GAMBIA SHARIA LAW REPORT

VOLUME 1

2011

Containing
Some Judgements & Rulings
of the Cadi Appeals Panel

TO BE CITED AS (2011) 1 GSLR

PREFACE

In the name of God, the Most Gracious, the Most Merciful.

Cadi Appeals Panel, which is a Panel vested with jurisdiction to hear appeals purely based on Sharia matters in the Gambia, is a creation of section 137A (1) of the 1997 Constitution of the Gambia. Appeals lie to it from decisions of the Cadi Courts and the District Tribunals of the Gambia in accordance with section 137 A (6) of the same Constitution.

The Panel, shall be comprised of a Chairperson and not less than four other members and for the purpose of hearing appeals its quorum shall be constituted by at least three members of the Panel in accordance with sections 137A(1) and 137A (2) of the Constitution respectively.

Jurisdiction wise, the Panel, by section 137A (6) of the Constitution is only allowed to hear appeals from judgements of the Cadi Courts on matters relating to marriage, divorce and inheritance and from the decisions of the District Tribunals where Sharia Law is involved.

However, section 7 of the Mohammedan Law Recognition Act Cap 6:04 Laws of the Gambia, which has not been expressly repealed by any law in the Gambia provides that, Mohammedan Courts (now Cadi Courts and Cadi Appeals Panel) can entertain causes and matters, contentious or un-contentious, between or exclusively affecting Mohammedan Africans relating to Civil status, Marriage, Succession, Donations, Testaments and Guardianship.

In determining appeals from the two courts above, the Panel shall be guided by the Cadi Appeals Panel Rules 2009 and any relevant authority pertaining to Sharia Law.

This product, cited as ***GAMBIA SHARIA LAW REPORT VOLUME 1 2011,*** contains 19 selected judgements/rulings of the Panel on Sharia matters from 2005 to 2011. The judgments and rulings are arranged based on the dates of the decisions. The product is aimed at affording the general public, most especially the law students, the practicing lawyers and the Honourable members of the bench who are the keepers of fountain of justice the opportunity of knowing the Islamic law as it relates to their family status.

Being first of its kind in this area, the product admittedly, must suffer in one way or the other from certain shortcomings. Please forgive us if you come across any such shortcoming.

Justice A. S Usman
For and on Behalf of Nigerian Team of Kadis
On Technical Assistance to the Gambia

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بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANEL
HOLDEN AT BANJUL

APPEAL NO. AP/01/ 2005

BETWEEN:

OMAR SECKA AND ANOTHER …….... APPELLANT

AND:

MAMIE SECKA AND OTHERS ……...…RESPONDENTS

{Before: Justice A. S. Tahir Chairman, Alh. Omar A. Secka Panelist and Alh. Essa F. Dabo Panelist at Banjul on Monday, July 11, 2005}

PRINCIPLES:

1. *It is an established principle of Islamic law that whoever sleeps over his right cannot come back to fight it back. See Alwajiz Fi Idhahil Fiqhil Qulliya by Abil Harith Al Gazzi page 370*

JUDGMENT

Written and delivered by Justice A.S. Tahir

This is an appeal against the decision of Cadi Court sitting at Banjul presided by principal Cadi Alh. M.L Kahn involving inheritance of late Sainabou Jah. The appellant dissatisfied with the decision appealed to the Cadi Appeals Panel.

THE GROUND OF APPEAL:

The Grounds of Appeal as contained in the Notice of Appeal dated 3- 11- 2004 signed by appellant are as follows:

> "We the undersigned beneficiaries hereby register our dissatisfaction with the decision of Banjul Cadi Court; the said decision was taken on the 24th day of May 2004 with hearing from the parties concerned. That the compound at Gloucester Street which the Cadi gave to Omar Secka and his sister Mariama Secka is a family compound, which does not belong to our late mother alone. So in the light of the above, we appeal to the above - mentioned Court to intervene as soon as possible"

After hearing the appellants and the respondent and going through the record of proceeding of Cadi Court, we discovered that the late Sainabou Jah had distributed the compounds among the beneficiaries and the other things (Clothes, rings and some money) were distributed by their uncle. And that all parties agreed on this distribution and were benefiting from it for 12 years.

And we also observed that in the lower Court (Cadi Court) they were asked to return the properties back for redistribution and the appellant failed to do that. That was when the Cadi confirmed the distribution that was made by the late mother. This is very correct because in Sharia it is stated that "Assakit la Ya Oud". See Alwajiz Fi Idahil Fiqhil Qulliya by Abil Harith Al Gazzi page 370. We herby confirm the decision of Cadi Court and dismiss the appeal accordingly.

……

(Signed): Hon. Justice A.S. Tahir

……. …… ……..……

(Signed): Alh. Omar A. Secka (Signed) Alh. Essa F. Dabo

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/8/ 2005

BETWEEN:

SHEIKH HAYDARA ……..…… APPELLANT

AND:

YANDEH NJIE ……..…RESPONDENT

{Before: Justice A. S. Tahir Chairman, Alh. Ousman Jah Panelist and Alh. Muhamad Jaiteh Panelist at Banjul on Thursday, November 28, 2005}

PRINCIPLES:

1. *Where a court holds that the a child is entitled to maintenance from his or her father, it should go further to explain the mode of such maintenance especially as it relates to the child's education.*

JUDGMENT

Written and delivered by Justice A.S. Tahir

This is an appeal against the decision of Bundung Cadi Court presided over by Cadi Tijan Kah involving the custody of the children (three daughters). The appellant, Sheik Hydara dissatisfied by the decision of the Cadi Court appealed to the Cadi Appeals Panel against the decision.

HIS GROUNDS OF APPEAL ARE:

1. I divorced my wife after I understand that she has no more interest in my marriage because she has not being performing her matrimonial duties.
2. She then fled with my children to Essau N.B.D.
3. I filed case against her at Bundung Cadi Court in order to retrieve my children.
4. The Cadi misconceives the role of fair hearing by refusing to hear me because I went to complain to the High Court about the delicacy of the case
5. The Cadi later informed me verbally that I never have a wife or children.
6. I firmly believe that I married my said wife on a true Islamic way.
7. I firmly believe that we have three children within the said marriage one of which is one and a half year old.
8. I do frequently visit these children at Essau and I am very much dissatisfied with their living condition and also they are not attending school in both Islamic and English.
9. That on my last visit to them, I realized that she has dispersed the children by giving one to her elder sister and sent the other to Senegal
10. I field this appeal in order to retrieve my children, put them in good living condition, education them in both Islam and English and to train them on the moral and ethics of a good Muslim.

Having listened to the two sides, and having gone through, the records of the Cadi Court, we have come to the conclusion that the Cadis Judgment is in order

according to the principles of Sharia. We therefore uphold the decision. However, we observed that:

1. The Cadi fails to mention the mode of maintenance for the children especially with regards to their education.
2. The appellant is not actually appealing against the Judgment of the Cadi but he is worried about their education, well being and care of the children of which the mother has already undertaken.
3. We also observed that the respondent is willing and ready to give the appellant access to the children. This is because during the holidays, she took the elder child to the appellant (father) on his request.

In this regard, since the wife is divorced and the appellant wants the children to have proper care and good education he has to contribute financially by monthly payment of D600.00 (six hundred dalasi) for the two children for:

a. Their feeding,
b. Education and upbringing,

Copy of this Judgment will be made available to the Bundung Cadi Court for their retention and execution in case of default by the appellant.

……

(Signed): Hon. Justice A.S. Tahir

……. …… ……..……

(Signed): Alh. Ousma Jah (Signed) Alh. Muhamad Jaiteh

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/14/ 2005

BETWEEN:

MUSA SABILY…….. ……..…… APPELLANT

AND:

HASSANA BAYE …….……..…RESPONDENT

{Before: Justice Omar A. Secka Chairman, Alh. Ousman Jah Panelist and Alh. Mashona Kah Panelist at Banjul on Tuesday, November 6, 2007}

PRINCIPLES:

1. *The burden of proof lies on he who alleges, if not discharged, the burden of oath lies on a party against whom the allegation is made. See a prophetic tradition reported by Tabarani and Bayhaqi.*
2. *A valid distribution of estate is the one that was conducted by Cadi in the presence of all parties and his two assessors or assistants. This is based on the popular pronouncement of Sayyadina Umar where he was reported to have said "give equal treatment to all parties before you and in application of justice to them as well as on how and where they stand before you in such a way that an influential person will not be confident in his influence and the poor will not be in a state of despair".*
3. *The share of a widow where the deceased leaves a child is 1/8. Qur'an 4:12*

4. *The residue of an estate always go to the children where they are male or a mixture of males and females and it shall be shared among them on the principle of a male carries the double share of a female. This is based on the provision of the holy Qur'an 4:9.*
5. *The right of custody of a child (male or female) is exclusively vested in the mother provided that she has satisfied the laid down conditions. This is as reported by Bin Qudama in the famous Islamic book of procedure (Al-Mugni). In the instant case the appeal Panel has affirmed the custody of Hauwa Sabily at the hand of her mother Hasana Baye the respondent and appointed her the guardian of the child who will have control over her estate. However the Respondent has no right to dispose of the house that has been given to Hauwa by sale or gift or mortgage without seeking and obtaining the approval of the Appeal Panel or that of Hauwa if she has attained the legal age of puberty.*

JUDGMENT

Written and delivered by Justice Omar A. Secka

On 8/11/2005 the Cadi Court of the Kanifing on 08/11/2005 announced its judgment in a this case to the effect that the estate of late Dimba Sabily which was a house at Birkama be shared among his heirs as follows:

Hassana Baye (Wife) to receive 1/8. While the remaining properties to be distributed among the children of the deceased. They are: 1. Musa Sabily (son) and 2. Hauwa Sabily (daurgter) on the principle of the male takes the double share of a female. As the plaintiff was not satisfied with this judgment he filed his appeal before this panel on 10/11/2005 on the following grounds:

1. During the pendency of the instant case and before the judgment the Cadi had allowed the respondent alone to enter into his chambers.

2. The Cadi ordered for the detention of the appellant when he was making his statement of claim.

3. The distribution of the estate (house) was completed without the appellant or witnesses or his uncle or the Imam of the area in attendance.

4. The Cadi did not advert his mind to the allegation that the appellant has removed some properties from the house. Neither did the Cadi call for evidence in proof of the allegation.

5. The valuation of the house (estate) was done by an unknown estate valuer.

6. Initially the respondent did not support the idea of distributing the estate but he was of the view of leaving the whole properties for the children.

The case was slated for hearing before the Panel on 07/06/2007. On that day both the appellant and respondent were before the court in person. The appellant made the submissions that the respondent presented a requested for her own share and that of her small daughter in the house before the lower court. But appellant objected to that on the ground that the daughter was too small and he doesn't want part with her, he wants her share to be under his care up to the time she will be of age. He then appealed to the Panel to confer on him the right of custody of his sister (Hauwa Sabily) and to look after her share. At this juncture the respondent had made the same appeal she made before the lower court that she wants her own share of 1/8 and that of her daughter be given to her. And with regard to the appellant appeal for the custody of Hauwa Sabily she objected to that on the ground that he was yet to marry. She further said that the girl is her own daughter

and she was very small so she was concerned about her rights and the possibility of his tempering with them because since the death of their father three years ago he never showed her any concern or rendered any assistance to her. For this reason the respondent appealed to the Panel to confirm the decision of the lower Court.

EVALUATION OF SUBMISSIONS:

On the submission of the appellant that the Cadi of the lower Court maintained some level of inequality between him and respondent when he attended to the respondent alone in his chambers during the pendency of the case this Panel is of the view that this allegation should not be attended to or looked into due to absence of evidence to sustain it. This is in compliance with a prophetic tradition reported by Tabrani and Byhaqi that: The burden of proof is on he who alleges if he can't the burden of oath is now shifted to the party against whom the allegation is made.

On the submission of the appellant that the Cadi ordered for his detention while the hearing of the case was going on the Panel is of the view that this allegation also cannot attract consideration for lack of evidence in its support.

On the submission of the appellant on failure of the Cadi to advert his mind to a document which contains the inventory of the properties taken away by the respondent from the house the Panel of the opinion that this allegation like the previous ones cannot be considered for lack of evidence to sustain it, more especially that the appellant had confessed before this Panel that he cannot prove the allegation.

On the submission of the appellant that the Cadi distributed the estate without presence of witnesses, his uncle or the Imam of the area the Panel is of the view that Cadi is not under obligation to wait for any witness be he an Imam or not to be in attendance before he embarks on distribution in as much as his two assessors or assistants are present.

On the appellant's submission that the distribution of the estate took place in his absence the Panel is of the opinion that attendance of distribution is a right of the appellant. It is incumbent upon the Cadi to consider his presence unless where his absence is unavoidable. This is based on the popular pronouncement of Sayyadina Umar. He said give equal treatment to all parties before you and in application of justice to them as well and on how and where they stand before you in such a way that an influential person will lose confidence in his influence and the poor will not be in a state of despair.

On the submission of the appellant that the engineer who performed the valuation and drew the sketch plan of the house was unknown to him the Panel was of the view that it is not a condition precedent that he must know the valuer in as much as he is an official engineer. The appellant is however entitled to be rest assured that the engineer is an official valuerer. In the instant case there is nothing to confirm that the engineer in question is an official valuer. For this reason the appellant's complain carries weight and on this basis we hand down the following judgment:

After due consideration of this appeal and listening to both parties (Appellant and Respondent) this Panel has arrived at the following:

Firstly, this appeal was filed within the regulated time allowed by the law.

Secondly, we accepted the decision of the Kanifing Cadi Court and confirm its distribution of estate and apportioning shares to the heirs. As such the widow Hasana Baye will have 1/8 of the house. The residue is to be shared among the children (Musa Sabily= Son and Hauwa Sabily= Daughter) on the principle of a male take the double share of a female. This is in compliance with Allah's injunction in Al-Nisa Cap. 4 Verse 12 and 9 where He says:

فان كان لكم ولد فلهن الثمن مما تركتم

Meaning: …..but if ye leave a child, they get an eighth……

يوصيكم الله فى أولادكم للذكر مثل حظ لأنثيين

Meaning: Allah directs you as regards your children's (Inheritance): to the male, a portion equal to that of two females:

Thirdly, Valuation of the house and other structures attached to it, its distribution, delineating the boarders and specifying allotted portion for each heir on the sketch plan.

Fourthly, the request of appellant for the custody of Hauwa Sabily is hereby refused for the reason that the age of the said Hauwa Sabily is still within the period when the mother is strictly and exclusively vested with the right of her custody by law as reported by Ibn Qudama in the famous Islamic book of procedure (Al-Mugni):

اذا افترق الزوجان ولهما طفل أو معتوه, ذكرا كان أو أنثى, فأمه أولى الناس بكفالته اذا كملت الشرائط فيها, وهو قول مالك وأصحاب الرأى لا نعلم أحدا خالفهم.

Meaning: (if a marital relationship of a couple comes to an end and they have a child the mother has a better right of custody over the child (male or female) provided that she has satisfied the laid down conditions. This is Maliki's view and his disciples and no dissenting view is known to have been held by any one.). We have therefore affirmed the custody of Hauwa Sabily at the hand of her mother Hasana Bayayi the respondent.

Fifthly, the Respondent is therefore hereby appointed as the guardian of Hauwa Sabily who will have control over her estate. However the Respondent has no right to dispose of house that has been given to Hauwa by sale or gift or mortgage without seeking and obtaining the approval of this Appeal panel or that of Hauwa if she has attained the legal age of puberty.

Sixthly, we received the valuation report from the engineer Mr. Andrew of the ministry of land and physical planning on 24/09/ 2007 with the following details:

1. House No. A valued at D37,650.00
2. House No. B valued at D7,150.00
3. House No. C valued at D33,850.00
4. Land size is 942.65 meter valued at D115,000.00
5. Grand total is D193650.00

Hasana Bayayi will have as her share the sum of D24, 206.25

Children shall take the residue as their share. It is D169443.75.

Accordingly:

Hauwa Sabily shall have D56481.25

Musa Sabily shall have D112962.50

If the shares of Hauwa Sabily and her mother Hasana Bayayi are put together their total share s shall be D80,687.50.

……

(Singed): Justice Omar A. Secka

..…….…….. ……..

(Signed): Alh. Ousman Jah (Signed): Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/6/2006

BETWEEN:

AJI HAUWA SILLAH…….APPELLANT

AND:

AJI FANTA DRAMMEH ……..……..…..….RESPONDENTS

{Before: Justice Omar A. Secka Chairman, Panelist Alh. Essa F. Dabo Panelist and Alh. Seringe M. Y. Kah Panelist at Banjul on Wednesday, March 4, 2009}

PRINCIPLES:

1. *For a claim for recovery of debts against a deceased person to succeed in Islamic Law, the claimant must have proof to support his claim.*
2. *When division is conducted in accordance with Sharia, it becomes indispensable and irrevocable. See Fawakihud Dawani page 398*
3. *What is divisible, land or estate should be divided if no harm ensues but what cannot be divided without causing harm, then it must be sold and the opposing party must be forced to accept it. See Fawakihud Dawani page 394*
4. *Estates in Islamic Law of inheritance are divided by their value. See Jawahirul Iklil by Sheikh Khalil volume 2 page 165.*

5. *Evidence is invalidated if shrouded in doubt. See Alwajiz Fi Idahil Qawaidil Fiqhiyyal Kulliya by Dr. Muhammad Sidqi Page 216. See Also Alfatawal Kubrah by Ibn Taymiyyah Vol. 2 Page 121*

JUDGMENT

Written and delivered by Justice Omar A. Secka

The case before the lower court (Lower Islamic Court of Banjul) pertained to the division of the estate of the deceased Alhaji Dembo Ceesay among his heirs. The deceased was said to have left the following:

1. Two compounds; one at Banjul valued at **D619,567.00** and which is currently occupied by Hauwa Sillah and her family and the other one at Dippa Kunda valued at **D819,480.00** and occupied by Aji Fanta Drammeh and her family,
2. Four widowers, (namely Hauwa Sillah, Aji Fanta Drammeh, Aja Nyima Jabbie and Aja Bintu Baldeh) and
3. Seventeen children both males and females from different mothers. One of the deceased's daughters is separately alone and the rest are children of two surviving widowers. The other two widowers have had no issue with the deceased.

The total value of the two compounds stands at **D1,439,047.00.** The total share of Hauwa Sillah and her family is estimated at **D604,599.63** while that of Aji Fanta Drammeh and her family is estimated at **D697,871.20**. The one sixth of the two widows (1/8 divide by 2) from the net total value is **D44,970.21**. The share of the single separate daughters is **D46,635.78.**

The lower court decided that the Appellant, then as plaintiff should inherit the compound at Banjul with her family and ordered her to reimburse an amount of D14,967.37. The compound at Dippa Kunda would be inherited by Aji Fanta Drammeh and she should reimburse the sum of 121,608.00. The remaining inheritors will each receive his /her share in cash. They are as follows:

(a) Nyimma Ceesay (daughter) whose share shall be **D46,635.78**
(b) Aja Nyima Jabbie (widower) whose share is **D44,970,21**
(c) Aja Bintu Baldeh (widower) whose share shall also be **D44,970.21**

Unsatisfied with the decision of the lower court, the appellant herein, through her counsel Mr. Hussein Darbo filed an appeal dated 26/5/2006 before this Panel upon the following grounds:

1. The decision of the Cadi is in conflict with the Sharia since he had combined the entire property (estate) of the deceased, Dembo Ceesay and distributed it among his heirs in total.
2. The decision of the Cadi compelling the heirs to accept their respective shares by substitution is in sharp conflict with the principle of Sharia for every inheritor enjoys the right of.

The counsel therefore sought from the court an order annulling the decision of the lower court and ordering a retrial in the case.

The appeal came up for hearing on 14/11/2007 with the parties and their respective attorneys present in court. The attorney to the appellant Mr. Hussein Darbo, arguing the case submitted that when Dembo Ceesay died, he was survived by seventeen children eight of which are the children of the appellant (4 boys and 4 girls). The respondent on the other hand had two (2) girls and six (6) boys. There is no separate daughter by the name Nyima Ceesay. He argued further that no one is

disputing the right of these people to inheritance including the right of the four widowers in their collective 1/8 share. But the point of contention is the compulsion by the lower court forcing one of the heirs to inherit a specific portion or thing in the estate. The two properties in Banjul and Dippa Kunda are large enough for all the inheritors. It is not permissible to force some heirs to accept their share in the compound in Banjul while forcing others to accept it from Dippa Kunda.

He argued further that mathematically, there is discrepancy between the children of Aji Fanta Drammeh and those of Hauwa Sillah only in regard to shares and actually there is a vast difference regarding their shares of the estate.

On the areas of the two compounds, the attorney submitted that the one at Dippa Kunda measures 1623m2 and the one at Banjul is 338.4m2. Thus, is it just for the share of six children to be this size and the share of seven children to be that? They should have been consulted and allowed to make free choices but not to force them as stated in page 7 of the record of proceedings. Mr. Darbo applied to the court verbally that review should be had regarding the valuation.

Responding, the attorney to the respondent Mr. Borry Touray on 21/11/2007 submitted that the appeal be struck out for lacking legal validity. He submitted further that the total number of the inheritors is 17 children; among them is 10 males and 7 females. The inheritance was only divided between the wives and children. No complaint was raised to the effect that there was an inheritor who received a portion other than those mentioned. The attorney further submitted that there is no complaint that the deceased left another estate other than this one which is not distributed or divided. The entire estate is represented in two compounds only. He added that there is no complaint as well that a group of the inheritors have

collected more than their allocated shares; this is not stated either in the notice of appeal or in the course of hearing the appeal. He also submitted also that in reality there is no objection against the scheme used by the lower court in the distribution process or that it committed an error. That the only objection is that the deceased estate was not divided as it is. As it is? Only two compounds the deceased left and these were divided accordingly.

The respondent's counsel argued further that his colleague's assertion that Aji Hawa Sillah has not received her share of the compound at Dippa Kunda does not really mean that the compound was not divided or that she did not receive her rightful share from the estate and vice versa. Dividing an estate means that each inheritor receives his or her definite share of the total value of the inheritable property and this has actually happened. The role of this court, the counsel submitted further, is to confirm or not to confirm the correctness of this process and when this process is endorsed, there is no any reason for the annulment of the decision already rendered.

On ground 2 of the grounds of appeal, that the lower Islamic Court coerced the respective inheritors in their choices, it is submitted by the respondent's counsel that that is not true since at page 12 of the record the lower court asked the appellant if she had any more thing to say and she replied that she wants to bring this matter to an end and that she wants to repair the zink in the house before the rainy season. He submitted further that this response shows that the appellant accepted her choice of the compound at Banjul. The counsel argued further that this assertion cannot be true also since the Cadi has stated what share each inheritor is entitled to and if the inheritor receives his or her share in accordance with the allocation, then he has received what he or she is entitled to. The attorney illustrated the point further by citing an example of where a man left an indivisible

estate among his heirs, this property will be sold. In the same manner, if he leaves more than a thousand compounds and 17 children for example, then an inheritor can receive more than one compound on that and this, he argued, is in line with Islamic teaching. The attorney also submitted that distribution in line with the appellant's attorney's submission is only possible where the inheritors were limited only to the families of Hauwa Sillah and Fanta Drammeh but since there are other inheritors that procedure of each inheritor getting his or her share from each compound is not possible. He maintained that the lower Islamic Court was right in applying this method which will relieve and satisfy all.

On the final reply by the appellant, her attorney reacted to the issue of a deceased who left inheritors and a thousand compounds by submitting that, that situation is different from the case at hand. That the similitude of the instant situation is as where a deceased died leaving copies of the Holy Quran and copies of a book of jurisprudence called Al-Risala of Abi Zaid Al-Qairawani to be inherited among his heirs.

There was allegation of forgery of the report of valuation by the appellant and the Panel decided to invite the valuer by name Mr. Wally Ndure to appear in court on 27/2/2008 for purposes of confirming or rejecting the report. The valuer on perusing the documents told the court that there was forgery in the figures and signature and the panel instantly decided to set aside the report of the valuation which is attached to the record of proceedings of the lower court on the grounds of doubts over its authenticity on the principle that "**evidence is invalidated if shrouded in doubt"** and the Panel instructed that another valuation of the two compounds be conducted in accordance with the Appellant's request. See *Alwajiz Fi Idahil Qawaidil Fiqhiyyal Kulliya by Dr. Muhammad Sidqi Page 216. See Also Alfatawal Kubrah by Ibn Taymiyyah Vol. 2 Page 121*.

This is despite the respondent's objection to that effect on the ground that, the request did not form part of the appellant's grounds of appeal. This Panel, being an Islamic Court, aims at doing substantial justice without undue regard to technicalities. The Panel consequently appointed another valuer by name Ebrima Barry of the Department of Estate for Land and planning to repeat the process of valuation which he did and to which the respondent consented after her attorney Mr. Darbo demanded the presence of the valuer before the Panel to answer some questions. The matter was therefore adjourned to 4/2/2009 for that purpose on which day the valuer Mr. Ebrima Barry appeared in court to confirm the report. The parties having consented to the report of the new valuation, the new value for the property at Banjul is now **D1,732,243.00** as against its earlier value of D619,567.00 while that of the compound at Dippa Kunda is **D968,934.00** as against its former value of D819,480.00.

A Memo from the respondent seeking the payment of debts incurred by the deceased was presented to the Panel by the respondent. After series of adjournments at the instance of the lawyers the Panel on 4/6/2008 decided to hear from the respondent concerning the unpaid debts she is claiming from the deceased. After hearing the matter and the arguments of the two attorneys on it the Panel rejected the debts on ground of lack of evidence to support them as enshrined in the Holy Quran Suratul Baqara Verse 286 "**Oh ye the believers establish in writing whenever you loan to each other".**

On 6/11/08, the attorney, Mr. Darbo informed the Panel of the demise of the appellant and the Panel advised him to find a substitute among the inheritors which substitute he informed the court of on 4/12/2008 to be Hawa Ceesay.

This Panel has gone through the grounds of appeal and the submissions of the attorneys on them and it finds it difficult to agree with the appellant on ground 1 that the lower Islamic Court forced the inheritors against their will to accept their allocated compound by compensatory scheme. This is because the record of proceedings of the lower court showed that the parties were asked to voice out their opinion after the presentation of the report of the valuation and before final decision by the court. All the parties, including the appellant, agreed that the matter should proceed to the end. Furthermore, the lower court after clearly stating in the record that each widower is entitled to the sum of D44, 970.21, it went further to ask them (appellant inclusive) if they wanted to receive their shares in cash. The appellant responded thus "**yes we shall do that; I will contact my children to remit the money if I know the exact compensatory amount".** Pursuant to this, the appellant made an advance payment of D4, 812.00 and this is attested to by the respondent.

The compound at Banjul was allocated to the appellant and her children while the one at Dippa Kunda to the respondent and her children. The lower court's judgment is to the effect that each of them should purchase the allocated compound from their allotted shares of inheritance and pay the excess there from to the other inheritors in cash and this was done with the consent of all. There is therefore no substance in the appellant's argument on this issue of coercion. The Panel therefore affirms the decision of the lower court on this ground relying on the book of Fawakihud Dawani Vol. 2 page 398 in the chapter dealing with Adjudication and Evidence that "**when division is conducted in accordance with Sharia, it becomes indispensable and irrevocable".**

إذا وقعت القسمة علي الوجه الشرعي كانت لازمة لا تنقض.

It is difficult, if not practically impossible, to share two compounds per 27 shares of the children and ¼ of 1/8 for each of the four widowers without causing any harm. It is inconceivable to share the compound at Banjul which measures 338.4 M2 among 27 heads plus ¼ of 1/8 for each widower. In the same *Fawakihud Dawani page394* it is stated that "**what is divisible, land or estate, should be divided if no harm ensues but what cannot be divided without causing harm, then it must be sold and the opposing party must be forced to accept it".**

ومن انقسم بلا ضرر قسم من ربع وعقار. وما لم ينقسم بغير ضرر. فمن دعا البيع أجبر عليه من أباه.

Since the valuation has changed, the value each inheritor will get must also necessarily change. The new share now based on the new valuation is as follows:

PROPERTIES LEFT BY THE DECEASED:

S/NO	The Property & it's location	It's New Value:	Denomination of 1/8	Denomination of ¼ of 1/8	The Residue for the Children
1.	Compound at Dippa Kunda	D968,934.00	=	=	=
2.	Compound at Banjul	D1,732,243.00	=	=	=
	Total Value	D2,701,177.00	=	=	=
3.	=	=	D337,647.13	D84,411.78	D2,363,529.84

THE INHERITORS & THEIR SHARES

Males:	Females:	Number of	Males' Share:	Females'

			Shares:		Share:
1.	10	7	27	D175,076.28	D87,538.14

SHARE OF FAMILY OF AJI FANTA DRAMMEH:

	Inheritors:	Calculations:	Amount Due:
1.	Six boys	x175,076.28	D1, 050,457.68
2.	Two Girls	2x87,538.14	D 175,076.28
3.	Aji Fanta	(¼ of 1/8) 1x84,411.78	D 84,411.78
		Total	D1, 309,945.74

THE SHARE OF FAMILY OF AJI HAWA SILLAH:

	Inheritors:	Calculations:	Amount Due:
1.	Four boys	4x175,076.28	D 700,305.12
2.	Four Girls	4x87,538.14	D 350,152.26
3.	Aji Awa	(1/4 of 1/8) 1x84,411.78	D 84,411.78
		Total =	D1, 134,869.16

THE SHARE OF REMAINING HEIRS:

	Name of Inheritor:	Description:	His/Her Share:
1.	Binta Ceesay	Daughter	D87,538.14

2.	Aja Nyima Jabbie	3rd Widower		D84,411.78
3.	Aja Binta Baldeh	4th Widower		D84,411.78
		Total	=	D256,361.7

If we subtract the share of Aji Fanta Drammeh and her children i.e. **D1,309,945.74** from the total value of the compound given to them at Dippa Kunda, i.e. **D968,934.00** being the value of the compound, they will be left with a balance of **D341,011.74** to be refunded to them in cash.

The same thing applies to Aji Hawa Sillah. If we subtract **D1, 134,869.16** which is her share with her children from **D1,732,243.00** being the value of the compound at Banjul we will be left with the sum of **D597,373.54** to be refunded by them.

Read more from the following authorities:

1. Assamar Addani Commentary on Risala Chapter on Adjudication and Evidence page 623
2. Fawakihud Dawani Commentary on Risala by Ahmad Bin Gunaym Almaliki Volume 2 pages 266 – 264
3. Mukhtasar Al-Khalil page 206
4. Fiqhul Mawarith by Muhammad Jabr Al-Alfi and Muhammad Abdul Mun'im pages 253 – 257
5. Al-Ihkam Lil A'amidi volume 3 pages 47
6. Almahsul Volume 3 page 187
7. Al-Mustasfa page 483 and
8. Al-Bahrul Mahit volume 2 page 315

……..

(Signed) Justice Omar A. Secka

……..… …….

Alh. Essa F. Darbo Alh. Seringe M. Y. Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/ 31/2005

BETWEEN:

AJI TIDE CEESAY……..……..…….....APPELLANT

AND:

MODU NJIE……..…….……..….RESPONDENT

{Before: Justice Omar A. Secka Chairman, Alh. Essa F. Dabo - Panelish and Alh. Seringe M. Kah – Panelish at Banjul on Thursday, June 3, 2010}

PRINCIPLES:

1. *Any property subject to inheritance which could be partitioned without any harm for purposes of distribution to the inheritors must be partitioned for that purpose. See page 394.*
2. *Monetary compensation does not therefore apply in an inheritance matter where the property in respect of which the compensation is sought to be paid can be partitioned and distributed among the heirs.*

JUDGMENT

Written and delivered by Justice Omar A. Secka

The appeal was filed on 18/10/2005 against the decision of Cadi Court of Banjul dated 10/10/2005 which distributed the property which is situate and laying

at Street 45 Stanley Banjul belonging to the late Pa Njie to the following legal heirs and beneficiaries;

(a) A widow called Meta Secka,

(b) A son called Modu Njie and

(c) A daughter called Sukay Njie

The judgment was to the effect that the widow was entitled to 1/8 and the son and daughter would share the residue on the principle of to the male double the share of a female. It was equally contended before the lower court that the said widow (Meta Secka) and the daughter (Suky Njie) passed away before the distribution took place. That the son (Modou Njie) agreed to compensate her beneficiaries in cash.

The appellant being dissatisfied with the said judgment appealed to this panel upon the following sole grounds i.e. ***I am not satisfied with the type of distribution although I agreed that the male will have the two shares of the female but there is a mistake in the demarcating.***

At the hearing of the appeal on 28/11/2006, the appellant was represented by lawyer Genet Sallah, while the respondent was represented by lawyer Anthuman Gaye. The counsel to the appellant at the hearing amplified the above ground of appeal by submitting that the estate in question was distributed since 1969 through a Curator (a public trustee) in line with Sharia principles. That the Cadi of the lower court had no right to re-partition the estate when same has been partitioned about 45 years back. He argued that the re-partition done by the lower court is unlawful and un-constitutional and not done for the benefit of the appellant.

The counsel argued further that by the 1997 Constitution of the Gambia, this court has a supervisory power over the lower court to order the acceptance of partition done years ago and to be acted upon. Where both sides are Muslims, they follow the Sharia way of partitioning. The Cadi was informed about this procedure, but he never considered it. That the copy of that distribution is available in the office of curator and that he would follow it up before the next proceeding. The hearing was therefore adjourned.

On 30/1/2008 the court resumed sitting with same Genet Sallah appearing for the appellant. The counsel informed the court that he did actually follow up the curator, but was unable to trace the document because there were so many documents. He therefore asked for further adjournment and the appeal was accordingly adjourned to 12/3/2008 for continuation.

On 12/3/2008 one female lawyer Amie Joof appeared with lawyer Genet Sallah who informed the court that the document could not be traced in the office of the curator. Based on this, the panel decided to continue with the hearing without the document from the curator's office or in the alternative, the panel would request for it officially. The appellant therefore continued his argument by submitting that the Intestate Estate Act Volume III Cap. 14:02 Laws of the Gambia provides that distribution should be based on Sharia law. He argued further that the lower court accorded hearing to the respondent only excluding the appellant. That the appellant could testify to the fact that she was not allowed to say anything at the hearing and, according to him that contravened the rule of fair hearing. The two parties to a case must be heard. For that reason the counsel urged the panel to set aside the court's decision and order for a retrial.

The panel thereafter asked the appellant to inform them of what happened in the lower court. The appellant answered thus:

> *"I was called there in the court, the Cadi asked me if I know Modou Njie I said yes, he asked me who is my mother I answered him, he asked me how many of us are? I informed him. he again asked me that Modou Njie is demanding his share from the compound, I told him the case is at the curator office, he said to me I don't asked you about the curator, I just I told him you can do what you want. For that being a while he called us for the second time, when I came to the court I found Modou Njie sitting in the Cadi's office I heard the Cadi saying that Modou Njie is the city born intact is our nephew, I heard Cadi said again that he has sent the evaluator to evaluate the compound. "*

Whereupon lawyer Genet Sallah told the court that, that is to say, the process was not complete, and any judgment in incomplete proceedings is equally an incomplete judgment. He therefore prayed the court to allow the appeal.

At the close of the appellant's submission, the respondent represented by his counsel lawyer Koka Gaye holding brief for Anthuman Gaye submitted in response to ground 1 of the grounds of appeal that since the document pertaining to the land could not be traced from the curator's office, the appellant's counsel could not base his argument on that. That he conceded to the argument that this court, based on the provisions of the Constitution, has supervisory power but disagreed with the counsel that the lower court had no right to distribute the property when he could not produce evidence that the office of the curator had earlier on done the distribution of the estate in question before the court.

The lawyer also argued that, contrary to the appellant's argument, the appellant was fully heard because she admitted before this panel that she was asked

a lot of questions by the Cadi such as who is their mother and how many children their mother has. The argument of non hearing is therefore a non issue. She submitted further that the fact that the decision of the lower court was based on D82,804 is a clear proof of the fact that all the parties to the proceedings were heard in conformity with the rules of fair hearing as applicable in Islamic law and not in conformity with the process of hearing in the High Court. He concluded his argument by submitting that the appellant's counsel was not faulting the distribution made by the lower court but hammering on the fact that the proceedings were incomplete. He therefore urged the court to affirm the decision of the lower court.

Genet Sallah made final reply to the submission of the respondent's counsel by submitting that there was no concluded hearing on the case and this is a foundation stone for any judgment. On the issue of hearing all the parties, the case file forwarded to this court by the lower court is very clear on this. The case file showed that the process was not completed before the lower court. About the dissimilarity between the procedure of Cadi Court and that of the High Court, he submitted that the procedure of Cadi Court is based on the Holy Quran. And what she said that he was not faulting the judgment of the Cadi Court, her arguments are quite explicit to the contrary.

Having carefully listened to the arguments of the appellant and the respondent, this panel finds it difficult to agree with the appellant's counsel that the property was distributed before by the office of the curator since no evidence to that effect could be produced by the appellant from the office of the curator. Furthermore, the panel also disagreed with the lawyer to the appellant that it was the office of public trustee (the office charged with the division of estate) that divided the property since there is no evidence to that effect also.

About the submission by the appellant that she was invited by the Cadi and when she went, she found the Cadi referring to the respondent as the son of his (the Cadi's) sister, that submission is unacceptable to the panel also since there is no evidence to prove that. On the incompleteness of the court process, the panel finds it difficult to agree with that submission because the appellant submitted orally before this court that the trial judge called them twice in respect of the case and thereafter arranged for the valuation of the property by a valuer with a view to distributing it to the beneficiaries. It was because of the completeness of the process that the court knew the family members and their relationship with one another.

The panel however agrees with the appellant on the issue of dissatisfaction with the division done by the court and also with the respondent on the fact that there is nothing to show that the division was done by public trustee.

Based on the forgoing analysis, the panel decides and orders as follows:

3. That the decision of the lower court on the distribution of the property of late Pa Njie among his beneficiaries i.e. wife to get 1/8 and the son and the daughter to share the residue to the male double the share of a female is hereby affirmed.
4. That the cash compensation by Modou Njie to his sister as ordered by the lower court is not in order since the property in question could be partitioned without any harm as stated in Fawakihud Dawani page 394 (any property that is divisible without any harm must be divided).
5. That the first distribution done by lower court is set aside and order to re-valuate the property including the developments done on the property through Mr. Wally Ndure is hereby made.

6. That a new distribution be made based on the new valuation.

……

(Signed) Hon. Omar Secka

……. ……

(Signed) Alh. Essa F. Dabo (Signed) Alh. Sering M. Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/16/2010

BETWEEN:

MARYAM CAMARA ……..……APPELLANT

AND:

YOROO CAMAR……...…..…….RESPONDENT

{Before: Justice Omar A. Secka Chairman, Justice A. S. Usman, Alh. Ousman Jah Panelist and Alh. Masohna Kah Panelist at Banjul on Tuesday, January 31, 2011}

PRINCIPLES:

1. *Even though The Cadi Appeals Panel by section 137 A (6) of the 1997 Constitution of the Gambia, has jurisdiction to entertain appeals from judgments of the District Courts where Sharia law is involved, that jurisdiction does not extend to entertaining appeals from the decisions of the said tribunals where those decisions were founded on criminal trials.*
2. *By section 26 of the District Tribunals Act Cap. 6:03 Vol. II Laws of the Gambia only a party to the proceedings of a District Tribunal, who is aggrieved, can appeal against its decisions to the Cadi Appeals Panel where Sharia law is involved.*
3. *Where a person (who is not a party) has an interest in a case that is pending before a court, the appropriate thing to do is to apply for joinder under the relevant rules of the court to enable him or her to partake in its proceedings.*

The appellant, having not been so joined, is incompetent to prosecute the instant appeal and the Panel has no better option than to strike out same.

JUDGMENT

Written and delivered by Justice A. S. Usman

This is an appeal against the decision of the District Court Tribunal of Jarra (hereinafter referred to in this judgment as the lower court) dated 13/11/2010. The respondent, as plaintiff in the lower court sued the defendant one Momodou Yahya Kanteh for taking away his wife without his knowledge.

The claim before the lower court as could be discerned from the evidence of the respondent contained on pages 1-4 of the printed record of proceedings of the lower court placed before this panel is that, the defendant who was his next door neighbour at Burufut and who on some occasions visited him and sought for a traditional treatment for a sickness he was suffering from, was in love affairs with his wife Maryama Camara the appellant in this case. The said defendant, the respondent at the lower court narrated further, one day came to his house in the night thinking that he was away to Birikama with the aim of meeting his wife; the appellant herein but surprisingly saw him laying on the bed. He gave the defendant a hot chase but the defendant managed to escape. The following day, the defendant's father begged the respondent and apologized on his behalf. Despite this, the defendant did not stop his atrocities against his wife but courageously thereafter, decided to camp and in fact did camp the appellant in a room at Farato which arrears of rent totaling D600 he was made to settle when he went to bring her to Base on the request of her father for admonition in company of one Malado Camara; a germane sister to the appellant and pw2 on page 5 of the record of the lower court. Even at Base, the defendant still ambushed her and camped her in the

house of one Kebba Kebbeh at Sancheba Suley Jobe where he normally goes to meet her from Burufut. He encountered difficulties before he could trace the appellant and even after tracing her, to his astonishment, she was pregnant for the defendant. To crown it all, the respondent alleged being denied total access to the appellant by the defendant and that his children as a result are forced to live without their mother.

The respondent in addition to his testimony at the lower court called two witnesses, to wit, Amodou Keiteh as pw1 and Malado Camara as pw2 (p3-6) in proof of his case at the close of which the defendant opened his defence.

The defendant at pages 6-9 reacted to the respondent's claim by denying liability on the ground that the appellant is his wife. She was given to him in marriage by her brother Muattarr Camara who resides at Guinea Bissau. That the marriage was contracted between him and the appellant after the respondent had divorced her and upon the production of the divorce letter to that effect. That they had three issues from the marriage, two are alive but one is dead. In support of his case the defendant also called two witnesses i.e. Wandifa Jameh as dw1 and Maryama Camara as dw2. (p9-12)

At the close of the evidence for the defense, the lower court relying on sections 12 and 13 of the District Tribunals Act Cap. 6:03 Vol. II Laws of the Gambia passed its judgment sentencing the defendant to pay a fine D3000.00 or in default to serve a 6 months term of imprisonment with hard labour and additionally to pay the sum of D7000.00 as compensation to the respondent and in default to serve a 12 months term of imprisonment with hard labour.

It is against this judgment of the lower court that the appellant vide a Notice of Appeal dated 24/11/10 and filed on the same day, appealed to this panel to have same set aside upon the following grounds, to wit,

1. That the judgment was wrong in law because the tribunal failed to take into consideration the fact that the appellant was divorced from the respondent for many years,
2. That the order by the court for the present husband of the appellant Momodou Yahya Kanteh to pay the sum of D7000.00 to the respondent and D3000.00 to the court is not based on any law neither in Sharia and
3. That the respondent misled the court by saying that I am still his wife which is not true because my marriage with the respondent ended long time ago.

When this appeal came up for hearing on the 25th day of January, 2011, the appellant argued the appeal on the basis of the afore-quoted grounds of appeal and further submitted that the suit before the lower court which gave birth to this appeal was exclusively between the respondent and the defendant.

The respondent on the other hand disagreed with the appellant on grounds 1 and 3 by submitting that it was Momodou Yahya Kanteh, the defendant at the lower court, that took away his wife and that they never separated. On ground 3, the appellant submitted that he was not in position to comment on that, since he was not the one that presided over the matter at the lower court. After hearing the arguments of both the appellant and the respondent the panel then adjourned the matter to today being 31/1/11 for judgment.

Before embarking on determination of the grounds of appeal argued before this panel by the respective parties, it will be necessary for this panel to pause here

a while and satisfy itself on whether the appeal is competent bearing in mind the respondent's claim before the lower court and the legal capacity of the appellant to file the appeal. These two issues touch on jurisdiction of this panel to hear this appeal and the issue of jurisdiction is so fundamental that once it surfaces in a trial, it has to be settled first. If the issues are resolved in favour of the appellant this panel will then proceed to determine the appeal on its merit. If however, the appeal is found to be incompetent, viewed from any of, or the two perspective highlighted above, there will be no need to go into the merit of the appeal because that will be a judicial exercise in futility.

Section 137A (6) of the 1997 constitution of the Gambia provides: "**The Panel shall have jurisdiction to hear and determine appeals from judgment of the Cadi Court and from the District Tribunals where Sharia law is involved**" Going by the above constitutional provision this panel is only competent to hear appeals from the decisions of the District Tribunals of the Gambia in so far as those decisions emanate from claims based on Sharia law.

Unfortunately, the record of proceeding placed before this panel did not, in categorical terms, reproduce the claim of the respondent against the defendant as presented by him in his capacity as plaintiff in the lower court. But from the totality of the respondent's evidence and the two witnesses presented by him, this panel inferred that the respondent sued the defendant before the lower court for enticing the appellant (his wife) to desert him when all attempts to amicably stop the defendant from committing the atrocities against him failed. This can be seen in the following instances:

1. The respondent's prayer to the court at page 3 paragraph 2 of the record of proceedings: "During all this rampancy that the defendant was doing to me

with my wife, they have three children one passed away. I really was tired what the defendant was doing to me, I do not have access to my wife because of him my children have it very difficult to even speak in the mix of their companion, I feel very bad when I see my children without their mother. I only want justice to reveal between us this is all what I have to say in this honourable court."

2. Page 14 of the record of proceedings under Judgment where the lower court remarked thus: ‘’The defendant Mamadou Yahya Kanteh was summoned by Yorro Camara for taken away of his legal wife Mariama Camara without his knowledge’’
3. A plea for mitigation of punishment (allocution or allocutor) which was made by the defendant at page 13 of the record as follows: "I am betaking for marry from court because I am a family man with a wife and children····",
4. The reaction of the lower court thus: "court heard your mitigation with lots of misunderstanding but your act of····taken away a married woman without the knowledge of the husband is a big offence which this court will not sit down to look people like you during it without taking legal action against it"
5. The observation of the lower court at page 14 paragraph 3 of the record of proceedings:

   ‘’For offence against customary law, district tribunal may subject to the provisions of this act, impose a five or many order imprisonment with or without hard labour or both fine and imprisonment, or many inflict any punishment authorized by customary law’’ at which point the court proceeded to convict and sentence the defendant.

From the totality of the foregoing, it will be crystal clear that, the respondent's claim against the defendant was not strictly founded on determining the validity or otherwise of the marriage between the respondent and the appellant vis-a-vis the alleged second marriage between the appellant and the defendant or based on infringement of any of the conjugal rights of the respective spouses in the two marriages as to confer jurisdiction on this panel to entertain the appeal. The respondent herein dragged the defendant (who is unfortunately not a party to this appeal) to the lower court to seek for the court's protection against the defendant who has constantly, and with disturbing regularity, enticed the appellant to desert the respondent and deprived him from enjoying the fruits of his marriage with her. This claim, which to my perception looks criminal in nature, cannot be said to fall within the purview of section 137A (6) of the Constitution of the Gambia as to confer jurisdiction on this panel to determine the appeal on the basis of 'marriage' simpliciter. The defendant's conviction and sentence under section 13 of the District Tribunal Act (supra) for an offence against customary law is a clear testimony on this. Appeal is always determined on the basis of the claim before the trial court and this panel has no jurisdiction to entertain criminal appeals.

This panel is not oblivious of the fact that by section 10 of the District Tribunals Act (supra) District Tribunals in the Gambia are empowered, inter alia, to try and determine all civil suits and matters, including claims based on Mohammedan Law Recognition Act Cap. 6:04 Laws of the Gambia Vol. II as enshrined in S. 11 thereof, but that does not mean that where the issue of marriage, divorce or succession comes before the court but the plaintiff's claim was not founded on them, this panel will automatically assume jurisdiction and entertain appeals emanating there from. That is not the intendment of section 137 A (6). For

this reason, it's the decision of this panel that this appeal lacks merit on this ground for being fundamentally defective in law for want of jurisdiction.

As to the second issue, whether the appellant is competent to maintain this appeal bearing in mind the fact that she was not a party to the proceedings at the lower court and no attempt was made by her to be joined as an interested party either at the lower court or before this panel, it is pertinent to know at this juncture who may appeal against the decisions of the District Tribunals in the Gambia. Section 26 of the District Tribunals Act (supra) restricts the right to appeal against its decisions to the parties. The section provides: "**Any party who feels himself aggrieved by any judgment, order or a decision of a District Tribunal whether given in the exercise of its civil or criminal jurisdiction,·····may appeal therefrom to the Supreme Court···**".

The proviso to this section makes the issue of appeal from District Court to the Supreme Court amenable to modification by the Chief Justice with a view to eliminating undue formality, delay and expense. Section 137 A (6) of the 1997 Constitution of the Gambia has overtaken the rules that may be made by the Chief Justice in this regard by providing that such appeals may lay to this panel where Sharia law is involved.

Undoubtedly the appellant is an interested party but is she competent to appeal against the decision of the District Tribunal Act within contemplation of section 26 of the District Tribunals Act (supra)? Being a party to the proceedings of the District Tribunals is a condition precedent to filing an appeal against its decisions. The appellant has not satisfied that requirement since she was neither a party to the proceedings before the lower court nor was she joined as an interested party under the relevant rules of either court. The appellant should have applied

for joinder as an interested party to enable her gets the requisite competence to file and argue this appeal. The fact that she testified for the defendant at the lower court as dw2 at page 9 of the record does not relieve her of the necessity of satisfying this condition. This condition, having not been satisfied by the appellant, it is the decision of this panel, and it so holds, that the appeal is incompetent and same is hereby struck out.

…….……. …….

(Singed): Justice Omar A. Secka (Signed): Justice A. S. Usman

..…….…….. ……..

(Signed): Alh. Ousman Jah (Signed): Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/17/ 2010

BETWEEN:

YORRO FATTY…….. ……..…..……... APPELLANT

AND:

LAMA BAH…….. ……....…...…RESPONDENT

{Before: Justice Omar A. Secka Chairman, Justice A. S. Usman, Essa F. Dabo Panelist & Siringe M. Y. Kah Panelist at Banjul on Thursday, February 24, 2011}

PRINCIPLES:

1. *Court cannot force an unwilling litigant to continue with prosecution of his case which he intends to withdraw.*

RULING

Ruling written and delivered by Justice A. S. Usman

This is an appeal against the judgment of Cadi Court of Brikama as presided over by Lamin Essay...in suit No. 28 dated 30/11/2010

The respondent sued the appellant before the lower court for abandonment. That the respondent her husband abandoned her for about a year effective from January 2010 without anything to maintain her. That he used to give her D50.00 every two days but at times when he paid once he would disappear for two months.

The lower court after hearing from the parties passed its judgment to the effect that the appellant pay to the respondent the accumulated arrears of feeding at

the rate of D8,250.00 and D25.00 daily thereafter. In addition, the lower court ordered the appellant to pay the sum of D800.00 for the three menstrual periods. It is against this background that the appellant appealed to this court upon the following grounds:

1. That the judgment was wrong in law know that the appellant was not given the chance to narrate his side of the story which contravenes the law of natural justice and equity.
2. That the order by the Cadi for the appellant to pay to the respondent the sum of D8,250 as maintenance plus another sum of D825.00 as iddah is wrong in both law and the Sharia.
3. That the court was wrong in believing the evidence of the respondent that she had not seen me for one year was based on nothing but the mere fabrication by the respondent and I have witness to prove otherwise.
4. The judgment was against the principles of equity, natural justice, fair hearing and the Sharia.

The appeal came up for mention on 28/1/2011 with all the parties in court from which date the same was adjourned to 24/2/2011 for hearing.

On 24/2/2011 when the appeal came up for hearing the appellant was in court but the respondent was absent. The Panel would have continued with the hearing in the absence of the respondent in line with Order 7 Rule 22 (1) of the rules of this court since there is no any cogent reason before the Pane excusing her absence. The appellant however informed the court that he intends to withdraw his appeal pursuant to a family meeting they held in that respect that the continued prosecution of the appeal would not be in the interest of the family. He further

informed the court that he had written a letter to that effect which letter could not be traced in the case file.

Court will not force an unwilling litigant to continue with prosecution of his case which he intends to withdraw. Based on the application of the appellant to withdraw his appeal, this Appeal No. AP/17/2010 is hereby struck out pursuant to Order 28 of the Cadi Appeals Panel Rules 2009.

……..…. ……
(Signed): Justice Omar A. Secka (Signed): Justice A. S. Usman

…… ……
(Signed): Essa F. Dabo (Signed) Siringe M. Y. Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/ 4/2011

BETWEEN:

FATOU FAYE…….APPELLANT

AND:

SIRANDOU FAYE & 3 OTHERS……..….RESPONDENTS

{Before: Justice Omar A. Secka Chairman, Justice A. S. Usman, Alh. Ousman Jah Panelist and Alh. Masohna Kah Panelist at Banjul on Tuesday, March 8, 2011}

PRINCIPLES:

1. *For a claim to be valid in Islamic law trial it must satisfy two basic conditions, to wit, (a) the subject matter must be tangible and identifiable and (b) must be supported with a detailed explanation of how it accrued.*
2. *The plaintiff's statement of claim under Islamic law however strong and convincing cannot constitute evidence. Evidence must be led to support. It's akin to pleadings in common law system where same is deemed abandoned if no evidence is led on it.*
3. *A trial court must decide a case on the strength of legal evidence adduced before it and where it has failed to follow this course, as it is in the instant case, an appeal court will have no option than to interfere with its decision.*
4. *What distinguishes a Cadi from other stakeholders in the arena of dispute settlement is the evidence upon which his decisions are based and founded.*

Where this distinctive feature of proof is lacking from a court proceedings, the proceedings of that court, no matter how well conducted, cannot be called a judicial proceedings.

5. *The burden of proof under Islamic law is on the plaintiff. Where the plaintiff fails to discharge that burden, then the defendant is asked to subscribe to what is called "Judicial/Exculpatory Oath" to entitle him to judgment where the claim is pecuniary in nature or same is based on claim of a disputed property of monetary value.*
6. *The procedure for conducting a trial under Islamic law succinctly stated is as follows:*
   - *(a) The plaintiff shall state his case or claim before the court which claim must be a valid one satisfying all its prerequisites,*
   - *(b) The defendant is then asked to respond to same by either admitting the claim or denying same,*
   - *(c) Where the defendant admits the claim the case ends there and judgment is entered for the plaintiff based on the admission,*
   - *(d) Where the defendant denies the claim, the plaintiff is asked to produce his witnesses which, in pecuniary claims or actions based on claim of properties of monetary value, must be:*
     - *(i) Two male witnesses or;*
     - *(ii) One male witness and two female witnesses or;*
     - *(iii) One male accompanied with the claimant's oath or;*
     - *(iv) Two female witnesses and claimant's oath,*

The claimant's oath in (c) and (d) above complements the second witness which cannot be found by the plaintiff to establish his claim before the court.

(e) Where the plaintiff has proved his case as outlined above, the defendant is asked to defend the case by calling witnesses to disprove or dislodge the plaintiff's claim in line with the procedure for proof adopted by the plaintiff above.

(f) After this the court then analyses the totality of the evidence adduced by the two sides and passes its judgment accordingly. See on this the case of Dahiru Gaya Vs Uwani (2007) 3 S. L. R. PT IV page 138.

JUDGMENT

Written and delivered by Justice A. S. Usman

This appeal emanated from the Cadi Court of Banjul (hereinafter called "the lower court"). The appellant and the respondents were said to be maternal brothers and sisters. The appellant herein sued the respondents for distribution of No. 2 Mantel Street, Banjul (hereinafter called "the property") which their mother inherited from her father Momodou Gaye.

The lower court based its distribution on D382, 123.00 as the value of the property which figure this panel could not fish out from the record how it was arrived at since there was no evidence before the lower court from the proceedings of 6th January 2011, when the case started and ended, to resolve this. The females and males were each to get a share of D54, 589.00 and D109, 178.00 respectively based on the principle that to the male double the share of a female.

It's against this sharing that the appellant appealed to this panel upon the grounds set out hereunder;

1. That the Cadi was wrong in the way and manner in which the property was shared as it was not done with fairness and equity and more over was against the rules of natural justice and the Sharia,
2. That the Cadi decision to give to the appellant the sum of D54, 000 was wrong because it was not done with fairness,
3. That the decision by the Cadi to pay the D54, 000 to the appellant by installment is wrong,
4. That the judgment was not done according to the rules of inheritance as stipulated in the holy Koran specifically the rules of the Sharia and
5. That the judgment was wrong, unreliable and one sided.

The appeal came up for hearing on 1st March 2011 on which day all the parties were present except the 2nd respondent Lamin Faye who the 1st respondent said he traveled to the US long before the service of the process of this panel on them. That they contacted him on phone and he instructed that they should proceed with the case in his absence. Based on this, the court proceeded to hearing.

At the hearing the appellant argued her case in person based on the afore-stated grounds. For the sake of convenience, I will merge grounds 2 and 3 together as well as grounds 4 and 5. On ground 1 the appellant submitted that the judgment was not in compliance with the rules of Sharia because the lower court used the valuation of her opponents as against her wish. On grounds 2 and 3 the appellant submitted further that the lower court mixed up the valuations because it topped her opponent`s valuation with her own hence the reason for rejecting the D54, 000.00. On grounds 4 and 5 it was the appellant's submission that it was wrong in

Islam to exclude her from the valuation which included the physical structures of block work constructed on the property since she is entitled to inherit from her mother`s property. She maintained that it's the 2nd respondent (Lamin Faye) who was instrumental to her being excluded and the lower court proceeded on that lane. She concluded her argument by praying the panel to set aside the decision of the lower court by re-sharing the property.

The respondents in turn, starting with the 1st respondent (Sirandou Faye) argued the case based on the said grounds. On ground 1 the 1st respondent submitted that the judgment of the lower court was in order. On grounds 2 and 3 she submitted further that she agreed with the share of D54, 000 but opposed to paying the appellant by installments. That the appellant should be paid at once. On grounds 4 and 5 she argued that she agreed with the judgment of the lower court and that same is in order. The 3rd and 4th respondents. (Ida Faye and Mbaye Faye) adopted the submission of the 1st respondent but the 4th respondent added that the appellant agreed with the sum of D54, 000 ab initio and that was why they made arrangements towards payment of same to her. That the appellant rejected the valuation because the block work constructed by the 2nd respondent on the land was not included in the valuation they (the respondents) presented to the court while she (the appellant) included it in her own. When asked to clarify the matter further, the 4th respondent submitted that the valuation which constituted the basis for distribution of property No. 2 Mantel Street Banjul was done excluding the physical structures that were constructed thereon by the 1st respondent for their late mother. In other words, it was not a real valuation consisting of physical block structures on the land but an imaginary one consisting of a wooden structure that was on the land before the block structure. That is, even if the appellant claims that she is entitled to the property in contention by descent from its owner and succeeds

on that ground, she cannot trace any enforceable right to the structures on the property.

Having carefully listened to the arguments of both the appellant and the respondents based on the grounds of appeal filed, one issue arises for determination, namely whether the proceedings of the lower court, as reflected on its record of proceedings placed before this panel, has satisfied the basic requirements of a valid trial under Islamic Law? In determining this, recourse must be had to:

(a) Whether there was a valid claim before the lower court?
(b) Whether the claim has satisfied the requirement of proof under Islamic law and
(c) Whether the valuation of D382, 123.00 upon which the distribution was based was in order?

The claim which was commenced and ended on 6th January, 2011 reads thus:

> "The Plaintiff: I am to summon my brother and sisters whom are 1- Lamin Faye 2- Mbaye Faye 3- Sereg Faye 4- Ida Faye. I had dispute with them concerning my share from the estate of our late mother share from the estate in fact they refuse to distribute the estate up to date."

Order XXIII Rule 111 of the Cadi Courts (Civil Procedure) Rules 2010 (hereinafter called "the rules") provides that the practice and procedure of the court shall be conducted in accordance with the rules of Islamic Law**.** In Ihkamul Ahkam; (commentary on Tuhfa) by Alkafi Chapter 2 (which deals with pillars of judgment and matters related thereto) page 12 it is provided that the subject matter of litigation must necessarily satisfy two basic requirements, to wit, identifiability

of the subject matter of the claim and detailed explanation of it and how its cause of action accrued.

والمدعي فيه له شرطان تحقق الدعوي مع البيان.

راجع احكام الأحكام لمحمد بن يوسف الكافي ص 12

The plaintiff's statement of claim above does not, under Islamic law as well as the rules of the lower court; qualify to be a valid claim. Certain questions such as full description of the estate, the name of the late mother, the date of her death, her survivors etc were all left unanswered and unresolved. Order II Rule 3 (2) of the rules of the lower court provides that no claim shall be entertained if such claim does not contain: (i) the occupation, full name, description and residence or place of business of the plaintiff, (ii) the full name and the residence or place of business of the defendant and (where known) his description and (iii) a short statement of the cause of action, or remedy or relief sought. The claim before the court did not satisfy the above criteria most especially item (iii). The record should have contained a short statement of the cause of action, or remedy or reliefs sought as required by law to enable a third party know the claim before the lower court. Additionally, Order XIII Rule 77 (2) provides that in inheritance cases, application for distribution of estate of a deceased person shall contain the name of the deceased, the time of death, the estate sought to be distributed and the names of all the heirs. In fact sub-rule 4 of the same rule went further to vitiate any proceedings conducted in contravention of this requirement. In the whole record of proceedings, there was no place therein where the name of the deceased, whose property (No. 2 Mantel Street Banjul) was to be shared, was mentioned even once. The non compliance with these provisions is fatal to the case and the intervention of this panel is justified on that ground.

On issue (b) whether the claim has satisfied the requirement of proof under Islamic law? From the totality of the record of proceedings of the lower court placed before this panel, there is no evidence from which the lower court could be said to have based its conclusion that Plot No. 2 Mantel Street Banjul was an inheritable property left by the deceased talk less of sharing same between the appellant and the respondent. The lower court should have extracted evidence from two witnesses to prove the facts contained in the plaintiff's statement of claim since under Islamic law such statements however strong and convincing cannot constitute evidence and must need evidence to support it. It's akin to pleadings in common law system where same is deemed abandoned if no evidence is led on it. A party hardly succeeds on the facts pleaded without evidence to support it. In the case of *Muhammad A. Aidami Vs Bukar Kusumi (2007) 3 S.L.R. PT IV P. 208* it was held by the Court of Appeal of Nigeria that under Islamic law, as opposed to common law, parties are not competent witnesses. They can only state the facts of their respective cases and prove same by credible evidence duly adduced by witnesses. The plaintiff should have therefore called witnesses to prove the following facts, namely:

1. That there was a demise of Mbaye Gaye; the mother of the appellant and the respondents;
2. That the said deceased left behind the appellant and the respondents as the only surviving heirs,
3. That the deceased left behind, inter alia, an inheritable property i.e. Plot No. 2 Mantel Street, Banjul which constituted the claim before the lower court and the subject matter of appeal before this panel.
4. That the deceased's parents predeceased her.

The above issues were not proved by credible evidence. It is a trite law that a trial court must decide a case on the strength of legal evidence adduced before it and where it has failed to follow this course, as it is in the instant case, an appeal court will have no option than to interfere with its decision. In Ihkamul Ahkam Chapter 4 (which deals with issues relating to Judicial Proceedings) page 16 it is provided:

وفي الشهود يحكم القاضي بما يعلم منهم باتفاق العلما

وفي سواهم مالك قد شددا في منع حكمه بغير الشهدا

راجع احكام الأحكام لمحمد بن يوسف الكافي ص 16

Meaning it is unanimously agreed by the jurists that a judge can pass judgment only on a piece of evidence duly extracted from the witnesses. On cases other than that, Imam Malik has strictly forbidden judgments which are not based upon evidence of witnesses.

The burden of proof under Islamic law is on the plaintiff. Where the plaintiff fails to discharge that burden, then the defendant is asked to subscribe to what is called "Judicial/Exculpatory Oath" to entitle him to judgment where the claim is pecuniary in nature or same is based on claim of a disputed property of monetary value. This is based on the authority of a prophetic tradition in which the prophet (PBUH) told a plaintiff: "your two witnesses or his oath no more no less ".

شاهداك أو يمينه ليس لك إلا ذالك

The procedure for conducting a trial under Islamic law succinctly stated is as follows:

(f) The plaintiff shall state his case or claim before the court which claim must be a valid one satisfying all its prerequisites,

(g) The defendant is then asked to respond to same by either admitting the claim or denying same,

(h) Where the defendant admits the claim the case ends there and judgment is entered for the plaintiff based on the admission,

(i) Where the defendant denies the claim, the plaintiff is asked to produce his witnesses which, in pecuniary claims or actions based on claim of properties of monetary value, must be:

(a) Two male witnesses or;

(b) One male witness and two female witnesses or;

(c) One male accompanied with the claimant's oath or;

(d) Two female witnesses and claimant's oath,

The claimant’s oath in (c) and (d) above complements the second witness which cannot be found by the plaintiff to establish his claim before the court.

5. Where the plaintiff has proved his case as outlined above, the defendant is asked to defend the case by calling witnesses to disprove or dislodge the plaintiff's claim in line with the procedure for proof adopted by the plaintiff above.

6. After this the court then analyses the totality of the evidence adduced by the two sides and passes its judgment accordingly. See on this the case of *Dahiru Gaya Vs Uwani (2007) 3 S. L. R. PT IV page 138.*

What distinguishes a Cadi from other stakeholders in the arena of dispute settlement is the evidence upon which his decisions are based and founded. Where this distinctive feature of proof is lacking from a court proceedings, the proceedings of that court, cannot be called a judicial proceedings, and no matter

how well conducted. The non-compliance with this requirement of proof by the lower court has also rendered the case incurably defective as to justify the disturbance of its findings on that ground by this panel.

On issue (c) whether the valuation of D382, 123.00 upon which the distribution was based was in order? Order XIII Rule 77 (3) & (4) of the rules of the lower court provides that a court shall not proceed to distribute any estate without the prior valuation of same by a qualified estate valuer first had and obtained. That any distribution done devoid of such valuation shall be null and void. There were two valuations in respect of the property in question (copies of which accompanied the record of proceedings of the lower court to this panel.) One by Surveyor Joseph V. W. Lewis- Gaye of No. 5 Mantel Street, Banjul which valued the property at **D206, 372.00** as at **25/2/2010** and the other one by Ebrima K. L. Drammeh of No. 38A Lancaster Street Banjul, which valued the property at **D680, 000.00** as at **22/3/2010**. None of the two valuations formed the basis of the lower court decision. Rather, the court went on a voyage of getting another value for the property in the sum of **D382, 123.00** upon which it based its decision and shared the value to the parties. One would expect the lower court to base its decision on any of the above two valuations or at least explain why it could not use any of them and instead opted for the amount of D382, 123.00 which the appellant could not agree with. The fact that none of the two valuations was used as a basis for distribution by the lower court is tantamount to having none before it and this has occasioned a miscarriage of justice to the appellant. Parties to an inheritance case must all agree with valuation of the property which constitutes the subject matter of distribution.

The valuation from the office of Joseph V. W. Lewis – Gaye complicated the matter the more where it states:

> "Whereas it is established that Momodou Gaye (Deceased) and Matty Gaye (Deceased) were entitled to equal share of No. 2 Mantel Street Banjul having been the property of their late father Baboucar Gaye, a request is made by the children of the latter to value ½ share of the above property which was their mother's entitlement."

From the foregoing, it is crystal clear that property No. 2 Mantel Street Banjul which formed the basis of distribution appealed against was the property of one Baboucar Gaye; the maternal grandfather of the appellant and the respondents. The said Baboucar Gaye was survived by Momodou Gaye and Matty Gaye who shared the property on half-and-half basis and out of Matty Gaye's half the parties to this appeal are now sharing. All these are factual issues that need resolution by evidence. How a brother and a sister were entitled to half each from the estate of their deceased mother and the children of that sister (i.e. the appellant and the respondents) are now sharing her half are all factual issues which must be proved by credible evidence.

For the fundamental defects in the proceedings of the lower court enumerated above, this appeal succeeds. The decision of the lower court dated 16th January, 2011 is hereby set aside. An order for retrial is hereby made before the same court strictly in line with the Islamic law principles highlighted above.

…….……. …….

(Singed): Justice Omar A. Secka (Signed): Justice A. S. Usman

…….. ..……..……..

(Signed): Alh. Ousman Jah (Signed): Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/5/2011

BETWEEN:

ALIEU BARRY…….APPELLANT

AND:

FATOUMATA DAFFEY ……..…….....……RESPONDENT

{Before: Justice Omar A. Secka Chairman, Justice Aminu Sa'adu, Alh. Ousman Jah Panelist and Alh. Masohna Kah Panelist at Banjul on Tuesday, March 8, 2011}

PRINCIPLES:

1. *As long as a divorced woman does not re-marry, she has right of custody over her female child from her erstwhile husband.*

2. *In a Muslim community, the right to name a newly born baby is the exclusive right or responsibility of the father in consultation with his wife or parent as the case may be and not the mother. See on this Tuhfatul Wadud Fi Ahkamil Maulud Lil Imam Ibn Qayyim Al-Jauziyyah p. 96*

3. *The position under Islamic law is that in determining the amount of maintenance generally, regard must be had to the financial status of the husband. See Quran - Talaq Verse 7*

JUDGMENT

Written and delivered by Justice Aminu Sa'adu

This is an appeal against the decision of Budung Cadi Court between Alieu Barry plaintiff /appellant and Fatoumata Daffey Defendant respondent.

The gist of the appeal briefly is that the appellant instituted an action against the respondent his {former wife} after narrating how their marital life was up to the time of divorce and subsequent delivery of baby girl by the respondent.

The appellant basically claimed 2 things:

1. Confirming paternity of the baby girl delivered by the respondent to him.
2. Sustaining the name he chose for the baby girl delivered by the respondent as Naffy Barry see page 1 of the lower Court translated copy.

The defendant / respondent re-acting to the claim of the appellant narrated her own story, and the relevant portion for the purpose of this appeal is that the appellant deserted her and initially rejected the pregnancy of the said baby girl i.e Naffy Barry but latter on accepted the pregnancy and named the Baby girl Naffy Barry. Due to disagreement between the appellant and the respondent parent regarding maintenance of the pregnancy, the respondent parent changed the name of Naffy Barry to Mariama Barry, the lower Court at the conclusion of the hearing, gave judgment inter-alia confirming the paternity of Naffy Barry to the appellant and ordered him to pay D4,500.00 as arrears of maintenance of his pregnancy to the respondent as well as paying D300 monthly for maintenance of his daughter Naffy Barry.

Dissatisfied with the decision of the lower Court, the appellant appealed to this Honorable Court and filed 4 ground of appeal along with 2 prayers as follow:-

1. That the order made by the Cadi that the appellant should pay the respondent the sum of D4, 500.00 as maintenance is wrong because the Cadi fail to consider the means of the appellant

2. That the change of name was wrong as the appellant had given the Naffie Barry to child after her birth.
3. That the order for refund for the total expenses incurred during the marriage is wrong because the respondent denounce the marriage and absconded and was not seen by the appellant up to her delivery.
4. That the judgment was one sided and biased and cannot be supported by any law in both the Sharia and equity.

RELIEF SOUGHT FROM THE PANEL

1. That the order for the appellant to pay to the respondent the sum of D4, 500.00 as maintenance be set aside and in the alternative a reasonable amount be ordered taking into consideration the means of the appellant and order be made for the appellant to be given the custody of the child as the appellant can properly take of the child.
2. Any order or further orders that Court deems fit

On the 1st march 2011, the date fixed for hearing of the appeal, the appellant adopted his grounds of appeal and initially he informed the Court that he has nothing to add and urged the Court to allow the appeal by granting the reliefs he sought.

Responding to the grounds, the respondent urged the Court not to interfere with the decision of the lower Court because it was rightly decided. The espondent further stated that the appellant abandoned her while she is pregnant as a result she went to her grant mother`s house where she delivered the said baby girl without having anything from the appellant.

We carefully considered the record of proceeding of the lower Court together with the grounds of appeal filed by the appellant and the responds of the

respondent, this honorable Court is of view that the relevant issues for determination on this appeal is as follows:-

1. Whether the lower Court was right in awarding D4,500.00 to the respondent as arrears of maintenances of the respondent pregnancy without considering the financial condition of the appellant?
2. Whether the respondent`s parent have the right to change the name given by the appellant from Naffy Barry to Mariama Barry.
3. Whether the right of custody is with the appellant or the respondent

With regard to issue No.1, we went through the record of proceeding, of the lower Court, no where the learned Cadi enquire into the financial status of the appellant before awarding the sum of D4,500.00 as arrears of maintenance of pregnancy of the respondent. While the position of Islamic law is that in determining the amount of maintenance generally, regard must be had to the financial status of the husband, the Holy Quran provides.

لينفق ذوسعة من سعته ومن قدر عليه رزقه فلينفق مما أتاه الله لايكلف الله نفسها الا ما آتها. الطلاق 7 –

Meaning: “Let him who has abundance spend out of has abundance, and who ever has was means of sustenance strained to him, let him spend out of that which Allah has given him”

To ascertain the financial ability of the appellant and in line with the provision of the above quoted verse, we asked the appellant what he does for a living. The appellant answered that he is not working but a trainee receiving D750 monthly, with responsibility of taking care of his aged parent. We then asked the respondent about the assertion of the appellant regarding his means of livelihoods;

she confirmed what the appellant said. At this juncture, we asked the appellant how much would he afford to pay to the maintenance of his pregnancy and the appellant stated that he can afford D2,000.00.

It is important to pose here, and examine briefly the extent of the appellant responsibility to provide maintenance to the respondent for his pregnancy which is not undisputed that he is responsible for it. Under Islamic law the respondent is entitle to be maintained for her pregnancy even though she has been divorced, up to the time of delivery, regard less of the appellant physical or financial condition, he is under an obligation to maintain the respondent even where he is ill or undergoing imprisonment unless she voluntarily forego her right to be maintained. See Muslim law of Divorce by K.N. Amount p. 715. Also Ibn Asim Al-Andalusi said in *Ihkamul Ahkam* page 120

إسكان المدخول بها الي انقضاء * عدتها من الطلاق مقتضا

و ذات حمل زيدت الانفاقا * لوضعها والكسوة اتفاقا

Meaning: ‘’Providing accommodation to a divorced wife whose marriage was consummated up to the time of expiration of her iddah is an obligation on the former husband while for a pregnant women, feeding is added as well as clothing up to the time of her delivery which the Islamic scholars are unanimous on that.

In the light of the foregoing and in consideration of the appellant financial status, we here by review downward the amount awarded by the lower to D2, 700.00. We arrived at this figure by awarding D300.00 monthly for 9 month as the normal period of pregnancy against the 15 month awarded by the lower Court.

Coming to the second issue of change of name of the new born baby between the appellant and the respondent, ordinarily in a Muslim community,

naming of a new born baby is the responsibility of a father either in consultation with his wife or parent as the case may be. It is un Islamic to change the name given by a father to a different name under whatever circumstances as long as the paternity of the child remain with the father who named his child. See on this *Tuhfatul Wadud Fi Ahkamil Maulud Lil Imam Ibn Qayyim Al-Jauziyyah p. 96.*

We therefore align our self with the decision of the lower Court in this regard. The name of the baby girl born between the appellant and the respondent should remain Naffy Barry and should be so maintained. We further ordered that all relevant documents either previous or in future relating to the said Naffy Barry should bear the name chosen by the appellant.

While on the issue of who is entitled to have the custody of the said Naffy Barry between the appellant the respondent? Islamically, the respondent is the one entitled to have the custody of her daughter Naffy Barry unless she re-married to somebody else. The Hadith of Holy prophet S.W.A. reported by Abdullahi Bin Amru Lend credence to this position.

فعن عبد الله بن عمروان امرأة قالت يارسول الله : ان ابن هذا كان بطنى له وعاء وحجرى له حواء وتدين له سقاء وزعم ابوه ينزعه حتى , فقالت انت أحق به مالم تنكحي"

Meaning a woman said ‘O apostle of Allah, this son, my stomach was his place of abode, my thighs were his playing ground, and my breast is the source of quenching his thirst, his father claim to snatch him from me. The prophet S.W.A replied her by saying as long as you have not re- married you have the right of custody over him”

On this note, we hereby declared that Appeal Number this appeal succeeds in part and failed on the other part.

……..…….. ……
(Signed): Justice Omar A. Secka (Signed): Justice Aminu Sa'adu

……..…….…….. ……
(Signed) Alh. Ousman Jah (Signed): Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/13/2010

BETWEEN:

ASSAN SARR……..……..…….…….....APPELLANT

AND:

NENE SARR…….…….……..….RESPONDENT

{Before: Justice Omar A. Secka Chairman, Alh. Essa Dabo Panelish and Alh. Seringe M. Kah Panelish at Banjul on Thursday, March 24, 2011}

PRINCIPLES:

1. *A mere allegation of illegitimacy cannot in Sharia deprive the person, against whom the allegation is made, from inheriting his deceased father. Such allegation is nothing but a mere assertion which must be proved by credible evidence as required by Islamic law in line with the principle of "he who asserts must prove".*
2. *In any inheritance case before a Cadi Court, evidence to prove the death of the deceased, the estate and the beneficiaries left by such deceased is indispensable in line with the provisions of Order XIII Sub-Rule (2) of the Cadi Courts (Civil Procedure) Rules 2010.*
3. *Where the above procedure is not adopted by a Cadi Court, as in the instant case, the Appeal Panel will have no better option than to interfere with its findings.*

JUDGMENT

Written & delivered by Justice Omar A. Secka

This appeal is against the decision of the Cadi court of Kanifing, as presided over by Senior Cadi Alh. Masamba Jagne and assisted by Cadi Saikou Touray, Cadi Abubacarr B. Touray and Cadi Elman Ceesay on the two stages distribution of the estate of the late Pa Modou Sarr of Dippa Kunda among his beneficiaries:

1- A distribution of the deposited cash money at Islamic Bank.

2- A distribution of the late three compounds.

The judgment of the lower court gave 1/8 of share to the widow and the residue to the children where the male will have two share of the female. The lower Court based its distribution of the three compounds on the report from the valuer Mr. Wally Ndurr an expert from the Ministry of Local Government and Lands which is as follows:

1- An empty land property at Lamin Kombo North District valued at D 364,500.00 with land area of 781.75 sqm.

2- Developed land property at Lamin with land area of 2,876.76 sqm and valued at D950, 000.00.

3- Land property at Kanifing No. A121 Kanifing estate valued at D1, 609,000.00 total value of the whole estate = D2, 923,500.00.

And it was revealed in the records of proceedings of the lower Court on page 7 dated 10th / 9/ 2009 that the late has left the following:

1. Three compounds
2. One wife called Neneh Sarr and

3. Eight (8) children, namely:
    1. Fatou Sarr whose mother was the late Binta Jammeh.
    2. Assan Sarr whose mother was the late Mamy Saine (Asan Sarr was born out of marriage)
    3. Kaddy Sarr
    4. Isatou Sarr
    5. Gibril Sarr
    6. Ousman Sarr
    7. Wak Sarr and
    8. Modou Sarr.

Again at page 7 of the record of the lower court Ousman Sarr said that Assan Sarr is not a legitimate son and that there are two sons who the late did not marry their mothers. And it seen in the same page that Assan Sarr was given an amount of **D136,994.00** as a gift not as his share from the estate. This was done based on agreement of the beneficiaries.

When this judgment did not satisfy the appellant he appealed against it vide a Notice of Appeal dated 12th / 8/ 2010 to this Panel on the following grounds:

1- That the way the Cadi distributed the estate of the late Pa Modou Sarr among the inheritors was wrong and against the rules of the Sharia and equity, in the sense that Assan received his share in the monitory aspect but was excluded when it came to distribute the properties among the inheritances.

2- That the exclusion of Assan Sarr a Biological son of the lat Pa Modou Sarr is wrong in law specifically judging from the reason given for the said exclusion which were only speculation and not base on any factual evidence.

3- That the distribution made by the Cadi among the inheritors was wrong in law and against the rules of natural justice.

He sought the following from the appeal panel:

1- That the Cadis decision made on the 10th day august, 2010 be set aside and the order to exclude Assan Sarr be set aside.

2- That an order be made to include Assan Sarr in respect of the distribution of the properties of the late Pa Modou Sarr looking into consideration in the monitory aspect Assan Sarr was not denied his share.

3- Any further order that the honorable Court deems fit.

In the sitting dated 9th / 12/ 2010 before Cadi Appeal Panel, Mr. Ebrima Sarr appeared before the Court with a letter of power of attorney dated 10th /11/ 2010 to represent Assan Sarr before the panel in the presence of his lawyer Mr. Edrisa M. Sisoh.

The respondent on the other hand appeared before the Court with her counsel Mr. Borry Touray while the others were absent. In that sitting the lawyer Sisoho opened his defense before the Court and submitted as follows:

That I have received the record of the lower Court but that record does not contain our complaint, as it was cleared that the lower Court has distributed that cash money to all beneficiaries including my client he in fact received his right share in full. But in the estate there are three compounds but the said compounds

were not in the records to know whether they were distributed or not; it was only said that the late has three compounds and they are distributed, but how they were distributed was not mentioned. For that being the matter we cannot follow up the complaint in the particular issue.

Again the lawyer Sisoho argued that his client Assan was revealed in the records that he was born out of wed lock, and that is a big mistake done by the lower Court, when they decided without evidence taken before the court on that matter, and there was no correct procedure on it.

Since the Court has already given him his right share in cash and later turned to say he is born outside wedlock. Then my client was considered as an illegitimate child based on his step father's claim. I am appealing to the Court to take the proper procedure for this matter. In fact there was a point which was not reflected in the records but I was informed by my client that when the issue of illegitimacy was brought out to the Court, it was denied by all family members whose among them: Mr. Ebrima Sarr (the step father of the beneficiaries) and their auntie Aja Ida Sarr, Kaddy Sarr and Waka Sarr who happened to be the step father of the late.

Indeed lawyer Sisoho summarized his statement in the following manner:

1- That the lower Court decision was wrong and unlawful when it gave share to the other while it prevented others from having their right share based on unknown reason.

2- That the manner the three properties were shared did not reflect into the records.

3- That the matter of legitimacy or illegitimacy of Assan Sarr must take proper procedure before any decision will be taken.

4- That if the appeals Court will inquire into the lawfulness of the said child they will therefore have to refer the matter to another Court not the previous Court where the decision was made. based on that lawyer Sisoho supported his claim by tendering a counter affidavit which stated on which paragraph numbers 5, 6, 7, 8, 9, 10, 11 deposed to the following:

5- It is not correct that Assan Sarr received monies as gift from the family.

6- Assan Sarr received his full share of the menus as beneficiary.

7- There was never mention of Assan Sarr not been beneficiary at that stage.

8- It is also a fact that an inquiry was not held to determine Assan Sarr.

9- At one stage of the proceeding the issue was mention by Ousman Sarr.

10- He was challenge immediately by all members of the family who were present.

11- The cadi and his panel did not pursue mater.

Lawyer Borry Touray on the other hand on behalf of the respondent submitted as follows:

I was present before Cadi Court in Kanifing when the issue of Assan was raised that he was born out of wed lock by his step father Mr. Ousman Sarr. He said he was informed by the late himself, that he the late had married Assan Sarr's mother while under pregnancy, but the relatives who were present in that sitting all refused that claim. But the lower Court failed to record these statements therefore it is incumbent on my colleague Mr. Sisoho to submit an affidavit on that matter.

And on what reflected in the records that Assan Sarr was given an amount of cash money from the estate as a gift that is not true. But what was given to him was his right share from the estate. There is another son who was said to be a child out of wed lock, but that issue was not raised before the lower Court because that other one mentioned has no close relative in that family compared to Assan Sarr who has close relationship in the family, because Aja Ida Sarr is a relative to Assan Sarr's mother.

Touray concluded his reply by saying that Mr. Ebrima Garba Sarr was given an amount of money as a gift for his efforts in helping the family for the compound document transactions. But when the court asked them about the gift for that illegitimate child, my client agreed to give him, but the rest of the family refused that.

Finally Mr. Touray further requested from the appeal panel to conduct proper inquiry about the claim that the child is out of wed lock by calling witnesses on that matter.

The respondent on the other hand on 10th/ 3/ 2010 stated the following before the panel: I want to say what the truth according to my knowledge is. When I came to my late husband, I found all of these children were born. My husband's first wife was called Binta Jammeh. They got only one child called Fatou Sarr then they separated and he married Mamy Saine the mother of Assan Sarr. When I got married to the late husband his relatives used to tell me the story of Assan, Omar and Malick Sarr. When I sued them to lower court I have never raised any claim about legitimacy or illegitimacy of any of them. But Ebrima and Haddy Sarr's paternal brother and sister of my late husband are the ones who raised this matter there, saying that Omar and Malick Sarr were not born in wed lock. From that time

Mr. Ousman Sarr (paternal brother of the late) said that there is also another illegitimate child who is Assan Sarr. But before he raised the matter he requested from the family to give a gift to all of them but they refused to do so. From that time he claimed that Assan Sarr was born before the marriage took place between the late and the mother of Assan Sarr. But when he said that all of the family denied it and refused to answer. Myself I did not take any step. But when Ousman Sarr claimed this in the lower court, the court did not take it into consideration. From there he told the court that he will never come back if they don't believe him. From there the court proceeded and distributed the property and included Assan Sarr but did not give Omar and Malick Sarr any share. Later on the court turned back to say that Assan Sarr is an illegitimate child to the late and excluded him from the compound. The respondent submitted the distributing document to the appeal panel as an exhibit.

The panel after hearing from both parties and their lawyers, and reading carefully the grounds of appeal and the documents tendered, it has found that lawyer Sisoho focused on inquiring to know why the lower court in its judgment included Assan Sarr in the distribution of cash money and excluded him from the compounds?, whether that was based on Sharia or not?

And in the other way round:

1- Did the lower Court follow the correct procedure to finalize Assan's legitimacy? Or the Court only agreed on what was claimed by Ousman Sarr?

2- Did the lower Court base have any legal ground to give some beneficiaries their share and exclude others?

3- And the way lower court gave this amount of money which is D 136, 994.00 as a gift is it the correct way to give out gift in Islamic law?

4- And assuming that Assan Sarr was born out of wed lock and the amount that was given is a gift why that did not reflect on the records?

And he prayed the panel for the following:

1- To revoke the decision taken by the lower Court of excluding Assan Sarr from getting his right share from three compounds.

2- To include Assan Sarr among the beneficiaries.

For lawyer Touray what all he is concentrating on is t to support that the lower Court did not record all proceedings and arguments patterning to Assan Sarr's legitimacy. That the correct procedure did not take place on that matter. And what was given to Assan Sarr cannot be conceded as a gift but his right share, and why the Court and the family members agreed to give amount of money to Assan Sarr as a gift while refusing the other two? He stated that, he has attended all sitting before lower Court. Finally he prayed the panel to call witnesses on the issue of legitimacy of Assan sarr.

The subject matter before the lower Court was about requesting the right share from the estate. This was recorded in page 1 of the records of the proceedings in which the plaintiff Neneh Sarr, requested for her right share and the share of her children who are staying at Dippa Kunda.

She further mentioned that: I am the wife of the late Pa Modou Sarr who died on 22nd / 11/ 2007 and left ten children seven of them are boys and three are girls. In this particular claim the plaintiff is requesting for her right share and the share of her children from the estate of the late husband. Therefore the Court was to confirm first the death of the said person and to know the numbers of children and the properties he has left before rushing to distribution by calling two witness for that, as stated in Order Xiii sub rule (2) of the Cadi Courts Civil Procedure

Rules 2010 which states that: **Such application for the distribution of estate shall contain the name of the deceased, the time of death, the estate sought to be distributed and the names of heirs.** This is clear evidence that the Court before going into distribution is directed to take the following steps:

a- A request for distribution.

b- The name of the deceased person

c- The date of death.

d- The types of estate requested to be distributed.

e- The names of the beneficiaries.

f- To call witnesses on those pieces of information.

If the lower Court has followed these steps it would have traced the proper status of the said Assan Sarr earlier before the distribution as stated in the "Ihkamul Ahakam" page 12. [**That there are two conditions which a valid claim must satisfy after which that claim must be verified with clear evidence. The two conditions are:**

1- **To verify the claim against the defendant.**

2- **To explain the reason and causes }**

On page 7 of the records of the lower court, it is stated that the late has three compounds, this is not enough to be a complete estate, and hence he mentioned only compounds without other things related to the estate like:

1- The cash money deposited in P.H.B. of Serekunda as revealed on page 2-3 of the records.

2- Two cars as in page 10 – 11.

3- Electrical milling machines page 11

4- Clothes as in page 2.

All the properties are mentioned in different pages others were revealed after when the lawyer Mr. Borry Touray asked question about them. That Court has to inquire into all these before distribution as it is stated in “Ihkam Ahkam page 210” (**there are three pillars for sharing: the money (property) left by the late, and how much every beneficiaries is to inherit and know who should inherit and who is not.**)

The lower Court did not verify the numbers of the children as revealed from the statement of the plaintiff on page I that their numbers are ten, and on page 7 of the record that their numbers are 8 including the appellant. The Court was to make sure about the number of the children, because knowing the cause of the relationship is one of the measures required to be taken in an inheritance case like the three cause of inheritance. That what entitles a person to inherit are three, namely marriage, affinity and freedom from slavery by the beneficiary. There are no other grounds apart from these.

Coming back to the grounds No. 1, 2, 3, which are touching on whether the correct procedure was followed by the lower Court concerning the legitimacy of Assan Sarr. The Court based its verdict of illegitimacy of Assan Sarr on what his step Father Ousman Sarr has said. In this matter the plaintiff must clarify this point which is a basic principle, because it seems that the late said Pa Modou Sarr and Mamy Saine are accused of committing adulatory by giving birth a child out of wed lock. That being the matter Ousman Sarr who accused them is to support his claim by bringing four witness as Allah said in the Holy Quran: (and those who accused chaste women, and produce not four witnesses, flog them with eighty

stripes, and reject their testimony forever.) That lower Court should have asked Mr. Ousman Sarr to produce the required witnesses before recording anything on the record of the court. This is where the mistake of the lower Court came from as tasted on page 12 of Ihkamul Ahkam Commentary on Tuhfa: 'The plaintiff f is requested to prove his claim'.

So the issue raised by the step father (Ousman Sarr) was a mere claim and the issue which lawyer Sisoho raised whether there is a legal evidence for the lower Court to exclude some and include others? The answer to that question is since the lower Court did not follow the proper procedure to exclude the said child, the judgment cannot be supported by any authority in the Quran or Sunnah.

On what lawyer Sisoho said concerning the gift whether that type of gift is a valid gift in Sharia or not? We may say before any inquiry into the gift we are to look first into whether the appellant is entitled to a gift or not? We must inquire whether the child is part of the hairs or not? Since this is not stated then the gift is not in its original position. In fact the respondent has once stated before the Court that the lower Court has once given the cash money as the share of Assan Sarr and again came back to say that the money was a gift and this was witnessed by lawyer Touray before the panel. This shows the invalidity of the gift. The respondent through her lawyer from the look of things is not opposed to the submission of the appellant since they both confirmed that before the panel.

Based on that, it is incumbent on both the respondent and her lawyer to ascertain the status of Assan Sarr by calling witnesses on that matter. This Court called Mr. Ousman Sarr to appear before it to testify in the sitting dated 10th / 3/ 2011 but he failed to appear. In fact he sent us an undated written letter in which he was saying that Assan Sarr was born out of wed lock, but he has hidden that

issue from the family, but I have said that before the lower Court in the presence of the family, and that my step father Waka Sarr knows this very well, but he failed to say it before the Court. He also mentioned in the letter that he absented from the Court due to the heath condition.

After reading the letter to both parties, the lawyer Sisoho objected to it by saying the following:

1- It is not possible for the Appeal Court to depend on this letter.

2- That nobody witnessed on this letter.

3- Nobody knows whether the thump print is for Ousman or not?

Based on this fact we cannot constitutionally depend on this letter, especially that it said Mr. Ousman Sarr has a stroke he cannot even shake his lips.

After reading the grounds of appeal and hearing from both parties, calling the plaintiff Mr. Ousman to appear in person before the court to prove his claim, but he failed to do so and the sitting has been adjourned for several time in order to give him enough chance to come and prove his claim but all to no avail, this court decides as follows:

1- That the lower Court did not confirm first the number of the beneficiaries before the distribution of the property of the late Pa Modou Sarr.

2- That the decision taken by the lower Court concerning excluding the said Assan Sarr from the beneficiaries of the late Pa Modou Sarr is set aside, due to lack of evidence to support that decision neither before the lower court nor before this court.

3- That the letter sent to the Appeal Court by Mr. Ousman Sarr is rejected because it cannot the required evidence in Sharia for the proof of that

allegation as stated in the Hadith of the prophet where he said: (proof is on the plaintiff while the defendant is to take an oath).

4- That the decision of the lower court the money given to Assan Sarr is a given as a gift is hereby set aside and same is hereby converted as his right share from the estate.

5- That the distribution of the three compounds is hereby set aside and same is hereby ordered to be re-distributed afresh with Assan Sarr included in the distribution as a legitimate child among the beneficiaries.

The appeal succeeds

24th / 3/ 2011

……..……
(Signed) Hon Justice Omar A. Secka

…….. ……
(Signed) Alh. Essa F. Dabo (Signed) Sering M. Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/ 1/2011

BETWEEN:

ROHEY CEESAY……..…APPELLANT

AND:

FATOU K. CEESAY & 2 OTHERS……..…..…….RESPONDENT

{Before: Justice Omar A. Secka Chairman, Justice T.Y. Yakasai , Essa F. Dabo Panelist & S. Y. Kah Panelist at Banjul on Thursday, March 24, 2011}

PRINCIPLES:

1. *We cannot be justified to punish the applicant who is not knowledgeable in law for the negligent act of a professional lawyer. It is trite that the court cannot visit the sin of the counsel on the litigant. See* ***Alhaji Alhassan Maiwarwaro VS. A'ishatu Garba & 1 or (2207) 3 SLR PT IV Page 237***
2. *Based on these reasons coupled with the fact that this is a Sharia Appeal where emphasis is placed on doing substantial other than technical justice, we were of the view that the interest of justice in the particular circumstances of this case leans more on the side of granting the application for extension of time and deeming the appeal as filed within time and we so hold.*
3. *It is trite that the rules of court or procedure are not made just for the sake of making but in order to be followed by the courts concerned and to be*

guided by their provisions with the sole aim of arriving at justice or substantial justice as precisely as possible.

4. *Consequently a flagrant violation of the rules will only result in occasioning injustice. For this reason, therefore, it is necessary for cadis to limit their actions within the confine of the rules and to guard against any action that may directly or indirectly be inconsistent with the provisions of the rules. Otherwise their decisions are bound to be tempered with and reversed on appeal. In the famous Islamic book of procedure "Ihkamul-Ahkam" a commentry on "Tuhfatul Hukkam" page 11 it is postulated that observance of practice and procedure is one of the six ingredients of a valid judgment under Sharia and absence of any one of these ingredients renders the judgment invalid and must be quashed on appeal.*
5. *It is the pre-requisite, of a claim or Da'awa before a Cadi court to meet the degree of clarity required by Sharia to qualify for hearing, it must be realistic, unambiguous, definit**e**, precise, apt, succinct, full and complete and must not be evasive, vague and bogus. See Tuhfatul-Hukkam p. 20 and **Biri Vs Mairuwa (1996) 8 NWLR (Pt 467) 425**. In addition to all that have been said, rules 77(2) & (3) of the Rules imposes two additional conditions if Da'awa is in the form of an application for distribution of estate the Da'awa or claim must contain name of the deceased, the time of his death, the estate sought to be distributed and names of all heirs and their status. It is also a condition precedent for a valid claim for the distribution of estate that the claim must be accompanied by a valuation report. The claim in instant case is vague, incomplete and ambiguous. It cannot satisfy the requirements of a valid claim.*

6. *The consequential effect of absence of the required and valid application for distribution of estate before a Cadi court is so grave that it exposes the whole proceedings of the lower court particularly the distribution of the deceased's estate face to face with annulment under rule 77(4).*
7. *That it is a legal requirement that the heirs must prove the death, the heirs and estate of the deceased as it is provided on page 179-180 of the famous book of Islamic law of procedure (IHKAMUL AL AHKAM ALA TUHFATUL HUKKAM). Not a single witness was called in the whole proceedings of the court. This is a serious, fatal and an incurable error which results in vitiating the whole proceedings of the court as confirmed on page 224 of the book of Bahjah.*
8. *That the legal consequence of failure to observe the procedure of I'izari is that the whole proceedings become a nullity.* ***Hakimin Boyi Umar Vs A'isha Bakoshi (2006) 3 SLR Pt 1 P.80.*** *Despite this devastating consequence which results in rendering the whole proceeding of a court void the lower court did not apply it in the instant case.*

JUDGEMENT

Written and delivered by Justice T. Y. Yakasai

This is an appeal against the judgment of Banjul Principal Cadi Court in a suit No BIC 01/12/09, between Rohey Ceesay as Plaintiff and Fatou Cessay, Amie Nije, Rematoulie Nije Ndow as Defendants. The plaintiff's claim as it appears on page one of the record of proceedings at our disposal is:

> *"I came here to call these people that our husband has died and I want for the court to distribute the estate. He has left 3 compounds*

properties one in Allen street one in Fajara, one in Yundum, one Mercedes Benz saving account at the standard chartered Bank."

As the plaintiff completed her statement of claim the respondents responded on the same page as follows:

"Amie Njie: Resp: I heard it, I have no problem. Fatou Ceesay; Resp: yes I heard it but Ramatulie is represented by her sister Amie Njie."

After that the court had this to say: ***''the court heard your complain and the people you call are also aware of the fact that there must be merace. Now the Court request you to write an affidavit or a letter sign by all of you instructing the court to distribute estate, you are advised to proper plane and the valuation report for the properties.***" At this juncture the court adjourned the case to 26th January, 2010 for the parties to submit to the court valuation report for the properties and an affidavit signed by all heirs requesting the court to proceed with the sharing of the estate among the heirs. As these documents were not ready on the adjourned date a few more adjournments of the case followed. However, by 29th Mach, 2010 the two documents were already at the possession of the court. On that date the court read to the parties what appears to be its judgment in the case. Part of what the court read to the parties is:

".... No 25 Allen street property value at D1,3000,000= we therefore calculated and concluded that the that the said property to be allocated to the widows to be their share. No 25 Allen street is now given to Rohey Ceesay and Fatou Ceesay respectively the rest of the properties at Fajara and Old Yundum to the two sisters Amie Nije

and Ramatoulie Nje Ndow respectively as their share as there are no other other inheritors beneficiaries."

Dissatisfied with this decision the plaintiff now the appellant on 11th January, 2011 barely ten month from the date of the judgment filed an appeal before this court against the decision of the lower court on the following grounds:

1. That the judgment is wrong in law and Sharia because the Cadi when distributing the properties of her late husband Adama Aliu Ceesay gave the first and second defendant a compound each including an empty plot of land situated in Yundum and only gave the appellant second floor at the compound situated at 25 Allen Street in Banjul.
2. That the refusal of Cadi to give this compound at 25 Allen Street in Banjul is wrong because the appellant jointly constructed this compound with her late husband with whom she had been married for fifty years before he married the first respondent.
3. The Cadi was wrong in law when he gave the second respondent a compound without taking into consideration the second respondent is only a half sister of the first respondent and has no right to inherit any property of her late husband Adamu Aliu Ceesay.
4. Judgment was wrong because the Cadi was biased and would not let the appellant to have the compound at Allen Street for herself but said that the appellant could only occupy the top floor and that the down floor will be rented and the proceeds will go to the first and second respondent.

As it was stated above the appeal was late or out of time by about ten months from the date of the lower court's judgment. These facts availed themselves to us when we were attending to the application for enlargement of time filed by

the appellant. As such the application may seem to be statute barred by virtue of Order XXV1 rule 120 of Cadi Court Civil Procedure Rules 2010 which provides that " ***No application for enlargement of time to appeal shall be entertained after ninety days of the decision being appealed against***." We were, however, constrained to strictly apply this provision to the instant application due to an averment deposed to by the appellant/applicant in paragraph 3 of affidavit in support of the application which raises an obvious need to do justice at all cost, where the applicant states that:

> "*.... **when judgment was made at the Cadi Court in Banjul, I instructed a lawyer to file an appeal for me, but due to reasons not known to me he did not file it. And before I came to know of this problem it was late so I have no alternative than to try other source to file my appeal.***"

It is clear from this averment that the failure in filing the appeal within the regulation time was neither the actual and or deliberate act of the appellant nor was it done with her knowledge or permission. Conversely the appellant did what she ought to have done when she briefed her counsel to file the appeal within time. Ironically the perpetrator of the act of failure to file the appeal within time was a lawyer who is presumed to be fully aware of the implication and consequences of filing the appeal out of time. This being the case we were of the opinion that we cannot be justified to punish the applicant who is not knowledgeable in law for the negligent act of a professional lawyer. It is trite that the court cannot visit the sin of the counsel on the litigant. See **Alhaji Alhassan Maiwarwaro VS. A'ishatu Garba & 1 or (2007) 3 S. L. R. (pt. IV)**. Based on these reasons and coupled with the fact that this is a Sharia appeal where emphasis is placed on doing substantial other than technical justice, we were of the view that the interest of justice in the

particular circumstances of this case leans more on the side of granting the application for extension of time and deeming the appeal as filed within time and we so hold.

Having done that we equally felt the need for according the appeal an accelerated hearing. We therefore relied on rule on Order X1V rule 16 of the Cadi Appeals Panel Rules 2009, and proceeded into hearing the case as all the parties are ready for that. In her address the appellant started by adopting her 4 grounds of appeal and saying that she had no additional grounds than proceeded to say that she contributed and assisted her late husband in construction of number 25 Allen street compound when her husband was building it. She also said that during the life time of her husband he bought two plots at old Yundum and gave one of them as a gift to 1st respondent she therefore upon the above two reasons concluded that she is entitled to be given the whole of number 25 Allen street upstairs and downstairs as her share of inheritance.

In her response the 1st respondent refuted the fact that their late husband gave her a plot at old Yundum as a gift. Then she narrated her own version of the story about what transpired between her and her husband regarding the plot at old Yundum. She said the plot in question was originally her own and it never be owned by her husband and it was never been given to her by her husband as a gift. She further said that when she wanted to buy the plot in question she gave the money to her husband who in turn bought it for her. When asked the appellant said she is not challenging 1st respondent's ownership of the plot she is only contending that it was given to her by their late husband and that will be the reason why she will be entitled to number 25 Allen Street as her share.

I find no difficulty in resolving this little misunderstanding since ownership of the plot in question by the 1st respondent is not in dispute. What is however in dispute is how the ownership devolved on her. According to the appellant it was by a gift while 1st respondent insisted that it was by purchase. By whatever means the ownership devolved on her that cannot in any way affect their share by increasing or decreasing it.

Having carefully and meticulously gone through the record of proceedings of the lower court and submissions of the parties before us, I find it pertinent and for easy determination of this case to formulate the following issues for determination. This is undoubtedly necessary in view of the fact that there is no legal representation for either parties or the judgment contain allot of issues that may require examination and determination. The issues are:

1. *Whether or not there is substantial observance and compliance with Rules of procedure under the law and Sharia by the lower court while conducting trial of this case.*
2. *Whether or not the judgment of the court has satisfied the basic requirements of a valid judgment under the law and Sharia.*
3. *Whether or not the sharing formula adopted by the learned trial Cadi in distributing the estate conforms with Islamic principles of inheritance.*

On Issue No. 1, it may be of interest to note that the existing Cadi courts are the creation of section 137(1) & (2) of the 1997 constitution of the Gambia and they came into operation on 4th November 1997. The rules of practice and procedure of the courts titled "THE CADI COURTS (CIVIL PROCEDURE) RULES, 2010" (hereinafter called The Rules) were only recently made. What may be added here is that 70% of the rules were codified from various Islamic law of

procedure. It is trite that the rules of court or procedure are not made just for the sake of making but in order to be followed by the courts concerned and to be guided by their provisions with the sole aim of as precisely as possible arriving at justice or substantial justice. Consequently a flagrant violation of the rules will only result in occasioning injustice. For this reason, therefore, it is necessary for cadis to limit their actions within the confine of the rules and to guard against any action that may directly or indirectly be inconsistent with the provisions of the rules. Otherwise their decisions are bound to be tempered with and reversed on appeal.

In the famous Islamic book of procedure "Ihkamul-Ahkam" a commentary on "Tuhfatul Hukkam" page 11 it is postulated that observance of practice and procedure is one of the six ingredients of a valid judgment under Sharia and absence of any one of these ingredients renders the judgment invalid and must be quashed on appeal. The text reads thus:

أن أجزاء حقيقته التى لا يتم الحكم الا بجميعها ويختل بفقد واحد منها, وهى كما قال بعضهم ستة: القاضى, والمدعى, والمدعى عليه, والمدعى فيه, والمقضى به من كتاب أ وسنة أواجماع بالنسبة للمجتهد.....فمن حكم منهما بغير المطلوب نقض حكمه, وسادسها كيفية القضاء.....

Now turning to the case in hand, it is clear from the record of proceedings of the lower court at our disposal that what was before the lower court was a case of inheritance. Order XIII rule 77(1)-(5) deal with the procedure on how the case of inheritance is commenced before a Cadi court. The rules have spelt out in stages the procedure of commencing action and conducting trial in an inheritance case before a Cadi court. Going by rule 77(1) to be read together with order II rule 3 of the Rules no one will be left in doubt that inheritance cases are commenced the

same way other cases are commenced in Cadi courts. In other words it commences with filing a valid claim before the court. As it appears on page 1 of the record the case kicked off on 8/12/2009 by the plaintiff Rohey stating her claim before the court which was followed by response of the respondents and court's ruling thereafter. The graphic account of what transpired in the court on that date (8/12/09) was stated above but without the fear of repetition I will reproduce the following portion due to its importance:

> *" I came here to call these people that our husband has died and I want for the court to distribute the estate. He has left 3 compounds properties one in Allen Street one in Fajara, one in Yundum, one Mercedes Benz saving account at the standard chartered Bank."*

The question one may ask is: Can the above statement make a valid claim before the court? Did the court follow the proper procedure? To answer these questions relevant authorities have to be invoked. However, to give an illustrative exposition of the afore-Cited rules I am prepared to take the pain of explaining their intent step by step as follows:

STEP 1

Whenever any person desirous of filing a case be it of inheritance or otherwise appears before a Cadi and expressed to him his intention of filing a case, the Cadi shall listen to his claim or his Da'awa as it is otherwise known. If the Cadi is satisfied that the Claim has fulfilled all the criteria of a valid claim or da'awa he shall cause the claim to be entered. To enter a claim means that the Cadi shall order the scribe or registrar of the court to record the substance of the complaint in a book or register to be kept in the court for that purpose. The complaint that will be entered must consist of the full name and address of the complainant and that of

the person complained against. If the claim is for the distribution of estate just like the one in the instant case the claim shall in addition to prayers for distribution of estate of the deceased contain the name of the deceased, time of his death, the wealth he left behind and names of all the heirs. This is in compliance with rule 77(2) of the Rules. It is of importance to bear in mind that court can only assume jurisdiction where the Da'awa or claim filed before the court is a valid one. For a claim to be a valid one it must filter through the criteria of validity. A detailed explanation of this point is forthcoming under the next step. After entering of the complaint the next line of action to be taken by a Cadi is to issue a court summons or to invite the person against whom the complaint was brought.

STEP 2

When the plaintiff and defendant appear before the court the Cadi directs the plaintiff to state to the hearing of the defendant his claim against him. So what the Cadi did in the instant case when he directed plaintiff (Rohey) to explain her claim was right. However, to repeat the question asked above: can the statement of the plaintiff as we have seen it above make a valid Claim or Da'awa which can warrant the court to assume jurisdiction? In Tuhfatul-Hukkam the requirements of a valid claim has been postulated thus:

والمدعي فيه له شرطان تحقق الدعوي مع البيان

Meaning:" the matter in dispute must satisfy two conditions: the claim must be specific and that it should have full explanation."There is a plethora of judicial pronouncement by Superior Courts in Nigeria on this principle. In BIRI VS MAIRUWA (1996) 8 NWLR (PT 467) 425, the Court of Appeal held, per A. B. Wali,

> *" Under Islamic Law, the subject matter of a dispute has two conditions, namely:- ascertainment of the claim and explanation of the claim through evidence. The first circumscribe the scope of the claim whereas the Second establishes the claim."*

Maidama, JCA, in MAFOLATU VS USAIN AKANBI ITA ALAMU (UNREPORTED) held:

> *"Two conditions are essential to the subject matter in dispute. There should be clear statement of the complaint followed by proper description of the subject matter"*

What these requirements go to show is that it is the pre-requisite that for a claim or Da'awa before a Cadi court to meet the degree of clarity required by Sharia to qualify for hearing, it must be realistic, unambiguous, definite, precise, apt, succinct, full and complete and must not be evasive, vague and bogus. In addition to all that have been said rules 77(2) & (3) of the Rules imposes two additional conditions if Da'awa is in the form of an application for distribution of estate the Da'awa or claim must contain name of the deceased, the time of his death, the estate sought to be distributed and names of all heirs and their status. It is also a condition precedent for a valid claim for the distribution of estate that the claim must be accompanied by a valuation report. The relevant rules read thus:

> Rule 77(2) of the rules provides that such an application for the distribution of estate shall contain the name of the deceased, the time of death, the estate sought to be distributed, and names of all the heirs.

> Similarly Rule 77(3) provides that a court shall not proceed to distribute any estate without a prior valuation of same by a qualified valuer.

Without any doubt in my conviction i will not hesitate to say that the da'awa or claim before the lower court in the instant case can hardly satisfy these requirements. It is hereunder reproduced again:

> " I came here to call these people that our husband has died and I want for the court to distribute the estate. He has left 3 compounds properties one in Allen street one in Fajara, one in Yundum, one Mercedes Benz saving account at the standard chartered Bank."

The above statement is vague, incomplete and ambiguous. It cannot satisfy the requirements of a valid claim as we have seen them above for many reasons. No where it is stated in the statement that the deceased left two widows and their names. The expressions (our husband which appears in the statement) is vague since it does not strictly and exclusively apply to 2 wives only but can also accommodate 3 or 4 wives. The Da’awa is also silent about the two sisters. Neither their names were mentioned nor the kind of their respective relationship to the deceased as to whether they were his germane or consanguine sisters or whether one of them is the former and the other one is the later to him. All these vital pieces of information are conspicuously missing on the face of the Da'awa. The consequential effect of absence of the required and valid application for distribution of estate before a court is so grave that it exposes the whole proceedings of the lower court particularly the distribution of the deceased's estate face to face with annulment under rule 77(4) which reads thus:

> R. 77 (4) Any distribution of any estate in contravention of Order X111 sub-rule 2 and 3 or this Order shall be null and void.

For these reasons my answer to the above question is: there is no valid Da'awa or claim before the lower court and I so hold. At this juncture may I suggest the following as a format of how an ideal and valid claim of this kind should read:

> I am here to apply for the distribution of the estate of my late husband namely Adama Aliu Ceesay who died on (state the date), living behind two widows namely (state their names) and two sisters namely (state their names) (whether they are germane or consanguine sisters or whether one is the former and the other is the later all these must be clarified). He left no father, no mother and no child. The deceased also left so and so properties at so and so places.

STEP 3

The Cadi shall now turn to the defendants in order to take his response to the claim of the plaintiff. The purpose of this is to avail the defendant an opportunity to deny or to object or to make a counter claim if he has any. For example at this point an heir may claim gift or purchase of an estate from the deceased. Where one of these kind of counter claims is raised by one of the heirs the Cadi must resort to conducting a trial within a trial with a view to determining the truth or otherwise of the counter claim before he proceeds with the original case. At the instant case what the Cadi did by requesting the defendants to respond to the claim of plaintiff was right.

STEP 4

After taking the above steps the Cadi shall now call for evidence to prove the three vital content of the claim (i.e death of the deceased, his heirs and estate). Proof of these issues apart from being requirement of law is rationally necessary in view of the fact that the plaintiff and the so called defendant are in the same shoe as both of them are seeking for the sharing the wealth of another person who could have been the real defendant being the owner of the wealth but is not physically before the court and both parties are alleging that he died and they are his heirs and the wealth they want to share is his estate. All these facts are not within the knowledge of the court and the persons alleging them are the prospective beneficiaries of the allegation. Hence the need for evidence of a neutral person who will not directly or indirectly, benefit from the wealth to confirm the truth of the allegation to the court. In law, it is a legal requirement that the heirs must prove the death, the heirs and estate of the deceased. As it is provided on page 179-180 of the famous book of Islamic law of procedure (IHKAMUL AL AHKAM ALA TUHFATUL HUKKAM) as follows:

وحيث كان القسم للقضاة فبعد إثبات لموجبات

يعني وفي الحالة التي يكون القسم فيها للقضاة فإنما يكون بعد إثبات الموجبات بأن يثبت عند القاضي موت من يراد قسمة ماله, وإثبات الورثة و ملك الشيء الموروث الذي يراد قسمته للموروث الي أن ورثه ورثته.

Meaning*: "If sharing of the deceased person's properties is to take place in the court and before a judge that could only be possible after proving the death of the person to be inherited, his heirs and the estate he left behind."* My careful perusal of the lower court's record of proceedings does not set my eyes on where the learned trial Cadi complies with the above vital procedure. In other words not a

single witness was called in the whole proceedings of the court. This is a serious, fatal and an incurable error which results in vitiating the whole proceedings of the court as confirmed on page 224 of the book of Bahjah.

فان قسم قبل اثباتها فقط.....ينقض.....

STEP 5

The next line of action after taking evidence in proof of the death, heirs and estate of the deceased is what is called "I'izar." This procedure is not provided in the rule. It is, however, necessary on Cadi Courts to observe it not only because it is an integral part of practice and procedure of Sahria but also because order XXIII rule III has mandated the courts to apply Islamic law procedure in the conduct of their proceedings. The rule provides thus:

> R. 111. Save in so far as may be prescribed; the practice and procedure of the court shall be conducted in accordance with the Islamic Law Sharia.

On page 21 of the famous Islamic book of procedure (Ihkamul-Ahkam) Commentary on Tuhfatul Hukkam it has been stated thus:

وقبل حكم يثبت الاعذار بشاهدى عدل وذا المختار

Meaning: *before giving judgment a judge must comply with the procedure of I'izar and two unimpeachable witnesses must certify the compliance that is the chosen course*. Now the question is what is I'izar? I'izar is a pre judgment plea which enables the parties to a case a final opportunity to go over their respective claims or ventilate their grounds before judgment. It is synonymous to allocutus under

criminal justice of common law. The procedure is that the judge or a Cadi shall ask each of the parties or litigants thus:

هل بقيت لك حجة تدفع بها ما ثبت عليك

Meaning: *Do you have more grounds or evidence to give*. As earlier stated the answers of the parties shall be attested to by two credible witnesses before the Cadi proceed to judgment. The procedure is a condition precedent to a valid judgment. Where the proceeding of a court is lacking this fundamental procedure is held to be a nullity and liable to be set aside on appeal. See NASIRU ALHAJI MUHAMMDU VS HARUNA MUHAMMADU & 1O OTHER (2001) 6 NWLR (Pt. 708)104. In SULEIMAN VS ISYAKU & 6 ORS (2006) 3 SLR, Pt 1, it was held, per Wali, JSC thus:

> *"It is a mandatory principle of Islamic law that no one shall be condemned without being afforded the opportunity of being heard. At the end of the parties' case, the court shall ask them whether they have anything more to say before the court pronounces its judgment. This is what is called Al-Izar, something having similarity with allocutus.*"

On the legal consequences of failure to observe the procedure of I'izar Muntaka Coomasie, JCA (as he then was) in HAKIMIN BOYI UMAR VS A'ISHA BAKOSHI (2006) 3 SLR pt1 P.80, put it succinctly thus:- "***I must say without mincing words that it is wrong to condemn a party unheard. Both the common law and Sharia law protects the principle of hearing the other party. It was clearly stated in so many words that Al'Izar must be announced before the decision. The judge must ask the party whether he has anything more to say***

before judgment is entered against him or that whether or he had more witnesses to call. If Al-Izar was not done or done after the decision the whole proceedings becomes a nullity" Despite the devastating consequences which result in rendering the whole proceeding of a court void the lower court did not apply it in the instant case.

STEP 6

The next and last step is judgment of the court. Although there is no unanimous and one single style of writing judgment yet it is generally believed that there are some salient points that are expected to be reflected in every judgment. They include:

1. The historical background or origin of the matter the parties, the claim and cause of action and the counter claim if any.
2. Analysis a d valuation of the evidence adduced.
3. The submissions of plaintiff or his counsel and submissions of the defendant or his counsel. Logical or scientific of both submissions.
4. The result of the analysis and conclusion of the court substantiated with authorities.
5. The decision or order of the court.
6. Right of appeal.

Finally, the judgment of the lower court is devoid of many of the above points. For this reason and many more explained above as part of treating this issue I have no option than to resolve the issue in favour of non substantial compliance of the lower court's proceedings with the rules of procedure.

Issue no.2 on whether or not the judgment of the court has satisfied the basic requirements of a valid judgment under the law and Sharia. First and fourth grounds of appeal attacked the judgment of the lower court as being wrong both in law and Sharia but no proper particulars of error or wrong was given by the appellant yet it is the duty of this court to examine the whole proceedings of the lower court including the judgment with a view to determining their compliance or otherwise with both substantive and adjectival laws. What a judgment shall contain was spelt out by rules of practice and procedure of the lower court. Order X1V rule 79 of the Cadi Courts Civil Procedure Rules has made it a mandatory requirement for a valid judgment to contain the principles of law and evidences proffered before the court to form the basis upon which the judgment must be grounded. The order reads thus:

> Ord. R. 79. The judgment of the court shall contain principles and evidences on which such decisions are grounded.

Judgment is a court's final determination of the rights and obligation of the parties in a case, it includes an equitable decree and any order from which an appeal lies. Under Islamic law it necessarily affirms or denies that such a duty or such liability rests upon the person against whom the aid of the law is invoked. As earlier stated the ingredients which are indispensable for a valid judgment under Sharia and which the absence of any one of them renders the judgment invalid are six in number, namely:

> "The judge, the plaintiff, the defendant, the subject matter in dispute and the applicable law leading to the judgment (Qur'an or Sunnah or the Consensus) and lastly the procedure which such judgment has attained"

A judge shall on no account rely on facts within his personal knowledge and base his judgment thereon. It is mandatory that judgment must be based on poof proffered before him by witnesses and inferences drawn there from. See: AJAGUNJEUN Vs. OSHO (1977)5 SC 89 at 103. It is trite law that the court must decide a case on legal evidence adduced and where it fails to follow this course, an Appeal Court will interfere. Tuhfatut Al-Hukkam, page 16 simply put it that jurists are in concurrence that a judge should base his judgment upon what he learnt from the witnesses. Imam Malik strictly forbids giving judgments not based upon the evidence of witnesses.

وفى الشهود يحكم القاضى بما يعلم منهم با تفاق العلما

وفى سواهم مالك قد شددا فى منع حكمه بغير الشهدا

The rule is therefore that the Cadi shall not give verdict on any matter before him without listening to the entire claim and proof.

ولا يحكم حتى يسمع تمام الدعوى والبينة.

See page 119-120 of . Despite the obvious importance attached to evidence in any given proceedings coupled with the facts that unlike in other cases where evidence may be dispensed with at the instance of admission of claim by defendant in inheritance cases evidence is indispensable in all circumstances. The instant case is an inheritance one yet there is nothing on the record of proceedings to suggest that the judgment of the court is grounded on evidence. In other words the whole judgment is based on personal knowledge of the Cadi which he gathered from the parties and this is a clear violation of Rule 97 and several textual authorities cited above. I therefore resolve this issue in the negative i.e. the judgment failed to comply with basic and necessary requirements of law and Sharia.

Issue No. (3) Which reads: whether or not the sharing formula adopted by the learned trial Cadi in distributing the estate conforms with Islamic principles of inheritance.

Having dealt with issues numbers 1 & 2, I have in the process of doing that dealt with many part of this issue. It suffices, however, to say that the sharing formula adopted by the lower court came under attack by ground of appeal number 3. In this ground the appellant said:

3. The Cadi was wrong in law when he gave the second respondent a compound without taking into consideration the second respondent is only a half sister of the first respondent and has no right to inherit any property of her late husband Adamu Aliu Ceesay.

In his judgment the trial Cadi on page 6 has made this pronouncement:

> ".... No 25 Allen Street property value at D1,3000,000= we therefore calculated and concluded that the that the said property to be allocated to the widows to be their share. No 25 Allen Street is now given to Rohey Ceesay and Fatou Ceesay respectively the rest of the properties at Fajara and Old Yundum to the two sisters Amie Nije and Ramatoulie Nje Ndow respectively as their share as there are no other other inheritors beneficiaries."

It should be appreciated that in Islam, administration of the deceased person's estate and sharing formula of the estate among his heirs and determination of who among his relations will inherit him and many other related issues were divinely resolved by Almighty Allah in the holy Qur'an and detailed explanation of that came from the prophetic traditions. It is on the basis of textual authorities of

these primary sources of Islamic law that Muslim jurists were able to work out the legal expositions of Mirath (law of Inheritance) which deals with calculation and actual distribution of the estate among the legitimate heirs. In the instant case as we have seen in the lower court's judgment the deceased **Adama Aliu Ceessay** died and left behind two widows and two sisters only, no parents and no issues. In verses 176 & 12 of Suratul- Al-Nisa'i of the holy Qur'an the almighty Allah says:

يستفتونك قل الله يفتيكم فى الكلالة ,ان امرؤا هلك ليس له ولد وله أخت فلها نصف ما ترك, وهو يرثها ان لم يكن لها ولد, فان كانتا اثنتين فلهما الثلثان مما ترك, وان كانوا اخوة رجالا ونساء فللذكر مثل حظ لأنثيين, يبين الله لكم أن تضلوا والله بكل شئ عليم.

ولكم نصف ما ترك أزواجكم ان لم يكن لهن ولد, فان كان لهن ولد فلكم الربع مما تركن.....ولهن الربع مما تركتم ان لم يكن لكم ولد, فان كان لكم ولد فلهن الثمن مما تركتم.....

It is on the basis of these verses that jurists worked out and calculated the share of a sister or sisters to a deceased. In a famous book of Fiqh "Ar-Risala" by Ibn Abi Zayd Al-Qairawani on page 227, it is stated thus:

والاخوة للأب فى عدم الشقائق كالشقائق ذكورهم واناثهم, فان كانت أخت شقيقة وأخت أو أخوات لأب فالنصف للشقيقة ولمن بقي من الأخوات للأب السدس, ولو كانتا شقيقتين لم يكن للأخوات للأب شئ.....

Meaning: The presence of a deceased's father or his son or grandson excludes sisters from Inheritance. Also the presence of germane brothers and sisters excludes the Consanguine Brothers and sisters from inheritance. However, in the absence of the former the latter steps into their shoes. Where a germane sister and consanguine sister or sisters are left, the germane sister's share is ½ while that of the consanguine sister or sisters is 1/6. If the germane sister is more than one they exclude other consanguine sisters. The share of a husband from the estate of his

deceased wife, if she left no issue or grandson is 1/2 but in the presence of an issue or grandson his share is reduced to ¼. Also the share of a wife from the estate of her deceased husband if he left no issue is ¼ but in the presence of an issue her share is reduced to 1/8.

In the instant case the share of the widows is ¼ since the deceased left no issue. While the share of the two sisters defends on the type of relationship they have with the deceased. If the two of them are his germane sisters their share is 2/3. If both of them are his consanguine sisters their share is the same 2/3. But if one of them is a germane sister her own share shall be 1/2 while the share of the other consanguine sister shall be 1/6. The Da'awa or the claim for distribution of estate of late Adama Aliu Ceesay before the lower court did not specify the status of the sisters neither was there any evidence led to specify their status. It is therefore difficult if not impossible to ascertain the parameter used by the Cadi in determining the status of the two sisters. But ironically the Cadi apportioned 2/3 share to them and added the remaining 1/3 share to them by Radd. How did he arrive at that nobody can say since there is no evidence or any authority in support of his distribution. Finally, I find no difficulty in holding that the sharing formula adopted by the learned trial Cadi in distributing the estate does not conform with Islamic principles of inheritance and so I resolve the issue in favour of the appellant.

Finally, having resolved all the three issues raised in this appeal in favour of the appellant, I on the whole come to conclusion that this appeal has to succeed and it is herby accordingly, allowed. Consequently, the judgment of the lower court and any order given are hereby reversed. And the case is remitted back to the

same lower court (Principal Cadi Court Banjul) for retrial and the court shall take and apply all the corrections pointed out in this judgment.

……..…. ……

(Signed): Justice Omar A. Secka (Signed): Justice T. Y. Yakasai

…… ……..……

(Signed): Essa F. Dabo (Signed) S. Y. Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/ 6/2011

BETWEEN:

KHADDY SAMURAH……..…….APPELLANT

AND:

KAWSU KIJERA…….……...…….…….…….....RESPONDENT

{Before: Justice Umar A. Secka Chairman, Justice A. S. Usman, Alh. Ousman Jah Panelist and Alh. Masohna Kah Panelist at Banjul on Tuesday, April 5, 2011}

PRINCIPLES:

1. *Cadi Courts in the Gambia, under their inherent jurisdiction, can entertain a case for ejectment of a divorced woman who from the residence of her erstwhile husband on the ground of being a follow-up to divorce over which they have jurisdiction.*
2. *Whatever is necessary and indispensable for the fulfillment of an obligation, that thing is equally necessary and indispensable".*
3. *A divorced woman whose marriage has been consummated is entitled to accommodation from her husband until she finishes her iddah. In the case of a pregnant woman, she is additionally entitled to feeding and clothing on divorce until she delivers.*

4. *The appellant being pregnant on the date she was divorced on 27/4/2010, her iddah in law was to last until she put to bed in line with the Quranic injunction.*
5. *On delivery of Khajja Fatimata Kijera on 23rd September 2010 by the appellant, the obligation imposed on the respondent to feed, clothe and accommodate the appellant is deemed, and in fact, extinguished provided the respondent has not exercised his right of revoking the divorce before that date if same is revocable. That obligation, having been extinguished as said, the appellant has no right to insist on staying in the respondent's house against his wish.*
6. *The appellant, having been divorced by the respondent consequent upon which she observed and completed her prescribed iddah in law by delivery, the law has not recognized her continued stay in the respondent's house since the marital tie which entitles her to that right has been severed by the respondent through divorce. The appellant's ejectment from the house of the respondent was therefore not wrongful since the appellant had no right in Sharia worthy of protection.*

JUDGMENT

Written and delivered by A. S. Usman

The appellant herein being dissatisfied with the decision of Cadi Court of Brikama (hereinafter referred to as "the lower court") dated 29/12/2010 as presided over by senior Cadi Lamin L. Ceesay appealed to this Panel upon the following grounds:

1. That the said judgment is not equitable as it only took the Cadi 20 minutes to decide the case, without giving the appellant the chance to explain her side of the case,
2. That the Cadi failed to consider that the appellant have five children with the respondent,
3. That the Cadi did not listen to the fact that the appellant had been assaulted by her co-wife whilst she was 4 months pregnant,
4. That the Cadi wavering in dissolving the marriage and made an order ejecting the appellant from the matrimonial home.

The appellant prayed the court to set aside the judgment of the trial court and the divorce by the respondent. She also prayed the court for an order giving her access to her children.

The fact of this case is that the appellant and the respondent were husband and wife prior to 27/4/2010. After the divorce and the appellant's *iddah*, the respondent did all he could to prevail on the appellant to amicably vacate his house at Bakau but all his efforts were treated with contempt by the appellant. It's against this background that the respondent then as plaintiff instituted Case No. 17/2010 against the appellant then as defendant before the lower court for an order directing the appellant to vacate the house since the marital tie between them had been extinguished. After the hearing on 29/12/2010, the lower court ordered the respondent to vacate the house in question forthwith failing which, the lower court thereafter on or about 14/2/2011 ejected her there from. It's against this ejectment that the defendant as appellant appealed to this panel.

The appeal came up for hearing on 22/3/2011. The appellant argued the appeal based on the grounds of appeal filed. On ground 1, the appellant submitted

that she was not given the opportunity by the lower court to state her own side of the story and that the fire brigade approach adopted by the lower court in deciding the case, (i.e. the conduct of the case within twenty minutes), raises suspicion. On ground 2, she submitted that the lower court neither asked her about the number of children she had with the appellant talk less of taking that into consideration in its judgment nor did the court take cognizance of the fact that they had a pending matter before the Children's Court on the issue of maintenance of their children. She also argued that the lower court did not equally take into account the pendency of a criminal case between her and the appellant at the Magistrate Court Kanifing. The appellant, on ground 3 argued that the lower court failed to consider the fact that she had been assaulted by her co-wife whilst she was 4 months old pregnant.

On the last ground i.e. ground 4, the appellant was asked to clarify on whether it was the lower court that dissolved the marriage between her and the appellant as the ground connotes. The appellant, as well as the respondent in his reply, informed the Panel that the marriage between her and the respondent was dissolved by the respondent long before they appeared before the lower court. According to them the divorce took place on 27/4/2010 but they appeared before the lower court on 29/12/2010. Concluding her argument on that ground, the appellant maintained that her complaint is limited to her wrongful ejectment and forcing her door open by the lower court. She consequently prayed the court to set aside the judgment of the lower court on that ground and to order that she should be taken back into possession to enable her to stay with her children who are five in number. She also submitted that she was forced, as a result of the wrongful ejectment, to move to her parent's house without her children even though the children joined her the following day from where they go to the respondent's house occasionally.

Replying, the respondent submitted on ground 1 that the proceedings of the lower court lasted for more than twenty minutes and that the appellant even spoke more than he did after which the court retired to the chambers for purposes of writing its judgment. On grounds 2 and 3 the respondent submitted that they were before the lower court not over the custody of their children but for court's intervention to order the appellant to vacate his house at Bakau where he and the appellant lived as husband and wife since the marriage between them was no more. That there is a criminal case before the Kanifing Magistrate Court over the alleged assault which the appellant is complaining about. On ground 4, the appellant submitted that he wants the court to affirm the decision of the lower court. He finally told the court that they were blessed with five children, namely:

1. Khaddy Kijera - Born in March 22nd 1994
2. Isatu Kijera Jnr - Born in March 1998
3. Kramba Kijera - Born in March 2000
4. Umar Kijera - Born in 2nd Sept. 2010
5. Khajjo Fatimata Kijera - 23rd Sept. 2010

After the conclusion of the argument, the Panel adjourned the case to today being 5th April, 2011 for judgment.

I have carefully gone through the grounds of appeal filed by the appellant as well as the arguments canvassed on them by the parties. Before taking any step in this appeal, it is necessary to clear one important point and which is the issue of alleged dissolution of marriage by the lower court. The dissolution of marriage between the appellant and the respondent was no more an issue before this Panel since both the appellant and the respondent (as opposed to what is raised in ground 4 of the appellant's grounds of appeal) were in agreement that the dissolution of

their marriage was done by the respondent long before they appeared at the lower court. The parties appeared before the lower court as a result of a summons the respondent took out in that court seeking the intervention of the court to compel the appellant to vacate his house at Bakau in which he lived with the appellant as husband and wife and no more.

Having cleared that point, I now proceed to determine the appeal on its merit. In doing so, it is worth mentioning that most of the issues raised by the appellant in her argument as to the issue of lack of taking the interest of her children into consideration by the lower court, the issue of her being assaulted by her co-wife and the issue of her being before the Children's Court with the respondent do not carry any weight since they were neither raised before the lower court nor was any decision founded on them by it. The appellant's core complaint therefore revolves around her ejectment which she claimed was unlawful. I consequently formulate the following three issues for determination in that regard, to wit,

1. Whether the lower court has jurisdiction to entertain the matter taking into consideration the way the case was constituted before the lower court?
2. Whether the appellant is entitled in law to stay in the respondent's house after she had been divorced and has consequently completed her *iddah* (waiting period)?
3. Whether the ejectment of the appellant by the lower court was wrongful?

Resolution of issue 1 above in favour of the appellant leads this Panel to the determination of the 2nd and 3rd issues. Similarly resolution of the 2nd issue in favour of the appellant leads the Panel to determination of the 3rd issue. That is, if this Panel holds that the lower court had jurisdiction to entertain this case as it did,

then it will proceed without further ado to determine the merits or otherwise of the appeal based on the 2nd and 3rd issues formulated above. Where however, it holds otherwise, that will be the end of the matter and the appeal will suffer from incurable defect of being incompetent for want of jurisdiction.

Section 137 (4) of the 1997 Constitution of the Gambia provides that a Cadi Court shall have jurisdiction to apply Sharia in matters of marriage, divorce and inheritance where the parties or other persons interested are Muslims. The above section limits the jurisdiction of the Cadi Courts to only **marriage, divorce and inheritance where the parties or other persons interested are Muslims.** The case before the lower court as stated by the respondent is as stated on page 1 of the record of proceedings of the lower court and reproduced hereunder:

> "the reason of my being here is that, this Kaddy Samura was my wife and then divorced, and she waited for three months after that, I requested from her to go out of my compound with her materials, and indeed she refuse to do so, and I followed her for that matter but no avail, while am in need of my house and this is only my request"

From the above, it is clear that the respondent was before the lower court to seek for the court's intervention to compel the appellant, when all attempts to amicably prevail on her failed, to vacate their matrimonial house at Bakau since they are no longer husband and wife. The lower court from the questions put to the parties (i.e. the appellant and the respondent) and their replies thereto came to know, based on the parties' admission before it that:

(a) The appellant and the respondent were husband and wife prior to 27/4/2010,
(b) That the respondent divorced the appellant on 27/4/2010,

(c) That when the appellant was divorced she was pregnant,

(d) That the respondent's *iddah* terminated on delivery of her child.

It was after satisfying itself with items (a) - (d) above that the lower court deemed it necessary and expedient to entertain the matter since what constituted the basis for the appellant's stay in the respondent's house and occupation of same by her was the marriage. This marriage, which entitled the appellant to be accommodated by the respondent, was terminated by the respondent himself on 27/4/2010. Despite this extinction of the marital tie, the appellant decided to stay put in the house and all efforts to prevail on her to amicably move out of it failed. Presumably, the divorce took place when the relationship between the appellant and the respondent has broken down irretrievably. The continued stay of the appellant in the respondent's house therefore may further aggravate the situation and lead to more anarchy and rancor in the house which the lower court had a duty to forestall. The pendency of a criminal case before the Kanifing Magistrate Court clearly denotes this. Since there is a duty to maintain peace and order, the lower court equally had a corresponding duty to guard and ensure the maintenance of same through whatever means including the steps it took in the instant case. It was on this premise that the lower court assumed jurisdiction in the matter even though the trial Judge did not cite any authority from Sharia to back up his stand.

The matter before the lower court was therefore a follow-up to divorce over which it had jurisdiction and the lower court rightly intervened in the matter, even though same was not squarely founded on marriage, divorce or inheritance within the purview of section 137 (4) of the 1997 Constitution of the Gambia. In a similar vein, the lower court would have equally been justified in assuming jurisdiction if the appellant, after her said divorce, was denied accommodation by the respondent

to observe her *iddah* period. The right to accommodation is conferred by marriage and extinguished by divorce. In between the two (marriage and divorce) there are rights and obligations the court, under its inherent jurisdiction, should enquire into with a view to protecting and enforcing same. All these are ancillary issues that are dependent on the marriage or divorce over which Cadi Courts in the Gambia have jurisdiction. It is an established principle in Islamic jurisprudence that "**whatever is necessary and indispensable for the fulfillment of an obligation, that thing is equally necessary and indispensable".**

"ما لا يتم الواجب الا به فهو واجب". راجع المستصفي من علم الأصول للغزالي ج 1 ص 231

The above authority is in support of the judicial functions assumed by the trial Judge and on the strength of that, the lower court was right to have assumed jurisdiction in entertaining the case within the purview of Order XXIII Rule 111 of the Cadi Courts (Civil Procedure) Rules 2010 which provides that the practice and procedure of the Cadi Courts shall be conducted in accordance with the rules of Islamic Law.

Issue No. 1 having been resolved in favour of the appellant, I will now proceed to determination of the 2nd issue and which is whether the appellant is entitled in law to stay in the respondent's house after her divorce and completion of her *iddah* (waiting period)? It's trite in Maliki School of law that a divorced woman whose marriage has been consummated is entitled to <u>accommodation</u> from her husband until she finishes her *iddah.* In the case of a pregnant woman, she is additionally entitled to <u>feeding and clothing</u> until she delivers. The fact that the appellant was conceived at the time of the divorce imposes further obligation on the appellant not only to accommodate the appellant but also to feed and clothe her during the subsistence of her *iddah*. See on this *Ihkamul Ahkam* page 117.

إسكان مدخول بها الي انقضا عدتها من الطلاق مقتضا

وذات حمل زيدت الإنفاقا لوضعها والكسوة اتفاقا

This obligation is however deemed extinguished when the *iddah* period is over. In the instant appeal, the divorce took place on 27/4/2010 when the last baby of the marriage Khajja Fatimata Kijera was conceived by the appellant. Appellant's statement at page 2 of the record of the lower court line 9 ***"yes indeed he was my husband and then divorced me when I was pregnant"*** is quite explicit on this. The appellant being pregnant on the date she was divorced, her *iddah* in law was to last until she put to bed in line with the Quranic injunction which states:

وأولات الأحمال أجلهن أن يضعن حملهن. الطلاق الآية 4

Meaning "for those who are pregnant, their period is until they deliver their burdens". On delivery of Khajja Fatimata Kijera on 23rd September 2010, this obligation is deemed, and in fact, extinguished provided the respondent has not exercised his right of revoking the divorce before that date if same is revocable. There is no evidence either from the record of proceedings of the lower court or from the submissions of the parties before this Panel to the effect that the divorce was revoked during the *idaah*. That obligation, having been extinguished as said, the appellant has no right to insist on staying in the respondent's house against his wish. This is without prejudice to the appellant's right to institute a separate action before any Cadi Court in the Gambia for the maintenance of her five children with the respondent. This issue is therefore resolved in favour of the respondent and the ground upon which it is based hereby fails.

This brings us to the last issue i.e. whether the ejectment of the appellant by the lower court was wrong as per her argument. Issue 2 above has partially dealt

with this issue. Since the appellant, has been divorced by the respondent consequent upon which she observed and completed her prescribed *iddah*, the law has not recognized her continued stay in the respondent's house. The marital tie which entitles her to that has been severed by the respondent through divorce. The appellant's prayer that the court should bring her back into possession can therefore not be sustained since she does not have any recognizable and enforceable right in Sharia to entitle her to that relief. Despite the fact that she did not have any recognizable right in Sharia, the appellant willingly chose to clog the wheel of justice by disrespecting the order of the lower court and refusing to vacate the house in question from 29/12/2010 when the order was given, until 14/2/2011 when she was ejected from the house barely one and half months. This is despite the sum of D1,500.00 given to her by the respondent, as admitted by her, for that purpose. The appellant's ejectment from the house of the respondent was therefore not wrongful since the appellant had no right in Sharia worthy of protection. This issue, as the previous one, is equally resolved in favour of the respondent.

Based on the foregoing, the appeal fails and same is hereby dismissed. The decision of the lower court is hereby affirmed. The appellant was rightly ejected from the respondent's house which is situate at Bakau, the Gambia.

……..……	……
(Singed): Justice Omar A. Secka	(Signed): Justice A. S. Usman
……..	..……..……..
(Signed): Panelist Alh. Ousman Jah	(Signed): Panelist Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/ 9/2011

BETWEEN:

SANKUNG CEESAY…….…….APPELLANT

AND:

BAKARY CEESAY…….…....…….…….…….....RESPONDENT

{Before: Justice Omar A. Secka Chairman, Justice Sadik U. Mukhtar , Essa F. Dabo Panelist & S. Y. Kah Panelist at Banjul on Thursday, April 14, 2011}

PRINCIPLES:

1. *Where an appeal is not properly brought before the Panel the proper order is one of striking out under Order is one of striking out under Order 28 of the Cadi Appeals Panel Rules 2009.*
2. *Where an appellant is out of time to file an appeal before the Cadi Appeals Panel (as it is in the instant case), he needs the extension of time and the leave of the Panel through a proper application brought pursuant to Order IV Rule 15 of the Rules of this court to enable him properly file and argue the appeal.*
3. *This appeal having been filed out of the 30 days period allowed by Order III Rule 5 of the Rules of this court in disregard of the said Order IV Rule 15, the Panel has no option than to strike it out.*

4. *Appeal must be directly against the decision of Cadi's Court that gave judgment in the case being appealed against and not against the Chief's Court which merely enforced it.*

RULING

Written and delivered by Justice S. U. Mukhtar

This is an appeal against the decision of Cadi Court of Kanifing. The appellant Sankung Ceesay is not satisfied with the lower court's decision, he therefore appealed to this Honourable Panel upon the following grounds:

1. That the Chief was wrong in law for ordering the eviction of the appellant from his father's property including members of his personal family.
2. That Chief's order giving the property to the respondent is against the rule of inheritance and against Sharia.
3. That the judgment was not based on any law and is against the rule of equity and natural justice.

In the course of hearing the appeal today being the 14th day of April, 2011 an issue was raised, namely:

1. That the appeal was filed out of time,
2. That the parties are not properly joined,
3. That the appellant failed to understand that the case was heard and decided by the Cadi's Court Kanifing. The Chief's Court only enforced and executed the judgment of the Cadi Court.

We agree that this appeal brought by the appellant before us is full of flaws. The judgment was delivered by the lower court on 31st December 2009 and the appeal was filed on 28th March 2011. This is apparently a violation of Order III Rule 5 of the Cadi Appeals Panel Rules 2009. The rule provides that an appeal

shall be filed within thirty days from the date of the order or judgment appealed against. Under this circumstance, for the appellant to be entitled to be heard he must invoke and abide by the provisions of Order IV Rule 15.

It is equally in the interest of the appellant to amend his errors by joining Binta Jerju not only her son Bakary as a respondent though Bakary is also a beneficiary. Another error to be amended is, his appeal must be directly against the decision of Cadi's Court of Kanifing and not the Chief's Court which enforced the judgment.

In consideration of the above, this honourable Court is of the opinion that the appellant is not entitled to be heard. The fact that his appeal is not properly brought before us to dwell into this appeal is like a student sitting an exam without admission.

We therefore urge the appellant to follow due process of the law for his possibility of being heard. The appeal is therefore struck out under Order 28 of the Cadi Appeals Panel Rules 2009.

…… ……..……
(Signed): Justice Omar A. Secka (Signed): Justice Sadik U. Mukhtar

…… ……..……
(Signed): Essa F. Dabo (Signed) S. Y. Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANEL
HOLDEN AT BANJUL

APPEAL NO. AP/08/ 2011

BETWEEN:

MICHEL SILVA……..……APPELLANT

AND:

BABA DEMBAJANG…….……..…..RESPONDENT

{Before: Justice Omar A. Secka Chairman, Justice Bashir Ahmad B/Kudu, Alh. Ousman Jah – Panelist, and Alh. Masohna Kah – Panelist on Tuesday, 24th May 2011}

PRINCIPLES:

1. *It is a settled law that Marriage is contracted with the provision of*
   (1) Guardian of Marriage
   (2) Dowry
   (3) And witnesses
2. *Where the above three basic pre-requisites are available in a marriage (such as the instant one between Baba Dembajang and Isatou/Silva as clearly stated by two witnesses before this court Idris Jameh and Karamoh Fofana) that marriage is deemed a valid marriage in Islamic law.*
3. *It is generally provided in Islamic Law that admission/confession is higher in terms of admissibility than witnesses. See Tuhfa p.35.*

4. *The fact that the appellant at page 3 (printed copy) of the Brikama Cadi Court proceedings admitted that she was married to Baba Dembajang; the respondent in this case, is a clear testimony of existence of marriage between them.*
5. *The lower court was right in giving the custody of the child born out of wedlock (i.e. Fatou) to the appellant while HAWA AND ADAMA born in wedlock to the respondent in compliance with a prophetic Hadith which says "... Lawful child is the child found in a legal marriage..."*
6. *On perusal of the record of proceedings of the lower court one will see that the submission of the appellant took about three (printed) pages. This is a clear testimony that the appellant was given a fair hearing by the lower court.*
7. *It is a trite law under the rules of custody in Islamic law that after the death of a husband or separation of spouses by divorce, the custody goes to their mother. This is irrespective of the religion of the mother. The same rule applies to a Muslim and non-Muslim mother i.e. Christians and Jews.*
8. *The fact that the appellant was originally a Christian but subsequently converted to Islam and later reverted to Christianity, made the appellant in the eyes of Islamic law to lose her right to be identified as a Christian for she is no longer trustworthy. She is only making a mockery of the religion. It will be difficult in this circumstance to know whether the appellant is a Christian or not.*
9. *Based on the above submission, especially lack of trust and the deceitful behavior of the appellant, she has become disqualified from acquiring the right of custody of Muslim children. For more elaboration, the case could*

have been different if she were an ordinary Christian or Jew. One cannot be seen to be changing religion like a chameleon.

JUDGMENT

Written and Delivered by Justice Bashir Ahmad B/Kudu

This is an Appeal against the decision of Brikama Cadi Court sitting in Brikama presided over by Senior

1.Cadi Muhammed L. Ceesay

2. Cadi Dodou Barry and

3. Cadi Mustapha Sanneh

The plaintiff Baba Dembajang of Bonto Village sued Isatou Silva claiming that she was his wife. He married her after he made her convert to Islam. Baba Dembajang said that they got three children. The eldest is a female- Fatou Dembajang. Fatou was transferred to her mother's family. The plaintiff said he did his best for the defendant to return her but to no avail. He told his wife that he was ashamed to leave his daughter in his In-laws house where upon the defendant said he insulted her. She got angry and went out of the plaintiff's house with the two children.

The plaintiff said he personally followed up for her return but she refused. He received a letter of invitation from the ministry of social welfare. The ministry directed that the children must be in the custody of their mother because I have no wife to take care of the children. The children therefore remained with their mother but when the defendant returned to her family she turned her back against Islam. She baptized. My children were eating pork and attending the church and she no longer came to me as a husband.

I pray the court to give me the custody of my children. The children are:

1. Fatou Dembajang- 4 years
2. Adama Dembajang- 2 years
3. Awa Dembajang- 2 years

The plaintiff in answer to the courts question said he lives in Bonto. The compound is not his own but he has obtained a shop there. He has his compound in Bonto Village where his younger brother stays. His mother stays in Jarra Suma.
The court asked the plaintiff whether he could take care of the children since he is not living in his personal house.

The plaintiff answered by saying that he will take the children to his mother in Jarra and his sisters in Bonto and Serrekunda. The Court further asked the plaintiff whether he tried to convince the defendant to revert to Islam. He said he tried so many times but could not succeed. He could not send anybody to her parents because they were not happy with their daughter's conversion to Islam.
Having heard from the plaintiff, the court turned to the defendant for her response. Isatou/Silva, the defendant said she heard all what the plaintiff had said. She said she was a Christian and accepted Islam on the 23rd of December 2005. She was then four months pregnant with Fatou. Baba Dembajang was responsible for the pregnancy. Fatou was a child born out of wedlock because she was born four months after our marriage. Our problems with Baba started when I gave my mother Fatou to look after her. I accepted Islam because of Baba- the plaintiff when I was already four months pregnant. He was so eager to marry me I therefore converted to Islam. Baba later maltreated me a lot. I asked him to renovate his house for us to transfer there but he refused. On 25th December 2010, I decided to go back to my religion which is Christianity.

The plaintiff accused me of taking my children to the Church; the truth is when I converted to Christianity and decided to go to church there was nobody in

my house that could take care of the children. That was why I took them to the church for that day (25th Dec 2010). On the allegation that I made them eat pork, there was an occasion the children ate meat but I was not sure what meat they ate. My children are Muslims. On the issue of custody I will not give my children to the plaintiff because they are too small.

IIZAR

The lower court- Brikama Cadi Court, now turned to the plaintiff to clarify some issues where he said: He could not stay in his house because the compound is isolated and is not enough for them and his brother to stay in. The plaintiff also confirmed to this court- Brikama Cadi Court that Fatou was born out of wedlock. The lower Court asked the defendant weather she had anything to add and she said she had nothing. The court asked the defendant weather she had anything to add before the judgment and she said no. so also the plaintiff.

The Brikama Cadi Court asked the defendant weather the children are still breast feeding where she answered no. The court also asked her whether there is a Muslim amongst members of her family and she said no.

The brikama Cadi Court after hearing the claim of the plaintiff for the right of custody for his three children because their mother- defendant has already baptized, and the defendant has confirmed this, but at first refused to surrender the right of custody to the plaintiff because the children are small; and the defendant now finally accepted to surrender this right of custody to the plaintiff before the court; that the defendant also confessed before the court that daughter Fatou Dembajang was a child born out of wedlock. The cadi court based on this evidence decided the following:

1. Transfer the right of custody to the plaintiff because the defendant lost that right when she converted to Christianity. The authority is found in the book of Tuhfah at page 125

"the condition of custody of children includes religion"

2. Retain Fatou Dembajang in the custody of her mother because that child was born out of wedlock. This authority is found in a prophetic tradition where it is said

" lawful child is the child found in legal marriage whilst unlawful child is the child born out of wedlock"

AL- MODAOWANA

3. That the defendant ISATOU Silva has the right to see her children at any time possible i.e. Adama and Hawa
4. That both parents must join hands together for the welfare of the children financially and spiritually.
5. That both parties have the right to Appeal to the Cadi Appeal Panel within 28 days of the judgment

This is the final Judgment of the Brikama Cadi Court. Signed by the entire three Panelists:

(i) Senior Cadi Muhammed L Ceesay

(ii) Cadi Mustapha Sanneh

(iii) Cadi Dodou Barry

The Defendant, Isatou Silva (Michel) was dissatisfied with the decision of the Brikama Court and Appealed to this panel- Cadi Appeals Panel with the following grounds of Appeal contained in her notice of Appeal of 15th March, 2011.

1. That Cadi was wrong in his Judgment when he decided to give children to respondent whilst the said children were out of wedlock
2. That Cadi was wrong when he failed to ask whether we have legally married or not
3. That the Brikama Cadi Court was wrong in Law for not allowing the appellant to give her side of the story and proceed to give judgment which is wrong in equity
4. That the orders made by the Brikama Cadi Court are wrong in Law and against the rules of custody as mentioned in the Holy book, the Quran.
5. The Brikama Cadi court failed to take into consideration that the appellant was taking full care of the said children

The following reliefs were sought:

1. That the order in respect of the court be set aside and an order be made for the appellant to have legal custody of the said children.
2. That the decision taken by the court be set aside
3. Any other or further orders that the court deems fit.

Both parties- the appellant and the respondent have no counsels. We asked the appellant on her name used in the lower court; and she said when she converted to Islam her name was Isatou Silva and on her reversion to Christianity her name is Michel Silva. We requested the appellant to give any additional grounds of appeal and she gave the following:

6. I have been with the children for eight and a half consecutive months but the respondent paid maintenance only for one month.

7. My children should be located where I can see them conveniently.

The appellant said that is all about my grounds of appeal. I will now expatiate on them. Let me start with ground 2 and tell the panel that there was no

subsisting marriage between me and the respondent when the children were born (Adama and Hawa)

The panel puts it to the appellant that the lower court legalized the two children – and the appellant said she did not talk about the legality of children/ moreover in the lower court – Brikama Cadi Court they only asked me on what Baba said. The panel drew the attention of the appellant on the issue of marriage where on p3 the appellant said Fatou was born four months after her marriage with Baba and the lower court proceeding on the same page 3 four lines before last of the Brikama court proceeding. The appellant also said:

"…This is the way I entered Islam before we get married…."

On Ground 4- we asked the appellant to tell us what the Quran said about custody of children and she answered that the children are 2 years old; they should be 7 before they are taken away by their father.

On ground 5, we asked the appellant if she were taking full care of the children why were the children taken to church and given pork to eat? The appellant said that there was no body in the house to look after them. As for eating pork I am not aware they ate.

On ground 6 we asked the appellant about the maintenance of the children she said, before the respondent takes the children he should pay for their maintenance for seven and a half months.

On ground 7 where the appellant to direct the respondent to locate the children where she can see them easily; we asked the appellant whether she was conceding for the respondent to assume the right of custody; where she said she was complying with the lower court order that the children should be accessible like in Bonton. Jarra Soma is far away. We finally put it to the appellant whether

she has any interest for reconciliation and she answered positively i.e. she is interested.

Having completed her explanation on the grounds of Appeal the panel turned to the respondent Baba for response.

On ground (i) - the respondent said children were born within wedlock. They were born legally. We started as boyfriend and girlfriend. I requested her to become a Muslim and she agreed. Michel adopted a father Idriss Jammeh who tied the marriage between us. There were witnesses of the marriage contract like (1) Karamo Fofana. "I went buy kola nuts from Brikama and I took long. Her adopted father had kolanuts which was used to tie the marriage. It was in 2006."

We asked the respondent weather he knew the requirement of a marriage contract in Islamic Law and he said no. He also didn't know in the Gambian custom. He said he paid a dowry of D325 which was given to the adopted father who further gave Silva.

On ground 2 the respondent said Silva herself told the cadi the date of the marriage.

On ground 3 the respondent said the appellant was given more opportunity to explain herself than me.

On ground 4 the respondent said in Brikama Court the appellant Silva accepted that I become the custodian of the children. If the orders were wrong she could not have accepted.

On ground 5 the respondent said it is time the court did not consider the maintenance cost for seven and a half months. This happened because the social welfare ministry directed that whenever I wanted to see my children, I should be allowed. I started going but the appellant violated the social welfare directive and it was Silva who took the matter to social welfare.

At this juncture we requested the respondent- Baba to bring two witness.(1) Idriss Jammeh and (2) Karamo Fofana to testify before this panel as to the existence of a valid and subsisting marriage in Islamic Law before her baptisation.

On this adjourned date 10-5-11 the two witnesses appeared in court and we took the first witness Idriss Jammeh. Adult; Businessman of Bonto village. He promised to tell the truth.

Idris Jammeh said the marriage between Silva (Isatou) the appellant and Baba Dembajang was properly contracted according to Islamic Rights. When asked about the dowry he said D325 was paid to Isatou/Silva as dowry another D25 was paid to the Imam who tied the marriage. Idris Jammeh the witness said he was a guardian of Silva at the marriage. He said there were many witnesses but could not remember how many.

The first witness said in their tradition since the would-be husband and the would-be wife came to an agreement and witnesses were there with sadaq we simply asked the Imam to pray for the marriage contract and that was what happened. The marriage took place in my compound in Bundung. Silva/Isatou herself gave me the authority to execute the marriage contract as her guardian in my compound but I cannot remember when. We asked Baba whether he agreed with the testimony of this witness and he said yes.

We asked Isatou/Silva on this testimony and she said she did not agree with what the witness said. She said she was not given any money and I was not aware.
We asked the first witness Idriss who he gave the dowry/sadaq to. He said he gave Silva in Baba`s house. The witness said Mariama Bajinka and Muktar Jameh were all witnesses in the marriage contract.

Finally this witness said he came to know Isatou/Silva when we worked with her at Siffo Farms Bonto for six months with Lebanese. When she converted to

Islam she requested me to tie the marriage between her and Baba. She said she would have a problem with her father if he is told. The testimony was not rebutted by Silva and therefore the court accepted it.

(2) The second witness Karamo Fofana; Adult; Businessman; and resident of Bonto promised to tell the court the truth. He said he is aware of Baba and Silva's marriage. He was in His house when Idris sent for him and said they would tie a marriage between Baba and Isatou/Silva. Idris told the second witness that ISATOU Silva the appellant authorized him to be her guardian in the marriage. The second witness asked of dowry and Idris the first witness told him that D325 was the dowry and D25 was for the Imam. The second witness said that there were many people at the marriage but could not remember names. Baba the respondent agreed with the testimony but Isatou/Silva maintained that she did not receive anything from anybody. This testimony was also accepted.

IIZAR

At this juncture we asked the appellant whether she had anything to say relevant to her case before judgment were upon she said before going to Idris to tie my marriage I have Muslim relatives I could have gone to. Why couldn't Idris go to my parents if he knew me well? That is all.

We also asked the respondent if he had anything relevant to his case before we adjourned for judgment and he said yes.

(1) The respondent prays the Court to direct Silva/Isatou to release the documents of the children to him especially hospital documents.

(2) The fourth child born by Silva is mine. She left my house with the pregnancy

Having exhaustively heard from the appellant and the respondent; and having read the proceedings of the lower court- Brikama Cadi Court from cover to

cover and having observed what happened before us in the court; we members of the CADI Appeals Panel agree that the issues for the determination of the appeal are:

1. Whether there was a subsisting and valid marriage between the appellant and respondent before the appellant reverted to Christianity?

On this ground of appeal we referred to page 3(printed copy) of the Brikama Cadi Court proceedings where we find the appellant repeatedly saying and admitting that she was married with the respondent Baba Dembajang.

It is generally provided in Islamic Law that admission/confession is higher in terms of admissibility than witnesses. See Tuhfa p.35

(2) Secondly, it is a settled law that Marriage is contracted with the provision of

(4) Guardian of Marriage

(5) Dowry

(6) And witnesses

All these were available in the marriage between Baba Dembajang and Isatou/Silva as clearly stated by two witnesses before this court Idris Jameh and Karamoh Fofana. This Ground of Appeal has therefore failed. There was a subsisting and valid marriage between the two parties.

(3) Ground number one has equally failed because the child born out of wedlock Fatou was given to the appellant while HAWA AND ADAMA were given to the respondent by the lower court in compliance with a prophetic Hadith

"... Lawful child is the child found in a legal marriage..."

(4) The issue of the lower court- Brikama Cadi Court disallowing the appellant to give her side of the story before judgment was clearly rebutted by the fact that if one peruses through the proceedings of Brikama Cadi Court, one will

see that the submission of the appellant there took about three (printed) pages while that of the respondent took just about two and a half page. This confirms to us that the appellant was given fair hearing in the lower court.

This ground of appeal also fails for lack of merit.

(5) On Ground number 5; it is easier to merge this ground with six.

Ground 5 says the lower court, Brikama Cadi court has failed to take into consideration that the appellant was taking full care of the said children while Ground 6 is saying: I have been with the children for eight and a half consecutive months but the respondent paid maintenance only for one month. This Ground of appeal succeeds because we have not seen any place in the lower court proceedings where the court has given order as to the issue of maintenance cost arrears for the children.

(6) Ground number 7 which is now 6 because of the merger of five and six on the issue of giving the appellant the opportunity to see her children at convenience is bound to fail. This is because if you cast a cursory look at the orders given by the lower court, you will see that item No. 3 gives the appellant wonderful opportunity to see her children at and when she wishes. This ground has therefore failed for lack of merit.

Finally, on the last ground of appeal that is, the orders made by the Brikama Cadi court are wrong in law and against the rules of custody as mentioned in the Holy Book, the Quran. It is a trite law under the rules of custody in Islamic law that after the death of a husband or separation of spouses by divorce, the custody goes to their mother. This is irrespective of the religion of the mother. The same rule applies to a Muslim and non-Muslim mother i.e. Christians and Jews. The question to be asked now is whether the appellant is a Christian or not? The fact that she was originally a Christian but subsequently converted to Islam and later

reverted to Christianity, in the eyes of Islamic law she has lost her right to be identified as a Christian for she is no longer trustworthy. She is only making a mockery of the religion.

Based on the above submission, especially lack of trust and the deceitful behavior of the appellant, she has become disqualified from acquiring the right of custody of Muslim children. For more elaboration, the case could have been different if she were an ordinary Christian or Jew. One cannot be seen to be changing religion like a chameleon.

In view of the preponderance of evidence before this court, we have no option but to confirm the decision of the lower court- Brikama Cadi Court with one or two variations.

(1) That the respondent, Baba Dembajang should refund the appellant Isatou Silva her maintenance cost for seven and a half months at a rate to be determined by the Chairman Cadi Appeals Panel through the assistance of experts.

(2) That the Appellant should surrender the documents of the children especially hospital documents to the respondent.

We therefore confirm the decision of the lower court with all the orders and authorities used; save for the above mentioned variations.

APPEAL IS HEREBY DISALLOWED.

…… ……

(Signed): Justice Omar A Secka (Signed): Justice Bashir Ahmad B/Kudu

…… ……

(Signed): Alh. Ousman Jah (Signed): Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/ 13/2011

BETWEEN:

BABUCAR BANJINKA & 5 ORS…….…….APPELLANTS

AND:

LANDING BANJINKA & 3 ORS....…….……..…....RESPONDENTS

{Before: Justice Omar A. Secka Chairman, Justice T. Y. Yakasai, Alh. Ousman Jah Panelist, & Alh. Masohna Kah Panelist at Banjul on Thursday, June 7, 2011}

PRINCIPLES:

1. *Plaintiff or Appellant is he who will be left alone whenever he decides to terminate the suit. See Al-Fawakihud Dawani Volume 2 page 296:*

   المدعي هو الذي لو سكت لترك علي سكوته

2. *A plaintiff or Appellant can discontinue his case/appeal at any stage of the proceedings. The Islamic law procedure allows this as stipulated in the authority above cited.*

RULING

Written and delivered by Justice Omar A. Secka

Pursuant to section 137A (6) of the Constitution of the Federal Republic of the Gambia 1997, the appellants filed this appeal against the decision of Bundung Cadi Court on 19th January 2011.

The appeal was filed on 14th April, 2011. On the 7th June, 2011 the date the case was scheduled for mention, the panel received a withdrawal notice from the counsel to the appellants one Borry Touray dated 6th day of June, 2011 informing the panel that **the appellants hereby wholly discontinue this appeal.** The parties were present before the court.

The Panel: We strike out this appeal as prayed because Islamic Law Procedure accepts it as stipulated in Al-Fawakihud Dawani Volume 2 page 296 where it is provided thus:

المدعي هو الذي لو سكت لترك علي سكوته

Meaning: the plaintiff is he who will be left alone whenever he decides to terminate the suit.

We therefore strike out the appeal accordingly.

…… …….

(Signed): Justice Omar A Secka (Signed): Justice Tijjani Y. Yakasai

…… ……

(Signed): Alh. Ousman Jah (Signed) Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANE
HOLDEN AT BANJUL

APPEAL NO. AP/11/2011

BETWEEN:

BABA LOWE & ORS…..……..……APPLICANTS/APPELLANTS

AND:

REDWAN LOWE & ORS…...……..RESPONDENTS

{Before: Justice Omar A. Secka Chairman, Justice Sadik U. Mukhtar, Alh. Ousman Jah Panelist, & Alh. Masohna Kah Panelist at Banjul on Thursday, June 12, 2011}

Lamin K. Boge = for the Applicants.

Cheyassin Ousman Secka for the Respondents.

PRINCIPLES:

1. *Perusal of the record of proceedings of the lower court (Bundun Islamic Court) will reveal that the appeal is out of time since the case was decided by the lower court in March 2007 and the appeal filed before this Panel this year 2011.*
2. *The applicant's counsel in his submission, failed to convince this court to the contrary. His argument that he did not lay his hand on the record of proceedings of the lower Court tends to be negligence on his part. This court is therefore in total agreement with the submission of the respondents that this appeal is out of time.*

3. *The applicants violated the provisions of Order III Rule 5 of the Cadi Appeals Panel Rules 2009, which reads: an appeal shall be filed within Thirty days from the date of the order or the judgment appealed against.*
4. *Order IV rule 15 of the Rules of this court vividly stated the procedure to be adopted if appeal to be filed is out of time.. Rule 13 of the same Order stipulates that an appeal shall not be brought out after the expiry of the time allowed for the appeal unless the panel grants an enlargement. No application for such an extension is filed before us. There is therefore no appeal before us in the eyes of law, talk less of entertaining the applicants for the prayer of stay of execution. See As'halul Madarik page 156 it had been stated "the existence of what the law does not recognize is like non- existence at all".*

المعدوم شرعا كالمعدوم حسا

RULING

Written and delivered by Justice S. U. Mukhtar

The case originated from Bundung Islamic Court before the Cadi Tijan Kah and panelists Alh. Mustapha Sanneh and Basiru Muktar Liegh. The case was heard and subsequently decided on March 2007.

The applicants / appellants filed their appeal through their counsel Barrister Lamin K. Boge before this honorable Court, this year 2011. The applicants stated their grounds of Appeal and jointly applied for the motion for the stay of execution.

In the cause of hearing, both parties i.e. applicants and respondents made their submissions. The respondents' counsel sought for an adjournment, the client

elected for the continuation of the hearing, the fact that his counsels via his letter raised preliminary objection that this appeal is out of time.

The applicant in his submission, failed to convince this court to the contrary. His argument that he does not lay his hand on the record of proceedings of the lower Court tends to be negligence on his part.

Upon our perusal of the record of proceeding of the lower Court; Bundung Court, the action speaks for itself. This case was decided on March 2007. The appeal is filed before this honorable Court this year 2011. This court is in total agreement with the submission of the respondents that this appeal is out of time.

The applicants violated the provision of Cadi Appeals Panel Rules, which reads: an appeal shall be filed within Thirty days from the date of the order or the judgment appealed against.

The rule vividly stated the procedure to be adopted if appeal to be filed out of time as enshrined in order IV rule 15. Rule 13 of the same order stipulates that an appeal shall not be brought out after the expiry of the time allowed for the appeal unless the panel grants an enlargement. No application for such an extension is file before us. Though in the eyes of law, there is no appeal before us, talk less of entertaining the applicants for the prayer of the stay of execution.

In a book called As'halul Madarik page 156 it had been stated:

المعدوم شرعا كالمعدوم حسا

Meaning: the existence of what the law does not recognize is like non- existence at all.

In view of the above, this application is refused, and appeal struck out for non compliance with Cadi Appeal Panel Rule on the process of filing this appeal.

…….……..…..…… …….

(Signed): Justice Omar A Secka (Signed): Justice Sadik U. Mukhtar

…… ……..……

(Signed): Alh. Ousman Jah (Signed) Alh. Masohna Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANEL
HOLDEN AT BANJUL

APPEAL NO. AP/12/2011

BETWEEN:

EDY TOUREY…… APPELLANT

AND:

ALHAJI MALICK GAYE & 5 ORS……....RESPONDENTS

{Before: Justice Omar A. Secka Chairman, Justice Tijjani Y. Yakasai, Alh. Essa F. Darboe Panelist, & Alh. Sering Muhammad Kah Panelist at Banjul on Thursday, June 30, 2011}

PRINCIPLES:

1. *Where there are two or more issues pending before a court awaiting determination, the court is enjoined to first and foremost take up the one that picks holes in its jurisdiction before taking any further step. This is to avert wasting court's precious judicial time in a futile exercise. See* ***Ofia VS. Ejem*** *(2006) 11 NWLR (p.t 992) 652 at 663.*
2. *Jurisdiction is the bedrock of any valid judicial proceedings that is why its determination does not only assume prominence and takes precedence in adjudication but its challenge can be raised at any stage of the proceedings. See* ***Banna v Ocean View Resort Limited*** *2002-2008 GLR VOL. 1 where it was held per Agim JCA that* ***"The issue of jurisdiction can be raised at any stage of a case and once raised it must be determined before any further step is taken."*** *Section 137 (4) of the 1997 Constitution of the Gambia has*

clearly defined and limited the jurisdiction of Cadi Court to application of Sharia to matters of ***marriage, divorce and inheritance*** *where the parties or other persons interested are Muslims.*

3. *Cadi Courts in the Gambia have no jurisdiction over landed properties.*
4. *The matter in dispute must satisfy two conditions: the claim must be specific and that it should have full explanation."There is a plethora of judicial pronouncement by Superior Courts in Nigeria on this principle. In* ***BIRI VS MAIRUWA*** *(1996) 8 NWLR (PT 467) 425.*
5. *What these requirements go to show is that it is the pre-requisite, that for a statement of claim or Da'awa before a Cadi court to meet the required degree of clarity by Sharia so as to qualify for hearing, it must be realistic, unambiguous, definite, precise, apt, succinct, full and complete and must not be evasive, vague and bogus.*
6. *Order 7 Rule 77 (2) of the CADI COURTS (CIVIL PROCEDURE) RULES, 2010 imposes two additional conditions where a claim involves distribution of estate. The claim must contain:*
    - *(a) Name of the deceased, the time of his death, the estate sought to be distributed and names of all heirs and their status.*
    - *(b) It must be accompanied by a valuation report. The relevant rules read thus:*
7. *The claim in the instant case couched as thus ".....****in which Mr. Malick Gaye the plaintiff who lived in Serakunda has raised the petition against Mr. Edy Touray who also lived in Banjul, the case is called before Banjul Cadi Court in the subject of selling the Compound of the late Haja Bintou Jeng of 14 Gloster street Banjul."*** *did not satisfy the above two requirement of a valid claim for being vague, incomplete and ambiguous.*

8. *Where no jurisdiction all subsequent steps taken by the court have become baseless and without foundation since you cannot put something on nothing and expect it to stay.*

JUDGMENT

Written and delivered by Tijjani Y. Yakasai

This is an appeal against the judgment of Banjul Principal Cadi Court, presided over by principal Cadi Muhammad L. Khan and assisted by Cadi Ebrima Kanteh and Cadi Muhammad A. Jaiteh, in a case which apparently has no number as per the record of proceedings of the court at our disposal. Also the case has no heading or title and there is no clear statement of claim. However from what we were able to discern from the record particularly on page 1 of the record Mr. Malick Gaye is the plaintiff and Mr. Edy Tourey is the defendant and the subject matter of the claim before the court is a sale of a house No 14 Gloster Street Banjul belonging to late Haja Bintou Jeng. The relevant portion of the record reads thus:

> *".....**in which Mr. Malick Gaye the plaintiff who lived in Serakunda has raised the petition against Mr. Edy Touray who also lived in Banjul, the case is called before Banjul Cadi Court in the subject of selling the Compound of the late Haja Bintou Jeng of 14 Gloster street Banjul."***

After hearing the parties the court read to the parties what appears to be its judgment. Part of what the court read was.

"2. If the said compound happens to be divided among the heirs that should be divided for each and every one of the heirs to have his or her share from the distributed compound.

But at the same time if the said compound cannot be enough to be distributed among the heirs than that compound should be sold and to distribute that cash money among the heirs, and this should be done after the evaluation of the compound to know the size of the land area and the house in the said compound....

Finally, it comes to be known to the court that the said compound cannot be enough to distribute among the heirs due to its small size, therefore the defendant refusal not to sale the compound would be null and void, because it will be harmful to other beneficiaries. "

Dissatisfied with this decision the defendant now the appellant commenced this appeal by notice of appeal filed on 13/04/2011 on three grounds as follows:

1. The learned Cadi of Banjul Islamic Court erred in law and in facts in not ordering that the suit land be partitioned as proposed by the appellant and shown in the proposed partition and accompanying sketch plans submitted by the appellant to the said court in 2010.

2. The learned Cadi of Banjul Islamic Court erred in law and in facts in holding that the suit land should be sold without first exploring the feasibility of partitioning the said property as proposed by the appellant or otherwise.

3. The decision of learned Cadi of Banjul Islamic Court dated 4th April, 2011 is against the weight of the evidence.

Then the appellant applies for the following reliefs:

1. An order that the decision of Cadi Banjul Islamic Court be set aside and

(¡) an order partitioning appellant's deceased mother Aji Betty Jeng's property known as No. 41 Gloucester Street Banjul The Gambia as proposed by the appellants.

2. Further or Other relief.

3. Cost.

At the hearing of the appeal which came up on 09/06/2011 the parties were represented by counsel. Mr. Joseph Joof appeared for the appellants and Mr. Papa Mbye appeared for the respondent. In his submission on grounds 1 and 2 the learned counsel for the appellant traced the origin of distribution of estate in the holy Our'an where he said under the Islamic law there are provisions on how the estate of a person who died having properties can be shared among his children. So the first duty on the Cadi Court is to ascertain the share of the heirs. He referred us to Qur'an, Surat Al-Nisa, Verses 11-13 and pages 209-211 of a book on translation and commentary of the holy Qur'an by Yusuf Ali. Accordingly going by the case at hand the share of the husband shall be 1/4 of the estate. The share has to be worked out in monitory terms and physically ascertained on the ground by a surveyor. The counsel further submitted that under verse 7 of the same Surat of the Qur'an the share of children has been made clear. It is stated that a male child takes the double share of a female. All these shall be after payments of legacies and debts which the learned counsel said did not arise in the current case. He finally on this point cited and relied on paragraph 2 of page 300 of the famous book of Sharia titled (Sharia The Islamic Law) by Professor Abdurrahman Doi.

In another breath the learned counsel for the appellant submitted that the appellant being one of the heirs has maintained the right of pre-emption under the

Islamic Law. His interest in the property must be considered first before it is sold to an outsider. This right still exists even after the disposal of the property to an outsider. He referred us to page 341 of professor Doi's book supra and further said that the right is as well recognized by all schools of law.

On how the landed property like the one at hand can be shared among the heirs Mr. Joof the learned counsel for the appellant submitted that the best way of dealing with the property is to partition it and give to the beneficiaries. To do this the Cadi must ascertain the share of each heir on the ground and this should have been done on another day at another sitting after conducting an enquiry by conducting a locus at the affected property in person or by a trusted officer of his court. The Cadi did not do any of these options but still arrived at a decision that the house cannot be partitioned. While on the contrary the counsel further said that the appellant had tendered before the lower court a sketch plan of the proposed petitioning of the house prepared by an engineer. A copy of which is available in the file of this court.

On the ground No. 3 Mr. Joof the learned counsel for the appellant said that the decision of the lower court cannot be supported by the weight of evidence. There was no locus visit. If the court cannot go it could have delegated a competent person. 2ndly, the provision of Surat al-Nisa to ascertain the share of the heirs was not there. To emphasize his position the learned counsel said that the sentimental right of an African child has to be protected. He linked the refusal of the appellant of endorsing the idea of selling the house to his compliance with his late mother's wish, who said that the house should not be sold.

Finally, the learned counsel said that his client the appellant was discriminated against to maintain his pre-emptive right and this is a violation of

section 33(1)-(5) of the Gambian Constitution. He then rounded up by urging us to set aside the judgment of the lower Cadi Court and order for an independent surveyor to go to the ground to do a professional plan and study on how the house can be partitioned for his client to get his right.

In his response Mr. Papa Mbye the learned counsel for the respondent started by conceding to the Qur'anic verses and other references cited and relied upon by the counsel for the appellant but disagreed with him on some of the conclusions he has drawn there from. The learned counsel has conceded to the appellant's right of pre-emption and further said that the right has even been recognized by the lower court on the last page of the record of proceedings. But he wondered how the appellant can reap the right without compensating the remaining heirs. He further said that there are seven beneficiaries including the appellant. The 1st respondent being the husband of the deceased is entitled to 1/4 of the estate. Then the learned counsel concluded by saying that it will be ridiculous to partition the property among the heirs.

The learned counsel then suggested a way out by saying that if the appellant is interested in the property he can buy the shares of other heirs. Justice demands that the property has to be sold out and the proceeds be shared among the beneficiaries according to their shares. The learned counsel then said that it will not be fair to throw away the idea of selling the property just because one of the beneficiaries is against it. He further said it is not a matter of sentiment since the mother has died the property is no longer her own, it now belongs to the beneficiaries. 2ndly, there was no evidence that it was the mother's wish that the property should not be sold, and even if there was it will be to no avail because it

contradict the provision of Sharia. If the mother said the property should not be sold and beneficiaries disputed that the idea of not selling cannot hold.

On section 33 of the constitution cited by the counsel of the appellant the learned counsel dispelled his submission as a mare misconception. He said there is no evidence suggesting discrimination against the appellant. There is nothing in the judgment discriminating any of the heirs. On the submission of the counsel of the appellant that the Cadi should have determined the shares of the parties the learned counsel said that determination of shares is Qur'anic injunction the Cadi has no business there, what he can only do is to give declaratory decision on that.

On a sketch plan submitted by the counsel of the appellant to this court the learned counsel said that the plan does not show the share of each heir. The learned counsel further conceded to the idea of showing the appellant's own share but to insist on his physical share is ridiculous. The effect of plotting out appellant's physical share on the ground will only result in causing harm to other beneficiaries which injunction of a prophetic tradition says should be avoided.

Finally, the learned counsel rounded up by saying that the reasoning of the lower court is sound enough to warrant confirming its judgment.

At this juncture and under the impression of a reply on point of law the appellants counsel chipped in and said that to say plotting of physical share of the appellant will harm other heirs is a professional idea which can only be proved by a surveyor.

Having carefully and meticulously gone through the record of proceedings of the lower court and submissions of the learned counsel to the parties before us I find it pertinent and desirable for easy and just determination of this case to

formulate the following issues for determination. This may, even be necessary, in view of the fact that none of the counsel has ever thought of proposing any issue for determination at the end of their respective addresses, despite the fact that the addresses hammer on vital and fundamental issues which require careful considerations and determination. The issues are as follows:

ISSUES FOR DETERMINATION:

1. Whether or not the lower court had jurisdiction to hear and determine the instant case.
2. Whether or not the decision of the lower court to sell the house No. 14 Gloster street Banjul was predicated on and preceded by a due observance of proper steps and procedure.
3. Whether or not the heirs and appellant in particular have right of pre emption over the estate.
4. Whether or not there was a substantial compliance with the rules of procedure by the lower court.

However, before embarking on determination of these issues it should be borne in mind that as an appellate court it is not our business to abdicate our responsibility to justifying the errors of the lower court. Conversely our major function is to bring into conformity with reality and consistency with provisions of law all actions of the lower court that are out of tune. To this end, we are to make sure that the lower courts confine their actions within their constitutional and statutory powers. With this at the back of our minds we will go to the 1st issue for determination.

ISSUE NO. 1

(Whether or not the lower court had jurisdiction to hear and determine the instant case.)

We are constrained to begin by taking up this issue not only because it is ideal to do so but more importantly because it is a judicial requirement that where there are two or more issues pending before a court awaiting determination, the court is enjoined to first and foremost take up the one that picks holes in its jurisdiction before taking any further step. This is to avert wasting court's precious judicial time in a futile exercise. See ***Ofia VS. Ejem*** (2006) 11 NWLR (p.t 992) 652 at 663. Closely related to this is the fact that Jurisdiction is the bedrock of any valid judicial proceedings that is why its determination does not only assume prominence and takes precedence in adjudication but its challenge can be raised at any stage of the proceedings. See **Banna v Ocean View Resort Limited** 2002-2008 GLR VOL. 1 where it was held per Agim JCA that ***"The issue of jurisdiction can be raised at any stage of a case and once raised it must be determined before any further step is taken."*** See also **I. E. C. Vs. N. A. D. D(2008)1 GLR VOL.1 250.** Another striking feature of jurisdiction relevant to the present concern is that it must be raised by the court if the parties have neglected to bring it up. This was clearly postulated in ***Oloba V Akereja*** (1988)3 NWLR 416 where it was held per Obaseki JSC that: "***The issue of jurisdiction.....can be raised by any of the parties or by the court itself suo motu. When there are sufficient facts ex facie on the record establishing want of competence or jurisdiction in the court it is the duty of the judge or justices to raise the issue suo motu if the parties fail to draw the court's attention to it.''***

It is upon this premise coupled with the fact that the issue was neither made as one of the grounds of this appeal nor any of the counsel of the parties ever thought of adverting his mind to it while addressing us, that we felt obliged to raise it based on our careful examination of the record of the lower court at our disposal. Having said this much I will now venture into examination and determination of the issue.

The general rule is that it is the claim before the court that determines its jurisdiction. See I. E. C v N. A. D. D (Supra). See also Tukur v Government of Gondola State (1989) 9 SCNJ 1. Ordinarily the process is to look at the statement of claim before the court and see if there is enough material on record disclosing want of jurisdiction on the part of the court. Section 137 (4) of the 1997 Constitution of the Gambia has clearly defined and limited the jurisdiction of Cadi Court to application of Sharia to matters of ***marriage, divorce and inheritance*** where the parties or other persons interested are Muslims. Our careful perusal and consideration of the entire record of proceedings of the lower court couldn't set our eyes at a proper, clear, concise and unambiguous statement of claim which satisfies the constitutional, procedural and Islamic law requirements of a valid statement of claim.

However if we take a close look at page 1 of the record we will still find some vague statements which might be intended to be the statement of claim. The subject matter of this statement is ***the issue of sale of a landed property*** i.e. house No. 14 Gloster Street Banjul which is not within the items listed under section 137 (4) of the constitution as we have seen them above . The statement in question reads thus ".....***Mr. Malick Gaye the plaintiff*** who lived in Serakunda ***has raised the petition against Mr. Edy Touray*** who also lived in Banjul, the case is called

before Banjul Cadi Court ***in the subject of selling the Compound of the late Haja Bintou Jeng*** of 14 Gloster street Banjul. It revealed that the late has the following beneficiaries: 1. Eddy Touray 2-Bakary Jeng 3- Ndey Shohna Jeng 4- Musa Jeng 5- Minga Jeng 6- Sadiq Mbye, the also survived with the husband named: Alh Malick Jeng"

For easy understanding the import of the above statement I have underlined the key words or expressions. They can be read thus: (***Mr. Malick Gaye the plaintiff....has raised the petiton against Mr. Edy Touray....in the subject of selling the compound of the late Hajia Bintou Jeng.....***) what will quickly come to the mind of the first reader of this extract is that Mr. Malick and Mr. Edy were in disagreement or dispute over the sale of a house belonging to late Hajia Bintou that is why they came to the lower court to seek for the resolution of the disagreement between them. There is nothing in the statement to give the impression that Mr. Malick and Mr. Edy were in court for distribution of estate of late Hajia Bintou. In fact words and expressions such as distribution of estate or mirath or inheritance which if well coached, will give rise to a valid claim for distribution of estate are not even mentioned in the purported statement of claim. Conversely It is quite clear and discernable from the text of the claim that ***dispute or disagreement over the sale of a house between the parties is what manifestly appears to be the claim before the lower court.*** Now the question is: is this one of the listed matters under section 137(4) of the Constitution as we have seen them above? Certainly the answer is in the negative. The next question is did the court have jurisdiction to hear and determine the case? Certainly the answer is in the negative. Determination of this issue at this point based on the foregoing authorities, facts and answers to the questions raised may not still seem to be apt

without answering a corresponding question, to wit, ***what makes a valid statement of claim?***

To answer this question the relevant legal materials have to be invoked. Order XX111 Rule 111 of the Cadi Courts (Civil Procedure) Rules 2010 provides that the practice and procedure of the court shall be conducted in accordance with the rules of Islamic Law. In Tuhfatul-Hukkam (a famous Islamic Law book on practice and procedure) the requirements of a valid statement of claim has been postulated thus:

- والمدعى فيه له شرطان تحقق الدعوى مع البيان

Meaning: "the matter in dispute must satisfy two conditions: the claim must be specific and that it should have full explanation." There is a plethora of judicial pronouncement by Superior Courts in Nigeria on this principle. In ***BIRI VS MAIRUWA*** (1996) 8 NWLR (PT 467) 425, the Court of Appeal held, per A. B. Wali,

'' Under Islamic Law, the subject matter of a dispute has

two conditions, namely:- ascertainment of the claim

and explanation of the claim through evidence. The

first circumscribe the scope of the claim whereas the

second establishes the claim.''

Maidama, JCA, in ***MAFOLATU VS USAIN AKANBI ITA ALAMU*** (UNREPORTED) held;

''Two conditions are essential to the subject matter in dispute. There should be clear statement of the complaint followed by proper description of the subject matter''

What these requirements go to show is that it is the pre-requisite, that for a statement of claim or Da'awa before a Cadi court to meet the required degree of clarity by Sharia so as to qualify for hearing, it must be realistic, unambiguous, definite, precise, apt, succinct, full and complete and must not be evasive, vague and bogus. In addition to all that have been said rules 77(2) & (3) of ''THE CADI COURTS (CIVIL PROCEDURE) RULES, 2010" (hereinafter called The Rules) imposes two additional conditions if claim is in the form of an application for distribution of estate it must contain name of the deceased, the time of his death, the estate sought to be distributed and names of all heirs and their status. It is also a condition precedent for a valid claim for the distribution of estate that the claim must be accompanied by a valuation report. The relevant rules read thus:

R. 77(2) ***such an application for the distribution of***

estate shall contain the name of the deceased,

the time of death, the estate sought to be distributed

and names of all the heirs.

(3) ***A court shall not proceed to distribute***

Any estate without a prior valuation of

same by a qualified valuer.

It is apparently clear that the statement of claim before the lower court in the instant case can hardly satisfy these requirements. It is hereunder reproduced again:

> "*.....**in which Mr. Malick Gaye the plaintiff who lived in Serakunda has raised the petition against Mr. Edy Touray who also lived in Banjul, the case is called before Banjul Cadi Court in the subject of selling the Compound of the late Haja Bintou Jeng of 14 Gloster street Banjul."***

The above statement is vague, incomplete and ambiguous. It has failed to satisfy the requirements of a valid statement of claim as we have seen them above for many reasons. In the first place the statement is not in a narrative form in which case the court would have recorded it in verbatim or word by word as put forward by the plaintiff but it is in a third person expressions. 2ndly, the date of death of the deceased is absent. 3rdly, the details about the gender of the children is also absent. For instance who and who and how many among them are the female and who and who are the male. 4thly, it is not clear from the content of the statement whether or not the parents of the deceased or one of them have survived her. All these vital pieces of information are conspicuously missing on the face of the claim. Likewise there is nowhere in the record of proceeding of the lower Court where it is stated that the Court has sought and received a valuation report in respect of the property either from the parties or from an independent surveyor. This aspect which is also an integral part of a valid claim before the Court is not only essential but unavoidably necessary. The consequential effect of absence of the required and valid application or statement of claim for distribution of estate and valuation report before the lower court is so grave that it exposes the whole proceedings of

the court particularly the distribution of the deceased's estate face to face with annulment under rule 77(4) of the Rule which reads thus:

R. 77 (4) ***Any distribution of any estate***

in contravention of Order X111

sub-rule 2 and 3 of this Order

shall be Null and void.

For these reasons my answer to the above question is: a valid statement of claim is the one that is well coached in observance of all legal requirements as clearly stated and explained above.

Finally, we are convinced that the lower court did not have jurisdiction to hear and determine the instant case which is based on a statement of claim for the sale of a landed property, and so we hold and determine the first issue.

Having dealt and resolved the issue of jurisdiction squarely and decisively in the negative or against the lower court it would certainly follow that all the subsequent steps taken by the court have become baseless and without foundation since you cannot put something on nothing and expect it to stay. Consequently, determination of the remaining issues which were fabricated upon these baseless steps is tantamount to a mere academic exercise which courts are always discouraged to engage into. See Edward Graham V Lucy Mensah (2002-2008) GLR VOL 1. (at 40). For this reason it is our resolve to decline engaging into an exercise in futility.

Based on the reasons we put forward we are of the view that the appeal ought to succeed and it is hereby accordingly allowed. Consequently, the decision of the lower court and any consequential order thereof `are hereby set aside.

…… ……..

(Signed): Justice Umar A. Secka (Signed): Justice Tijjani Y. Yakasa

…… …….

(Signed): Alh. Essa F. Darboe (Signed):Alh. Sering Muhammad Kah

بسم الله الرحمان الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANEL
HOLDEN AT BANJUL

APPEAL NO. AP/05/2010

BETWEEN:

DODOU TOURAY & 1 OTHER…… APPELLANTS

AND:

BADOU SENGHORE & 1 OTHER……....RESPONDENTS

{Before: Justice Omar A. Secka Chairman, Justice A. S. Usman, Alh. Ousman Jah Panelist, & Alh. Masohna Kah Panelist at Banjul on Tuesday, July 5, 2011}

PRINCIPLES:

1. *The Cadi Appeals Panel may, on the application of the opponent, under Order VII Rule 21 (1) and Order IX Rule 28 of the Cadi Appeals Panel Rules 2009 strike out an application for absence of counsel in court.*

RULING:

Written and delivered by A. S. Usman

This is a motion dated 23rd day of May 2011 filed on 14/6/11 praying for:

1. That there was an error of law when the Cadi's Appeals Panel struck out the appellants appeal for filing out of time when it did not enquiry into the respective dates when the Surveyor actually did the demarcation as that date when the real import of the judgment was brought to the attention of beneficiaries.
2. For an order extending time for the making of this application.

3. Such further, order orders.

The motion is supported by 13 paragraphs affidavit deposed to by the 2nd appellant (Ebrima Touray) and accompanied with judgment of the Panel, set of letters to Bundung Cadi Court and a letter dated 2nd January 2011 respectively marked as ***ET1, ET2 and ET3.***

When the motion came up for hearing today being 5th of July 2011, the 2nd appellant ((Ebrima Touray) as well as the 2nd respondent (Jaysuma Janneh) were in court but the counsel to the former, one Mr. Boury Touray was not in court to argue his application. 2nd appellant informed the Panel that the counsel was engaged in one of the courts without further details. The 1st appellant was said to have passed away about four months back while the 1st respondent was away to Sweden hence their absence in court.

In view of the conspicuous absence of the applicants' counsel in court to move his application coupled with the fact that there is no any letter from his chambers to excuse his absence, this Panel decides that the motion dated 23rd May 2011be, and same is hereby struck out under Order VII Rule 21 (1) and Order IX Rule 28 of the Cadi Appeals Panel Rules 2009.

……..……..…..…… ……..
(Signed): Justice Omar A Secka (Signed): Justice A. S. Usman

…… ……..……
(Signed): Alh. Ousman Jah (Signed) Alh. Masohna Kah

بسم الله الرحمن الرحيم

IN THE HIGH COURT OF THE GAMBIA
IN THE CADI APPEALS PANEL
HOLDEN AT BANJUL

APPEAL NO. AP/10/2011

BETWEEN:

KALA KAITA & 7 OTHERS…..…… APPELLANTS

AND:

MUSTAPHA DAMPHA……..……....RESPONDENT

{Before: Justice Omar A. Secka Chairman, Alh. Ousman Jah Panelist, & Alh. Masohna Kah Panelist at Banjul on Tuesday, July 26, 2011}

PRINCIPLES:

1. *Reconciliation is enjoined in divorce cases, and from the testimonies of witnesses as contained in the record of proceedings of the Cadi Court of Kanifing, the parties were given adequate time and opportunity to reconcile. See the letter of Caliph Umar to Abu Musa Al-Ash'ari contained in Tabsiratul Hukkam Vol. 1 Page 25 "Reconciliation is permissible between Muslims except a reconciliation that changes lawful to unlawful or changes unlawful to lawful".*
2. *Even if no attempt was made at reconciliation in the instant case, going by Order XX Rule 100 sub rule (1) of the Cadi Courts Civil Procedure Rules 2010 of the Gambia which provides that "**At any time before Judgment is delivered the Court may refer any matter to mediation or negotiation…"** that would not have resulted in overturning the decision of the lower court on that ground because it is not mandatory.*

3. *Going by section 137 sub section (4) of the 1997 Constitution of the Gambia which limits the jurisdiction of Cadi Courts to matters of marriage, divorce and inheritance were the parties or other persons interested are Muslim, the Cadi Courts have no jurisdiction to entertain cases concerning joint ownership of landed properties.*
4. *Where a man tells his wife "**I prefer to go to hell than to retain this woman in marriage**" that statement is tantamount to divorce by indirect means according to Maliki School of Law. See Bidayatul Mujtahid Vol. 2 Page 74.*
5. *The 1st appellant was deemed to have been divorced on 23rd/3/2011 when the Respondent referring to her told the court that "**I prefer to go to hell than to retain this woman in marriage**"*
6. *Long term marriage between the appellant and the respondent is not in law a bar for divorce since divorce (even though it is the most hated of all the permissible) is permitted by Sharia as stated by Prophet Muhammad (P.B.H.) "The most hated of all thing which have been permitted by Allah is divorce". See the Sharia Islamic law by Professor Abdur Rahman Doi P169. See also Sunanu Abu Dawud Vol. 3 Page 231.*
7. *The 1st appellant after her divorce and completion of Iddah she has no legal right according to Sharia to continue to stay in the matrimonial home in line with prophetic tradition which says: "It is reported by Fatimat Bintou Qays who said that her husband has divorced her three times and prophet (P.B.U.H.) did not give her right for maintenance and shelter" See Muslim with comment of Imam Nawawe. Vol. 4 page 94*

JUDGMENT

Written and delivered by Omar A. Secka

This is an appeal against the judgment of Kanifing Cadi court presided over by Senior Cadi Masamba Jagne assisted by Cadi Saikou Touray, Cadi Eleman Ceesay and Bubacar Bai Touray with case No. 407 between Mustapha Dampha as a plaintiff (the respondent herein) and Kala Keita & others as defendants (the appellants herein) in the matter of differences between couples. Although the heading is vague we were able to discover from the statement the plaintiff at page 1 of the record where he said:

> "And the reason of bringing the woman (my wife) before the Court is that, in the year 2005 I took her to the Court because of her refusal to share the bed with me and well before I divorced her".

Also in page 2 he said:

> "I wanted to see that the following are out of my compound".

From these two quotations we were able to realize that the dispute was about divorce and ejectment from the matrimonial house. According to the record of lower Court page1 the plaintiff / respondent claimed that the divorce took place since the year 2005 and it extended to the year 2010 and requested from the Kanifing Islamic Court to eject the divorced wife and her Children out of his compound as stated in page 2 of the record of proceedings where he said:

> "So in my capacity as the father and owner of the compound I want to see that the following are out of my compound:

1. Divorced wife
2. Bakary Dampha.
3. Ansumana Dampha
4. Kaddy Dampha

And he supported his claim by one witness Called Kebba Manneh who said:

> "I know something about this case. It stated since 2005 during the time we came to the Court to summon the defendant for refusal to share bed with her husband and the Court advised us to go and negotiate …… and if that resulted negative then the husband can write the divorce letter to divorce his wife".

At page 6 also in the same page he stated that:

> "I went to the husband just to reconcile between them and indeed that reconciliation resulted positive that is why the husband did not go to Cadi again". Also in the same paragraph he said.
>
> "But after five weeks the wife started bringing problem again …. That the only time I sat with the husband was the time he told me that he is afraid of himself because he is a blind man and the wife has started betting him and even his Children are abusing him at his own compound".

On the other side the defendant / appellant indirectly denied the claim as she said on page3 of the record:

> "Eventually he told me to get out of his compound, then I asked him the divorced letter, he replied that the letter is tendered to Mr. Sankung, and what he said that my Children have beaten his wife is not true at all."

To support her defense she called three witnesses. The first witness **Suturing Keita** on the 24th /2/2010 testified before Kanifing Islamic Court that:

> "I don't know nothing about that said divorce yes I once knew a problem occur between the couple, that was one day the husband came to me saying that his wife who is **Kalla Keita** has abandoned to share bed with him and for that matter I spoke to the wife".

For the second witness **Mr. Lamin Keita** when he was asked by the Court for whether he knows that the couple is divorced? He said:

> "any way one fine day the plaintiff / respondent came to me telling me that, your sister is in my home come and take her out".

When the court asked him that since then what did he know about them? He answered that:

> "I know that their marriage is there and by the time he told me to collect my sister from his home, I putted on him that I cannot do that, take her to were you got her from" .

For the third witness **(Jamba Keita**) he testified before Kanifing Islamic Court by saying that:

> "I received no letter from him in the fact that he has called me to come and take my sister out of his home, I answered to him that if you really divorced your wife you better take her to her family".

The lower Court also asked the plaintiff whether, he is interested to retain his wife in marriage. And he answered that:

> "I prefer to go hell fire than to retain this woman in my Marriage".

After hearing from the parties the Court read to them what appears to be its Judgemet as wallows: **that the divorce has occurred between the couple for the first time that, evidence is in the Quran where Allah said:**

> **"The divorced woman should wait and see the three waiting period** "

Dissatisfied with this decision the defendant now the appellant filed a notice of appeal against it on 28th March 2011 on eight grounds as follows:

1. The Cadi was wrong to proceed with divorce hearing without first encouraging the parties to reconciliation.

2. The Cadi failed to take a count that the dispute between the parties was about were married for more than 40 years.
3. The Cadi failed to appreciate that the dispute was about the ownership of a compound.
4. The Cadi failed to appreciate that the appellant was claiming a joint ownership of the matrimonial home / compound
5. The Cadi failed to appreciate that she was the bread winner of the household from 1981 when the respondent got blind.
6. The Cadi failed to appreciate that the from 1981, when the respondent got blind, five other children were born of the said marriage and relationship.
7. The Judgment of the Cadi did not represent or address all the issues that were before the Cadi for determination.
8. The appellant did not have a fair hearing before the Cadi.

Then the appellant applied for the following reliefs:

1. An order setting aside the Judgment of the Court below.
2. An order for re hearing of the dispute between the parties.
3. Any other order that the Court deem fit.

At the hearing of the appeal on 28th June 2011 the parties were present; the appellants were represented by Counsel Mr. Edrisa Sisoho and the respondent has no counsel he stood for himself the learned counsel Mr. Sisoho submitted as follows:

For the first ground of appeal, the lower Court did not encourage the parties for reconciliation before coming to divorce and if there was reconciliation that did not reflect in the record.

For the second ground, the lower Court was to put in its account that the spouses were married for more than 42 years, the family and the property were

built up together there is a though position to end that kind of marriage without fair settlement, and doing so is harm, and if it was a short time marriage we my say that may be each of them remarriage and form another family but on this circumstances the lower Court decision was wrong.

For the third and fourth ground: although the suit matter was about divorce before lower Court but it should have to listen to what the appellant has been saying because she said that according to page No. 2 of the record:

> "We have got the plot of land at that time my husband was working as well myself in the garden …. And therefore we jointly built the said compound we eventually transferred to our newly land "

On page 3 she said:

> "I was alone working feeding the family as well as paying the children school fees and clothing for them"

The lower Court did not address Issue of joint ownership, though that was not the suit matter before it but hence it mentioned the evidence and reasoning was to be there also issue of ejectment was not addressed in the judgment.

For ground nos. 5 and 6 taken together counsel Sisoho said: the issue of second wife has an imperator in the relationship of the marriage which mean that the appellant has committed with the marriage before the second wife came.

For ground 7, I want to argue that the way Court below handled the record on page 8 there were no inquiry for why the respondent want to eject his own children from the compound the Court below was wrong to combine the matrimonial issue and ejectment. There should have been a hearing on that issue before taking any decision on it.

Finally Mr. Sisoho requested from the Honorable panel to set aside the decision of the Kanifing lower Islamic Court, and order hearing denovo for the case

In his respond the respondent stated by saying that: On the first ground when we went to the Court it sent us back for reconciliation and we did so but have failed, it was in the year 2005. Then I went back to the Court and told it that we cannot get compromise from there I told the Court that I have divorced her but she refused to get out of my compound.

On the second ground I believe that the decision of the lower Court was correct and right because I told them that my wife refused to share the bed with me and saying that she no longer loves me. Hence I am the one who married her and I divorced her, also she and her children jointly beat my second wife.

On the 3rd and 4th ground I am to say that the purpose of our going to the lower Cadi Court was about divorce not about joint property or ownership.

On fifth ground I did not agree that the appellant was the bread winner of the household because before he became blind I was working and having money which later on I was feeding my family from it.

On the ground 8, I am saying that the appellant had a fair hearing as I had it.

And what I want to add is that my children I am the one who requested from the lower Court to eject them from my compound simply because they and their mother do not give me any respect and they are insulting me day and night.

Having carefully gone through the record of proceedings of the lower Court and also the grounds of appeal and submission of learned counsel for the appellant and the respondent before us it is necessary to clear one important point before taking any step in this appeal and which is the issue of alleged divorce by the respondent/the plaintiff:

1. Whether it took place on 22nd/8/2005 by letter given to the brother of the appellant?
2. And whether it was considered by the lower Court or not?

Based on the judgment of the lower Court the divorce took place at the Court on the date 23rd / 3/ 2011 because the respondent failed to prove before the lower Court the divorce neither by witnesses nor by a copy of the divorce letter. And when he was asked by the lower Court whether he has any interest in retaining the marriage? He answered negatively by saying that: "***I prefer to go hell than to retain this woman in marriage***" See p5 of the record. This according to Sharia means divorce by indirect speech.

قال ابن رشد

" واتفق الجمهور على أن ألفاظ الطلاق المطلقة صنفان صريح , وكناية .... فقال مالك وأصحابه : الصريح هو لفظ الطلاق فقط وما عدا ذالك كناية وهي عنده على ضربين ظاهرة ومحتملة وبه قال أبو حنيفة " انظر بداية المجتهد جـ2/ 74.

Which mean: the words that are used for divorce are two types: the direct words and indirect words. The direct word is through using the word "divorce": and the indirect words are any other words used to end a marriage. Based on this what the husband said before lower that "I prefer go hell than to retain this woman in marriage" automatically means divorce by indirect word of divorce according to Maliki school of thought.

Having clarified this point I will come to the argument of the appellant counsel who raised the following issues:

1. Issue of conducting reconciliation before ending the marriage.
2. Issue of long term marriage between the appellant and respondent.
3. Issue of joint ownership of property between the appellant and respondent to build the house of respondent at Bakau

4. Whether the lower Court addressed the issue of ejectment property in judgment before taking decision on it.
5. The issue of second wife whether it has impact in the relation of the appellant and respondent or not.
6. The issue of ejecting the children of the respondent from his compound whether the lower Court took proper procedure and hearing for taking that decision?

Coming back to the first issue in the record of the lower Court P1 the plaintiff / respondent said: “the reason of bringing the woman (my wife) before the Court is that, in the year 2005 I took her to the Court because of her refusal to share the bed with me”

Also in the same page the Court said: “ in that year 2005 conflict you could have negotiates it to be the better if no real you can ask for the termination of marital contract” also the plaintiff answered the Court by saying: “ in that particular year we had a big talk on this issue but we reached on no result”.

Also **Mr. Keeba Manneh** the witness of plaintiff testified before lower Court that: “this case started since 2005 during the time we come to the Court to summon the defendant …… the Court advised us to go and negotiate among themselves and if that resulted negative then the husband can write the divorce letter to divorce his wife”

All these are indicating that the lower Court has conducted reconciliation between spouses, long time ago before adopting the divorce, according to Sharia as stated by second Caliph, Omar bun Kattab in his letter to Abu Musa that:

والصلح جائز بين المسلمين إلا صلحا أحلّ حراما أوحرّم حلالاً

Meaning: reconciliation is permissible between Muslims except a reconciliation that changes lawful to unlawful or changes unlawful to lawful “see Tabsiratul Hukkam *Vol. 1 Page 25*

Also there is a very important point to be clarified that to conduct reconciliation is not a mandatory to the Court according to the Cadi Courts Civil Procedure Rules 2010 Order XX Rule 100 sub rule(1) as stated:

> “At any time before Judgment is delivered the Court may refer any matter to mediation or negotiation ...”

Based on the reason this ground failed.

For the issue of long term marriage between the appellant and the respondent argued by appellant counsel that the lower Court should put that into consideration, we are here by declaring that divorce is permissible by Sharia as stated by prophet Muhammad (P.B.H.)

" أبغض الحلال إلى الله الطلاق "

Meaning: The most hated of all things which have been permitted by Allah is divorce. Professor Abdur Rahman 1. Doi said on his comment on this Hadith had this to say at page 169 of his book Shariah: The Islamic Law:

> “The aim of the Sharia is to establish a healthy family unit through marriage, but if for some reasons this purpose fails, there is no need to linger on under falls hopes as the practice among the adherents of some other religions where divorce is not permitted”

This ground also fails based on afore-mentioned reason.

For the issue no 3 which the appellant counsel raised concerning the joint ownership of property between the appellant and respondent, we believe that the lower Court was right not to have listened to the issue of joint ownership of property because that falls out of its Jurisdiction according to section 137 sub

section (4) of the 1997 Constitution of the Gambia which limits the jurisdiction of Cadi Courts to matters of marriage, divorce and inheritance were the parties or other persons interested are Muslims. Also see Edi Touray V Alhaji Malick Gaye and others Unreported Appeal No. 12/2011 of Cadi Appeals Panel. Based on this the lower Cadi Courts has no Jurisdiction to look into the matter of joint ownership of property. This ground also fails.

Coming to the issue no 4 where the counsel argued that the lower Court did not address properly the issue of ejectment, as we said earlier that the divorce took place for the first time before the lower Court on 22rd / 3/ 2011 the date of Judgment.

From that time the lower Court was to explain to them the type of Iddah (Waiting period) that should be observed because Iddah differs from woman to another as stated in suratu Talaq.

" والئي يئسن من المحيض من نسائكم ان ارتبتم فعدتهن ثلثة أشهر والئي لم يحضن وأولت الأحمال أجلهن أن يضعن حملهن" سورة الطلاق:4

Which means: such of your woman as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts is three months, and for those who have no course For those who are pregnant their period is until they deliver their burdens. Also in Suratul Baqarah. Stated that

" والمطلقات يتربصن بأنفسهن ثلثة قروء " الأية 227

Which means: divorced woman shall wait concerning themselves for three monthly periods these are stating clearly that the woman in terms of Iddah are four types:

1. The pregnant one and their period are until they deliver.
2. Those who have passed the age of monthly courses. And their period is three months.

3. Those who have no course yet also their period is three months.
4. Thos who are in the age of monthly course and their period Iddah is three monthly courses.

Based on this, the Court below was to clarify the type of Iddah which is applicable to the appellant but it silent on that. However she has no legal right according to Sharia to continue to stay at the matrimonial home after observing Iddah (waiting period) as stated by prophet (P.B.H)

عن فاطمة بنت قيس رضي الله عنها:

" أنها طلقها زوجها ثلاث تطلقات فلم يجعل لها رسول الله صلى الله عليه وسلم نفقة ولا سكنى"

أخرجه مسلم.

It is reported by Fatimat Bintou Qays who said: “that her husband has divorced her three times and prophet (P.B.U.H.) did not give her right for maintenance and shelter” see Muslim with compliment of Imam Nawawe. V4 page 94

Sheikh Shanqeethy in his book said:

وقال الشنقيطي: (وهو نص صريح صحيح فى أن البائن بالطلاق لانفقة لها ولا سكني) أضواء البينا جـ1/ 108

Means: this is a clear and authentic that divorced women have no right for maintenance and shelter" See Adwa-ul Bayan Vol. 1 page 108. Based on this reason the ground succeeds.

For the issue of second wife whether it has had impact on the relationship between the appellant and the respondent or not, our opinion on this issue is that this matter was not the subject matter before the Court below and was not mentioned by any of the parties before the lower Court. So the Court below was right not to address the issue. Based on that reason this ground failed.

Coming to the last issue argued by the learned counsel Sisoho relating to the ejectment of the children of the respondent from his own compound, we do not agree with the learned counsel that the lower Court has taken any decision on that matter according to the judgment. It stated only the issue of divorce and maintenance of the divorced wife during the waiting period and end of waiting period. See P8 of the Judgment. But hence the plaintiff/ respondent mentioned it in his claim before the lower Court as stated in page 2 as follow: “so my capacity as the father and owner of the compound I want to see that the following are out of my compound.

1. Divorced wife
2. Bakery Dampha
3. Ansumana Dampha
4. Kaddy Dampha.

This is clear that he claimed to eject those mentioned children with their mother but the lower Court was silent on it. This was mentioned in the claim before it and it was wrong for the court not to consider it. The conditions which a valid claim must fulfill are?

1. A clear statement of the claim.
2. The proper description of the subject matter.

And when we look at the claim the first condition was fulfilled while it was up to the lower Court to ensure the fulfillment of the second condition but did not. Based on this reason this ground succeeds. In the final analysis we hereby declare that this appeal succeeds partly.

……..……..…..……

(Signed): Justice Omar A. Secka

…… ……..……

(Signed): Alh. Ousman Jah (Signed) Alh. Masohna Kah