,for 10 years title of such property will not be given to him. When the minor becomes of age he can reclaim his property. The minor under normal circumstances depends on his guardian to protect his interest. Thus, where the guardian failed to protect the interest of the minor or he himself usurped the property or for any reason the minor have no guardian, the defense of 10 years will not succeed against such minor.[135]

[134]Idris S. *An Appraisal of the principles of Hauzi (prescription/Adverse possession) under Islamic Law,*Ahmadu Bello University Law Journal,2005-2006 , Vol. 23-24, P75
[135] Ibid P75 at P81

Similarly where the property of a minor is sold in a manner contrary to *shari'a* either by a court, his parent, guardian, relative, a trustee or the minor himself sold the property, after attaining the age of puberty the minor did not raise any objection, he will not be heard to object if from the time of his attaining the age puberty the prescribed period for *Hauzi* has expired. If immediately after attaining the age of puberty he raised objection to the sale, it can be set aside and his property restored back to him.[136]

With regard to the second exception, it is a good defense if the claimant (real owner) was the one who put the defendant (person claiming *Hauzi*) in possession either as a free tenant, or fee paying tenant or he gave the property to him on hire or on loan. This shows that the claimant (real owner) retained the title to the property while the defendant (person claiming *Hauzi*) is only in possession with the permission or consent of the (real owner). In the case of *Mai Aiki v Mai Daji*[137] The learned justice while commenting on the defense of *Hauzi* observed quoting the author of *Bahjah* commentary on *Tuhfatul Hukkam* vol.2 at page 254 that there is need for evidence of possession, use, transfer, relationship, lack of consent and period. He added that loan defeats *Hauzi*.

The third exception raises the issue of trust, this is very common especially in respect of minors / orphans. Once it is established that the person in possession is holding the property in trust on behalf of the claimant (real owner) the principle of *Hauzi* will not apply.

The fourth exception is the issue of prolonged absence. It is a cogent reason if a person is absent from the locality i.e. where he traveled or resides at a very far place

[136] Ibid
[137] Supra at p 70

that he do not know what is happening to the land in question or if for any reason imprisoned. It has been submitted that a claimant who resides in a very far place will have a valid defense against *Hauzi*. The distance for the purpose of this defense should be for at least 7 to 8 days journey. A distance for a day's or two days journey is not sufficient for the defense, such distance is regarded in the case of a male claimant as the town.[138]

Likewise a married woman who observed the principle of seclusion (purdah), whose husband is the jealous type and does not allow her to go out or her representative to institute an action will have a valid defense. See the case of *Alu Danfagachi &1or v Lami Ahmadu.*[139]The learned justice observed that the position of the law that if there is evidence that during the said period of prescription of (10 years) or part of it, it was established that the claimant was married to a person who stuck to the principles of purdah (seclusion) and will not allow the female claimant, his wife, to institute an action against the occupier directly or through a representative, then the claim of defendant (person in possession) for *Hauzi* will not succeed. Likewise where a female who resides in a different town sued a person who took possession of her property in another town the doctrine of 10 years *Hauzi* will not avail the defendant (person in possession of the property) if the distance between where the female is residing with the town where the property is situated will involve a journey of a whole day or more.[140] According to *Ibn Abidin* a possessory action will not be heard after 15 years unless if it is against *al-Waqaf*(endowment) , inheritance, property of an orphan,

[138]Idris S. *An Appraisal of the principles of Hauzi (prescription/Adverse possession) under Islamic Law* Ahmadu Bello University Law Journal,2005-2006 , Vol. 23-24, P75
[139]Ibid P75 at p80
[140]Ibid P75 at p80

absent person,(even after 50 years) and existence of a legal excuse.[141] Going by the above examination, the decision of the court in the case examined was in compliance with provision of *Sharia* under perspective of *Maliki* and *Hanfi* Schools of law.

5.3 **Conclusion:**

In conclusion what emerges from reviewing /examining the selected decided cases on *Hauzi* above is that, all the courts' decisions appeared to be in in compliance with provision of *Sharia* mostly from the perspective of *Maliki/ Hanafi* Schools of Law.

[141]Ibn Abideen M. A. (1979) *Haashiyat Raddul-Mukhtar*, (2nd Ed) Vol.VII, Daar al-'Fikr pp419-422.

CHHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Introductions

This chapter attempts to give summary of the whole work, highlights some findings of the work, and makes some recommendations.

6.2 Summary

Hauzi is one of the means of acquisition of ownership of property recognised by Sharia, in which an individual(s) is allowed after a specified period to acquire title of the property. It equally gives him a defence against suit for the property.

The concept of *Hauzi* and its application in matters of adjudication as articulated in the classical Arabic literature of Muslim jurists particularly Maliki School of law has been extensively discussed, and analysed in this research. Every chapter has looked at a number of issues related to *Hauzi*.

Chapter one deals with the general introduction, identifying the statement of the problems, aims and objectives of the research, scope, justification/ significance of the research literature review, and organizational layout.

And chapter two deals with Ownership and Acquisition property in Islam highlighting its Meanings, and classification, it equally discuss the ways of acquiring property, and gives an overview of some rules relating to acquisition of property.

Also, chapter three discusses the concept of *Hauzi* in Islamic Jurisprudence, highlights its meaning, legality, conditions that constitute its effect on movable and

immovable property, among blood relatives and non-blood relatives and gives an overview on estoppel period with exception to its general rules.

Similarly, chapter four appraised*Hauzi* and analyzed the information generated from the view of respondents of the questionnaire presents the data and discusses the result. While, chapterfive reviews the decided cases, by examining some selected cases on *Hauzi* decided by *sharia* courts.

Finally, chapter six being the concluding chapter contains summary of the whole work, findings, recommendations, and the concluding remarks.

6.3 Findings

From what has been discussed in the research work the followings are some of the findings:

1-The doctrine of *Hauzi* is been fully practicing in the light of Maliki school in *Sharia* courts of Kano state northern Nigeria.

2-The major conflicting crises in the application of *Hauzi* among *Sharia* Courts' Judges in Kano state is that, the person who was physically in possession of the property did not explain the cause of his/her possession and also the real owner of the property brought evidence and witnesses to support his claim before the court.

3-Most of the individual(s) in Kano State are not aware of the doctrine of *Hauzi* in the light of Maliki School.

6.4 Recommendations

The following are some of the recommendations made.

1- It is recommended that, individual(s) should be encouraged to attend *Sharia* courts session situated in their locality as live audience, thus enable them to ascertain the practice of the applicable law under the Maliki School of law particularly on *Hauzi*.

2- Judges of Sharia courts should carefully examine the facts of a situation in any case brought before them in order to find out the truth of the situation thus will enable them to strictly use the applicable law in their decision to comply with provision of Maliki School of law.

3-Ulama', Judges, legal practitioners and academicians should significantly contribute toward increasing awareness of the applicable law pertaining *Hauzi* among individual(s) through discourse, organizing public lectures etc.in their various localities. Also students of law are strongly advised to form a legal literacy club in order to develop awareness of legal matters among individual(s) by organizing an outreach tour or legal programs in Medias so that conflicts may drastically be reduced especially on landed property.

6.5 Conclusion:

In conclusion, above are outcomes of the discussion that the researcher arrived at through the research conducted on this vital topic.

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