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Judicial Practice in Distribution of Inheritance (*mīrāth*) in Islamic Courts in Nigeria

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Abstract

Inheritance is one of the issues that has attracted the attention of many Islamic jurists. Although it has been regulated in fiqh books, the distribution of inheritance has the potential to cause disputes. This paper examines the legal framework governing distribution of inheritance under Islamic law as interpreted in Islamic courts in Nigeria. The paper analyses decided cases in constructing the judicial practice in distribution of estates among heirs in Islamic courts in Nigeria from commencement to conclusion of such distributions. This research is a legal normative study using judicial case and conceptual approaches. The paper concludes that Islamic courts in Nigeria adhere strictly to the Maliki school in the matters concerning distribution of inheritance.

Waris merupakan salah satu isu yang menarik perhatian banyak ahli hukum Islam. Meskipun sudah di atur dalam kitab-kitab fiqh, pembagian waris berpotensi menimbulkan sengketa. Artikel ini membahas kerangka hukum yang mengatur distribusi warisan berdasarkan hukum Islam sebagaimana ditafsirkan di pengadilan Islam di Nigeria. Makalah ini menganalisis kasus-kasus yang diputuskan dalam membangun praktik yudisial dalam distribusi perkebunan di kalangan ahli waris di pengadilan Islam di Nigeria mulai dari dimulainya hingga akhir dari distribusi tersebut. Artikel ini menyimpulkan bahwa pengadilan Islam di Nigeria secara ketat mematuhi madzhab Maliki dalam hal-hal yang berkaitan dengan distribusi warisan.

Keywords: Islamic courts; maliki school; Islamic inheritance law

Introduction

In Islamic law, there are precise and detailed rules governing distribution of inheritance. [1] In Nigeria, the Maliki's school is the official school (*madzḥab*).[2]

[1] For a concise explanation of these rules according to the Maliki school as applicable in Nigeria, see M. A Ambali, *The practice of Muslim family law in Nigeria*, 3rd ed. (Lagos : Princeton and Associates

Inheritance matters come within the ambit of Islamic personal law. Section 277(2)(c) of the 1999 Constitution lists "questions of Islamic personal law" as including (c) "any question of Islamic Personal Law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim". The courts have held that Islamic law is the personal law of every Muslim in the country. [3] Thus, once a person professes Islam, Islamic law of inheritance *ipso facto* applies to this or her estate in the event of death. [4] Area courts and sharia courts are the trial courts or courts of first instance for Islamic law matters in northern Nigeria. There are various grades of area courts and sharia courts. Every state created out of the defunct Northern Nigeria had area courts. However, in the post-1999 some states replaced area courts with sharia courts which have jurisdiction in matters of Islamic law only. Appeals from area courts and sharia courts go to the Sharia Court of Appeal in matters concerning Islamic personal law, which include inheritance matters. [5]

Appeals from the Sharia Court of Appeal go to the Court of Appeal and finally to the Supreme Court.[6] During the colonial era and until 1967, 'Northern Nigeria' meant the northern region of Nigeria, now the phrase 'northern Nigeria' refers to the states that were created out of the defunct regions.[7] There are no area courts, sharia courts and sharia court of appeal in any states in the southern Nigeria. In the southern states, there are only customary courts. Hence, the frequent complaint of Muslims that customary law is imposed on them in matters that are properly speaking Islamic law matters.[8] In this paper, "Islamic courts" include all the courts having jurisdiction on Muslims estates: area court, sharia courts, the Sharia Court of Appeal, Court of Appeal and Supreme Court. This paper examines the legal framework governing administration of estates by *Qadis* under Islamic law with particular reference to the Maliki school as applicable in Nigeria.[9] The paper then analyses the judicial practice in distribution of estates among heirs in Islamic courts in the northern states of Nigeria.

Publishing, 2014), 340–83; Abdulkadir Orire, *Shari'a: A Misunderstood Legal System* (Zaria [Nigeria]: Sankore Educational Publishers, 2007), 251–62.

[2] Alkamawa v Bello, No. 6 SCNJ 127 (1998); See also, Abdulmumini A. Oba, "Judicial Practice in Islamic Family Law and Its Relation to ʿUrf (Custom) in Northern Nigeria," *Islamic Law and Society* 20 (January 1, 2013): 272, 275–76, https://doi.org/10.1163/15685195-0011A0004.

[3] Agbebu v Bawa, No. 6 NWLR (Pt. 245) (1992), 80, 90 (CA); Shittu v Shittu (Annual Report Sharia Court of Appeal (Kwara State) 1998), 92, 98.

[4] Islamic law of inheritance and not customary law of inheritance applied to Muslims: Mando v Joro, No. NNLR 480 (SCA, Kwara State 2004); A. Oba, "Judicial Practice in Islamic Family Law and Its Relation to ʿUrf (Custom) in Northern Nigeria," 285.

[5] Section 257 and 262 "Constitution of the Federal Republic of Nigeria" (1999); section 54(3), Area Courts Law, Cap. A9, "Revised Edition of Laws of Kwara State" (2007).

[6] Sections 233 and 240 Constitution of the Federal Republic of Nigeria.

[7] They are Adamawa, Bauchi, Benue, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Nasarawa, Niger, Plateau, Sokoto, Taraba, Yobe and Zamfara States.

[8] Abubakri Yekini, "Judicial Imbalance in the Application of Islamic Personal Law in Nigeria: Making a Case for Legislative Reforms," *Journal of Islamic Law and Culture* 15, no. 1 (2014): 31, https://www.academia.edu/26501114/Judicial_imbalance_in_the_application_of_Islamic_personal_law_in_Nigeria_making_a_case_for_legislative_reforms; Moses A. D Bello, N. M Jamo, and A. M Madaki, *Administration of Justice in the Customary Courts of Nigeria: Problems and Prospects : Legal Essays in Honour of Hon. Justice Moses A.D. Bello OFR, President, Customary Court of Appeal, Abuja* (Zaria: Private Law Department, Ahmadu Bello University, 2009), 412–38.

[9] B. On the differences between the various schools of Islamic law on inheritance matters generally, see Ibn Rushd, *Bidāyat Al-Mujtahid Wa Nihayat al-Muqtasid*, trans. Imran Ahsan Khan Nyazee, vol. 2 (Beirut: Dar al-Fikr, 1995), 411–42.

Method

This research is a legal normative study using judicial case and conceptual approaches. The primary data were taken from decided cases in Islamic courts in Nigeria. Those data were also supported by secondary ones which derive from articles of journals, and books related to the topic. This paper examines the legal framework governing distribution of inheritance under Islamic law as interpreted in Islamic courts in Nigeria. The paper analyses decided cases in constructing the judicial practice in distribution of estates among heirs in Islamic courts in Nigeria from commencement to conclusion of such distributions.

Finding and Result

The Legal Framework for Distribution of Inheritance

According to Ibn Khaldūn, in the early period of Islam, judicial duties are within the duties of the Caliph who exercised this duty personally.[10] With increasing matters requiring the attention of the caliphs, Caliphs appointed judges to relieve them of the burden of adjudication. Initially, the duty of the *Qāḍī* was merely to settle disputes between litigants either by facilitating a peace reconciliation (*ṣulḥ*) or forcefully through a final binding judgment.[11] However, the jurisdiction of the *Qāḍī* eventually extended to such things as supervision of the property of persons with diminished legal capacities (e.g. lunatics, orphans, bankrupts) and supervision of wills.[12] The *Qāḍī*'s administrative powers in these matters are extensive. Islamic scholars do not classify distribution of inheritance among matters within the jurisdiction of the *Qāḍī*.[13] This is because any Muslim can distribute inheritance if he has the requisite qualifications. The Quran (4: 9) defines this thus:

> "And let those (executors and guardians) have the same fear in their minds as they would have for their own, if they had left weak offspring behind. So, let them fear Allah and speak right words."

This means that any free Muslim who fears Allah and is learned in the principles of distribution of inheritance under Islamic law is qualified to distribute estates.[14] Hence, al-Jibaly directed his manual on inheritance to "*Imams*, executors and other persons responsible for dividing an estate"[15] while Orire simply refers to "the person who would distribute an estate".[16] In *Jiddun v Abuna*,[17] the Supreme Court recognized this position when it held thus:

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[10] Ibn Khaldūn, *The Muqaddimah: An Introduction to History*, trans. Franz Rosenthal and N. J Dawood (Princeton, N.J.: Princeton Univ. Press, 1989), 452–56.
[11] 'Alī ibn Muhammad ibn Habīb al-Māwardī, *The Ordinances of Government = Al-Ahkām al-Sultāniyya w'al-Wilāyāt al-Dīniyya*, trans. Wafaa H. Wahba (Reading: Garnet, 2010), 79.
[12] Māwardī, 79.
[13] Māwardī, 79–80; Ibn Khaldūn, *The Muqaddimah*, 455; Abdullahi B Faudīy, *Guide to administrators Diya' al-Hukkam*, trans. Shehu Yamusa (Sokoto, Nigeria: The Islamic Acad., 2000), 17.
[14] See further, Abdulmumini A. Oba and Ismael Saka Ismael, "Challenges in the Judicial Administration of Muslim Estates in the Sharia Courts of Appeal in Nigeria," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 5 (2017): 81, 84, 94, https://doi.org/info:doi/10.5167/uzh-144631.
[15] Muhammad al-Jibali, *Inheritance : Regulations & Exhortations*, 2nd ed. (Bayrut: al-Kitaab & al-Sunnah Publishing, 2005), xxiv.
[16] Orire, *Shari'a*, 262.
[17] Jiddun v Abuna, No. 10 SCNJ 14 (Supreme Court October 6, 2000).

> "Where a Muslim dies, his heirs are permitted by law to appoint a person learned in Islamic law to share his estate among them according to such law, and if subsequently the matter is taken before a Court of law, that court will enforce the sharing, provided it conforms with the law"[18]

A *Qāḍī* by virtue of the qualifications required for his office would normally fall within the category of persons who could distribute inheritance. However, the *Qāḍī* has an exclusive jurisdiction in disputes arising from distribution of inheritance.[19] No other government official such as the *Muḥtasib* and the *Maẓālim* have jurisdiction in such disputes. Of course, the Imam, his *wazir* (vizier), and *Amirs* (Emirs) vested with full powers are also like judges in this regard. *The* types of matters that area courts and sharia courts could deal with are stated in the courts' constituent acts and in the relevant court rules in the relevant States in northern Nigeria. For example, Part II of the Schedule to the Kwara State Area Court Law[20] confers jurisdiction on area courts in "causes and matters relating to the succession to property and administration of estates under Islamic or Customary Law". The First Schedule to the Sharia Court Law[21] of Kaduna State states this as "causes or matters [concerning] "inheritance and grant of power to Administer under Islamic Law". Regarding "institution of proceedings in [sharia/area] Courts", the Kwara and Kaduna State laws provide that " Subject to the provisions of this Law and of any other written law, any person may institute and prosecute any cause or matter in an [area/sharia] Court".[22] Both laws state that a "cause" includes "any action, suit or other original proceeding between a plaintiff and a defendant and also any criminal proceedings".[23]

The Area Court Law defines a "matter" as including "any proceedings in court" but the Sharia Court Law defines it as "any proceedings of the court not in a cause".[24] Order 2 rule 2 of the Kwara State Area Court (Civil Procedure) Rules[25] says: "Every civil case shall be commenced by a complaint made in person or by the authorized representative of the person making the complaint". The Civil Summons in Form 1 of the First Schedule to the Rules is the only means of bringing parties other than the plaintiff to the court. The Form states inter-alia that: "You are hereby summoned to attend to this Court … to answer a claim by [The Plaintiff] … The Plaintiff claims … [substance of the claim]. Take notice that if you do not attend at this Court at the time and on the date stated, the Court may, on proof of service of this summons, give judgment against you". Clearly, the Kwara State definitions would accommodate only litigations between parties concerning complaints on distribution or non-distribution of inheritance. In such cases, it must be a contentious matter with plaintiff(s) and defendant(s) before the court. There is no provision for amicable and non-contentious submission of estates for distribution by the court. This view is fortified by the absence of a probate registry or probate division for area courts in Kwara State.

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[18] Abū Bakr ibn Ḥasan Kishnāwī Kishnāwī, *As'hal Al-Madārik : Sharḥ Irshād al-Sālik Fī Fiqh Imām al-A'immah Mālik*, vol. 3 (Beirut: Dar al-Fikr, n.d.), 209.
[19] Faudīy, *Guide to administrators Diya' al-Hukkam*, 21, 42.
[20] "Area Courts Law, Laws of Kwara State," § Cap. A9 (2004).
[21] "Sharia Courts Law, Laws of Kaduna State," No. 11 (2001).
[22] Section 14, Area Court Law and section 19, Sharia Courts Law.
[23] Section 2, Area Court Law and section 3, Sharia Courts Law.
[24] Section 2, Area Court Law and section 3, Sharia Courts Law (as amended).
[25] Area Courts Law (Subsidiary Legislation), Cap. A9, Revised Edition of Laws of Kwara State, 2007.

The definition of "matter" in the Sharia Court Law as "any proceedings of the court not in a cause",[26] opens the possibility of judges of the court having jurisdiction in distribution of inheritance. However, the practice shows that non-contentious voluntary submission of estates for distribution by the court is not a common thing in Islamic courts in Nigeria. In *Bako v Bako*,[27] the shares of the 4 wives and 21 daughters in the estate of their deceased husband and father respectively had been given to them and there was no problem as none of them disagreed with the distribution. The family did the distribution privately without recourse to the courts. However, when it came to the distribution of the landed properties that had been set aside for distribution among the 19 sons, some problems occurred and the heirs sought the assistance of the Upper Sharia Court, Shahuchi, Kano to distribute the estate. Given the voluntary and non-contentious nature of the submission of the matter to the court, there were no plaintiffs and defendants in the usual sense. However, some of the heirs disagreed with the distribution by the court and appealed to the Sharia Court of Appeal. The case then took an adversary nature. On further appeal to the Court of Appeal, the court noted the "seeming uniqueness in this appeal because there were [no] ... plaintiffs and defendants in the strictest sense before the trial court". The effect of this "uniqueness" is that some principles of adjudication may not be applicable to the case: "... therefore, because of this uniqueness, *al-'izār*[28] may not even be necessary in the circumstance". Again, in *Soda v Kuringa*,[29] the Court of Appeal stated the adjudicatory method as the only method in Nigeria courts:

> "Thus, where one of the heirs claims his share of inheritance [by filing a case in court] even if the remaining heirs do not give their consent to such a claim it is mandatory on the court to accept the claim and adjudicate over it. … In this regard even if the parties do not specially give their authority the court must make them parties to the suit so that the exact share of each heir would be calculated according to the fractions he or she is entitled to receive".[30]

In addition to the absence of a legal framework for non-contentious distribution of inheritance in area courts and sharia courts is the absence of probate registries for both courts, which meant probate services are not available in those courts. The jurisdiction of Islamic courts in Nigeria in contentious distribution of inheritance is well established. In clarifying the jurisdiction of the Sharia Court of Appeal *vis-à-vis* the High Court in Islamic law matters, the Court of Appeal has delimited the ambit of disputes touching on succession as follows: a) dispute over the failure to distribute the estate after the death of the deceased; b) a dispute over the devolution of the estate between the heirs; c) a dispute over any inheritable estate which any person withholds away from the heirs; d) a dispute over the right to take a particular property within the estate; e) a dispute

[26] See section 2, Area Court Law and section 3, Sharia Courts Law (as amended).
[27] Bako v Bako, No. 3 SQLR (Pt. 3) (2015)447 (CA).
[28] After the close of the case by the parties, the Qāḍī before proceeding to give judgement must give the parties a last chance to add anything in proof of their case or in rebuttal of their opponent's case by asking "have you got any remaining evidence that will repel what has been established against [you]?". Judgements delivered without being preceded by al-'izār is null and void: Chamberlain v Dan Fulani (1961-1989) 1 ShLRN 54, 59-60 (per Gwarzo, GK), Muhammadu v Mohammed (2001) 6 NWLR (Pt. 703) 104, 111 and Umar v Bakoshi (2006) 3 SLR (Pt. 1) 80, 92. See further, Adamu Abubakar, *Islamic Law Practice and Procedure in Nigerian Courts*, 2017, 163–66.
[29] Soda v Kuringa, No. 3 SQLR (Pt. 3) (2015)447, 480.
[30] Soda v Kuringa at 639.

over gift or will of a particular property said to have been made by the deceased in his lifetime; f) a dispute over payment of a debt, incurred by the deceased in his lifetime, from the estate he or she had left behind; g) a dispute over the exclusion of an heir from inheriting from the estate and all such disputes which can be attributed to the estate succession".[31]

The courts in Nigeria have consistently maintained that it is a heir's right to request for his or her share of inheritance and he or she can go to court and demand it even if the remaining heirs do not give their consent to the suit.[32] All the cases of inheritance filed in the area courts and sharia courts are normally instituted by way of complaints. The relief sought in *Kontangora v Kontangora*[33] was simply: "Seeking the assistance of the Court to distribute the estate [of their late father] among all his heirs in [accordance] with Islamic law". Normally, this claim sounds non-contentious invitation to the court to help distribute inheritance among the heirs. However, the claim belies the contentious nature of the suit. The fact that the suit was filed at all points to disagreement among the heirs as the hearing to the suit disclosed. When heirs are in harmony and they just want a learned person to distribute the estate among them, they would not go and file a suit in court because filing a suit in court in such circumstances is taken among the people as a declaration of enmity. When the learned person that the heirs prefer to do the distribution is also a judge, they would approach the judge who will then distribute the estate extra-judicially. However, the informal nature of such exercise and the extra-judicial role of the judge could easily lead to complications as the official judicial status overlaps his extra-judicial role.[34]

The absence of a legal framework in the area courts and sharia courts for handling non-contentious estates voluntarily submitted to the court has some grave consequences. When judges of these courts engage in extra-judicial distribution of inheritances, it can result in perpetration of fraud, mishandling of estates, arbitrary settlement of estates according to *ṣulḥ* rather than according to Islamic law of inheritance, absence of proper documentation of distribution of inheritances and even confusion in the judicial process. In a case reported in the newspapers,[35] the *walīy al-'amr* (administrators) of the estate of the deceased (a wealthy businessman) invited a judge of the Upper Sharia Court to help in distributing the estate among the heirs. The judge agreed to do this. The *walīy al-'amr* handed over to the judge, a bank draft for the sum of N21.644 million that was drawn in favour of the deceased. The bank had refused to release the money without a court directive. Eventually, the bank released the money through bank cheques drawn in favour of the Chief Registrar of the Sharia Court of Appeal which was paid into the official bank account of the Sharia Court of Appeal. When the money was needed for distribution among heirs, a court registrar was sent to collect the money from the bank but no money got to the court. It was alleged that the registrar absconded with the money. The matter was reported to the Police but all efforts to locate the missing registrar and the money proved abortive. The heirs petitioned the Grand Kadi of the

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[31] See, Garba v Dogonyaro, No. 1 NWLR (Pt. 165) (1991), 102, 111; Maihodu v Okaji, No. 2 SLRN 144 (1991 1989); Gulma v Bahago, No. 1 NWLR (Pt. 272) 766, 773 (CA) (1993).

[32] Soda v Kuringa at 638–39; Yari v Mikaila, No. 5 NWLR (Pt. 46) 1064, 1068 (1986), 1064, 1068.

[33] Kontangora v Kontangora, No. 2 SQLR (Pt. 3) 427, 436 (SC) (2014).

[34] for example see, Oba and Ismael, "Challenges in the Judicial Administration of Muslim Estates in the Sharia Courts of Appeal in Nigeria," 91 and 93.

[35] Musa Abdullahi Krishi, "How Court Registrar Ran Away with N21.6m Inheritance, by Grand Khadi," Daily Trust, September 4, 2014, https://www.dailytrust.com.ng/how-court-registrar-ran-away-with-n21-6m-inheritance-by-grand-khadi.html.

State Sharia Court of Appeal demanding their money but the Grand Kadi said the matter does not concern the Sharia Court of Appeal since there was no case concerning the estate filed before the Upper Sharia Court or any other court in the state. As far as the Grand Kadi was concerned, the matter is a private one between the *walīy al-'amr* of the estate, the heirs and the judge. The Grand Kadi then suspended the Upper Sharia Court judge from his post and ordered him to make available the money to the heirs. After the initial report of the matter in newspapers, nothing else was heard of it and we do not know how it was resolved.

In Balarabe *v Balarabe*,[36] the plaintiff filed a suit in 1997 asking the trial Upper Area Court, Birnin Kebbi to distribute the estate of his deceased father among the heirs. One of the heirs alleged that one Alkali Ladan of the Upper Area Court, Birnin Kebbi had distributed the estate in 1980 but could not produce any document in proof. The trial court went through the record of proceeding of the court but could not trace the alleged case or any evidence of the distribution of the estate. The court sent the Chief Inspector of Area Court to the Sokoto State History Bureau but the Bureau could not find anything relating to the alleged case and the alleged distribution. In the oral evidence proffered in support of the distribution showed that what took place could at best be regarded as negotiation rather than distribution of the estate the distribution was arbitrary and without compliance to the shares fixed by Islamic law. Based on the absence of any evidence of the alleged case and distribution, the court proceeded to distribute the estate among the heirs. On appeal to the Sharia Court of Appeal, the court acting on the admission by one of the heirs that certain sum of money was given to her, set aside the distribution of the estate by the trial court and restored the alleged previous distribution by one Alkali Ladan. In reversing the decision of the Sharia Court of Appeal and restores that of the trial court, the Court of Appeal held that distribution of the estate of a deceased person should not be hinged on speculation, as there must be clear evidence in form of witnesses or documents that the distribution actually took place. The court held that crucial facts regarding the person who distributed the estate, the venue of the distribution and the witnesses to the distribution of the estate were left unanswered. The court concluded that since the alleged distribution of the estate by Alkali Ladan was not proved, the decision of the Sharia Court of Appeal could not stand.

As noted above, Islamic courts in Nigeria follow the Maliki School and thus they rely heavily on textbooks from that school. Garba and Ostien[37] give a comprehensive list of the major textbooks. These include various editions of classical and modern Maliki textbooks and manuals. The classical texts include Ibn Farḥūn, *Tabṣirah al-Ḥukkām*,[38] Ibn Abi Zayd,[39] (and its commentaries, Al-Nafarāwī,[40] and Al-Ābī Al-Azharī, *al-Thamar al- Dānī*[41]) and Ibn Isḥāq Khalil's *Mukhtaṣar Khalīl*[42] (and its

[36] Balarabe v Balarabe, No. 3 SLR (Pt. 1) (2006), 248, 252 and 260..

[37] Ahmed S. Garba and Philip Ostien, "Sixty Authoritative Islamic Texts in Use in Northern Nigeria," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, October 29, 2009), 108–21, https://papers.ssrn.com/abstract=1496531.

[38] Ibrāhīm bin Shamsudeen Ibn Farḥūn, *Tabṣirah Al-Ḥukkām Fī Usūl al-Aqḍiyah Wa Manāhij Aḥkām* (Beirut: Dār al-kutub ᶜIlmiyyah, 2001).

[39] 'Abdullah ibn 'Abd al-Rahmān ibn Abī Zayd al-Qayrawani, *The Risālah*, 2018.

[40] Aḥmad ibn Ghunaym Sālim Al-Nafarāwī, *Al-Fawākih al-Dawāni Alā Risālat Ibn Abī Zayd al-Qayrawānī* (Beirut: Dar al-Fikr, 1995).

[41] Shalih ᶜAbd al-Samīᶜ al-Ābī Al-Azharī, *Al-Thamar al-Dānī Sharḥ Risāla Ibn Abī Zayd al-Qayrawānī* (Beirut: Dar al-Fikr, n.d.).

commentaries especially Al-Ābī Al-Azharī, *Jawāhir al-'Iklīl*[43] and Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*[44]). Other classical texts are al-Kashnawī, *Ashal al-Madārik* and *Ibn* ᶜĀṣim*, Tuḥfat al-Ḥukkām*[45] (and its commentaries especially al-Tasūlī's *Bahja*,[46] al-Kafī, *Iḥkām al-Aḥkām*[47] and al-Mayyara, *Sharḥ al-Mayyarah*[48]) while textbooks by modern authors include Al-Zuḥailī[49] and Ambali[50]. However, the courts do not have or use any standard referencing format and texts as such they cite texts without details as to publishers, place and date of publication, and edition.[51] This is due in part to the fact that some of the texts in circulation in the country were printed without these details. Many times, the popular local name for the text or an abbreviated title rather than the actual title is used.[52] Thus, one often encounters difficulties in locating the pages cited by the courts. In this paper, where we are able to trace the edition used by the courts or an edition whose pages correspond to the ones cited by the court, we have used the editions cited by the court. In other cases, we have used the edition that is available to us and we have indicated these by the use of square brackets and the pages of the edition cited by the court we have put in round brackets.

Preliminaries Matters in Distributing Inheritance

In *Muḥammadu v Haruna*,[53] the Court of Appeal explained: "it is the duty of the judge who is called upon to distribute the estate of a deceased person to his heirs to determine and ascertain" the following preliminary matters: (a) the death of the deceased; (b) the legitimate surviving heir(s); and (c) the inheritable estate.[54] All these matters encompass more issues. In *Yari v Mikaila*,[55] the Court of Appeal explained the duties of a trial court in relation to distribution of estates in cases filed in their courts: (a) Confirm the death of the deceased person; (b) Enquire into the affinity of each of the legal heirs to the deceased; (c) Confirm the deceased's exclusive ownership of the estate; (d) Enquire into whether the deceased owned debts; and (e) Whether the deceased made any will.[56] According to the Court of Appeal, all these preliminary issues must be established by evidence before the trial court. The position of Nigerian

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[42] Khalīl Ibn Isḥāq, *Mukhtaṣar Khalīl* (Bayrut: Dār al-Fikr, 1995).
[43] Shalih ᶜAbd al-Samiᶜ al-Ābī al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, vol. 2 (Qāhirah: Dār al-Fikr, n.d.).
[44] Muḥammad ibn Muḥammad ibn Abd al-Raḥman Al-Ḥaṭṭāb, *Kitāb Mawāhib Al-Jalīl Li Sharḥ Mukhtasar Khalīl* (Tarabulus, Libya: Maktabat al-Najah, 1969).
[45] Muḥammad ibn Muḥammad Ibn 'Āṣim and 'Alī ibn Qāsim Zaqqāq, *Tuhfat Al-Hukkam, or, Gift for the Judges* (Zaria: Centre for Islamic Legal Studies, Ahmadu Bello University, 1989).
[46] ᶜAlī bin ᶜAbd al-Salām al-Tasūlī, *Al-Bahja Fī Sharḥ al-Tuḥfah Li Muḥammad Bin ᶜĀṣim* (Bayrut: Dār al-Kutub al-ᶜĺlmīyah, n.d.).
[47] Muḥammad bin Yūsuf al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām* (Bayrut: Dār al-Fikr, n.d.).
[48] Muḥammad ibn Aḥmad Al-Mayyārah, *Sharḥ Al-Mayyārah al-Fasī Alā Tuhfat al-Hukkām* (Qāhirah: Dār al-Fikr, n.d.).
[49] Wahba Al-Zuḥailī, *Al-Fiqh al-Islāmī Wa Adillatuh*, 4th ed., vol. 5 (Damascus: Dār al-Fikr al-Muasir, 2002).
[50] Ambali, *The practice of Muslim family law in Nigeria*.
[51] Garba and Ostien, "Sixty Authoritative Islamic Texts in Use in Northern Nigeria," 108–10.
[52] For example, in *Yahaya v Yahaya* (2015) 3 SQLR (Pt 4) 708, 718 (Court of Appeal), counsel referred to Al-Ābī al-Azharī, *al-Thamar al-Dānī*, op cit., (also locally known as '*Summaradani'*).
[53] (2013) 1 SQLR (Pt 3) 44, 60-61 (decided on 9 November 2000, Court of Appeal, Sokoto Division).
[54] See also, Hamza v Yusuf, No. 3 SLR (Pt. 3) (2006)142, 164.
[55] (1986) 5 NWLR (Pt. 46) 1064
[56] See also *Kaka v Ibrahim* (2007) NNLR 333, 333-335 (SCA, Kogi State).

courts tally with the expositions of classical Islamic scholars whose books form the major source of Islamic law in these courts.[57]

Death of the Deceased

The basic rule is that a person's estate cannot be distributed as inheritance when he or she is alive. In *Salami v Salami*,[58] the deceased while alive wrote a letter on how he wanted his estate to be distributed among his heirs when he dies. He fortified this with a video recording of himself sharing his estate. The deceased did not transfer the properties to the heirs in his lifetime. In setting aside this purported distribution of inheritance, the Kwara State Sharia Court of Appeal after taking "a critical look" at the letter and video, concluded that there is nowhere this kind of action is allowed in the Quran. The court insist that the definition of estate (*tarika*) in the Quranic verses dealing with inheritance is "what a person left behind after his death…". The court concluded that the "estate distribution of a Muslim … can only take place …after his or her death and NOT during his or her lifetime"[59] and the purported distribution of his estate by the deceased violated provisions of Islamic law.

The death of a person must be established before his or her estate can be distributed to his or her heirs.[60] Generally, this is not a difficult thing. However, in some cases it is not as easy as in instances when a person went missing. The issue of inheritance of the estate of a missing person (*mafqud*) came before the Supreme Court in *Jatau v Mailafia* concerning the case of one Inno who claimed to be the daughter of one Mailaifa of whom nothing had been heard of him since he left his home about 60 years ago.[61] Inno was asking the court to declare her his heir. The court adopted the definition proffered by Al-Zuḥailī[62] to the effect that a *mafqud* is a person who has been absent from his place of abode for a long period of time that information on his whereabouts or whether he is dead or alive is unknown. The court held that the onus is on the claimant to prove the death of Mailafia or that Mailafia has been missing and his whereabouts are unknown for a period within which a person of his age would be presumed dead.[63] The court held that Inno had not discharged this burden.

Legitimate Surviving Heir(s)

The heirs must be legitimate heirs, that is, persons who are qualified under the law to inherit by being within the prescribed persons who can inherit the deceased and by having survived the deceased. Allah (SWT) in the Quran as explained by the Prophet (SAW) defines the prescribed persons and the quantum of their inheritance. Islamic jurists agree that the right to inherit can be based on three factors, namely, blood relationship (*nasab*), relationship through marriage (*nikāh*), and patronage (*walā'*) between a master and his freed slave.[64] However, any person claiming to be in any of

[57] al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:327; al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 331.
[58] (2007) NNLR 290, 298-299.
[59] Emphasis supplied by the court.
[60] *Ahmed v Jibrin* (1982) Sh. LRN 68 cited in *Jatau v Mailafiya* (1998) 1 SCNJ 48, 54.
[61] (1998) 1 SCNJ 48 (16 January 1998, SC).
[62] Al-Zuḥailī, *Al-Fiqh al-Islāmī Wa Adillatuh*, 5:784.
[63] Sule v Lawan, No. 3 SLR (Pt. 3) (2006).
[64] Rushd, *Bidāyat Al-Mujtahid Wa Nihayat al-Muqtasid*, 2:411; al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 280; Ambali, *The practice of Muslim family law in Nigeria*, 345–46; Orire, *Shari'a*, 255; This

these three categories in relation a deceased must prove the relationship before the court can accept his or her claim of entitlement to the estate or part thereof.[65] In addition, there is no inheritance between persons of whom it is unknown who preceded the other in death.[66] Thus, successors to a deceased heir must prove that the deceased heir survived the deceased person from whom they are claiming the deceased heir's inheritance.

In *Jiddun v Abuna*,[67] armed robbers invaded the house of a family. They killed the husband and one of his wives but no one knew which of the spouses died first. A relative of the deceased husband contended that the deceased wife could not inherit from the estate of her deceased husband because she died before the husband. However, they were unable to proffer any evidence in proof of their assertion. Those who distributed the estate gave the deceased wife a share in the estate. The trial Upper Area Court in upholding this decision held that in absence of evidence that the wife preceded her husband in death, she is entitled to inherit from the estate of her deceased husband. The Borno State Sharia Court of Appeal reversed this decision on the ground that it was not established which of the spouses died first. The Court of Appeal set aside the decision of the Sharia Court of Appeal and restored the judgment of the trial court. On further appeal to the Supreme Court, the court confirmed the decision of the Court of Appeal. The Supreme Court held that the matter of which of the spouses died first is a matter of evidence and that the onus of proof is on the person who asserts that the wife died before the husband.[68]

Islamic courts in Nigeria will give inheritance to relatives that are stipulated in the Quran as having the right to inheritances in the circumstances defined by the Quran. In *Muḥammadu v Mohammed*,[69] two sisters instituted a complaint against their two brothers for failure to distribute the estate of "their father who died 36 years ago". The court explained that the sisters being daughters of the deceased fall within the ten Quranic heirs (*aṣḥāb al-furūḍ*) stated as follows: husband (widower), wife (widow) up to four widows, mother, father, Grandfather, Grandmother, children (sons and daughters), [son's] sons and daughters, brothers/sisters, full and half-brothers and their children. Thus, the court held that under Islamic law, sons do not have any right to exclude their sisters from their father's estate. Again, in *Ayanda v Akanji*,[70] the deceased whose estate was valued at N100,000.00 left two widows, three sons and three daughters. The trial Upper Area Court gave each of the widows, sons and daughters N5000, N20,000.00 and N10.000.00 respectively. In setting aside this distribution, that Sharia Court of Appeal held that the portion given to the widows are not up to their joint entitlements of one-eighth of the estate stipulated by the Quran (4:13). The court ordered that the estate be redistributed and each of the widows should have 1/16 and the

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principle was also affirmed in Sule v Lawan, No. 3 SLR (Pt. 3) (2006), 194, 199; Wudil v Wudil, No. 3 SLR (Pt. 4) (2007), 108, 114; Hamza v Yusuf at 164–65.

[65] Sule v Lawan at 194 and 199.

[66] al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 294; al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:339.

[67] (2000) 10 SCNJ 14.

[68] The court cited Al-Ābī Al-Azharī, *Jawāhir al-'Iklīl*, vol. 2, 240, al-Kafī, 35-36 and Shams al-Dīn Muḥammad Arafa *al-Dasūqī, Ḥāshiyat al-Dasūqī alā Sharḥ al-Kabīr, vol. 4, Dār Ihyā'u al-Kutub al-Arabiyyah, Qāhirah, n.d*., 188 for these propositions of law.

[69] (2001) 6 NWLR (Pt. 703) 104.

[70] (2002) NNLR 209, 211-212.

remainder of the estate which should be 7/8 should be distributed among the children with each son taking twice of a daughter's portion.

Secondly, Islamic courts in Nigeria have upheld the right of spouses to inherit from each other.[71] Often there are disputes as to whether there is a marriage or a subsisting marriage between the persons. Where it is known that a couple are married, the onus of proof is on any one alleging that the parties had divorced.[72] In *Ngbdobe v Dubrare,*[73] the respondent told her husband's brother that there had not been any sexual intercourse between her and her husband for six years before he died and for this reason; she doubted whether their marriage still subsisted. On the strength of this, her brother-in-law excluded her from his brother's estate. In court she insisted that he had told her brother-in-law that her husband had medical problem, which led to his becoming impotent and that if it were the girls of nowadays, they would have left him. The brother-in-law admitted that he did not hear of the divorce from his brother or any other person apart from her but the court asked her to take oath to confirm that that was what she actually told the brother-in-law. She refused and the court excluded her from the estate. On appeal, the Upper Area Court affirmed this judgment. On further appeal to the Sharia Court of Appeal, the court reversed these decisions. The Court of Appeal in affirming this judgement cited al-Mayyara[74] to the effect that the burden of proof that a husband has divorced his wife rests on the wife or her representatives claiming such a divorce. The court therefore held that there is a presumption that the marriage subsisted up to the time of the husband's death as there was no evidence to the contrary before the court.

Spouses of a voidable marriage inherit from each other if one of them dies before the marriage is legally terminated. In *Yusuf v Yusuf,*[75] the Kwara State Sharia Court of Appeal citing Ibn Juzayy[76] and Ibn Rushd[77] held that the husband of a marriage that is voidable (due to absence of a *waliy* - marriage guardian) could inherit from the estate of his deceased wife because the marriage has not been legally set aside. Thirdly, inheritance due to patronage (due to slavery) is recognized as one of the bases of inheritance under Maliki school applicable in Nigeria.[78] Within the Islamic law context, whatever a slave owns belongs to his or her masters and the slave's blood relations (children) and spouses do not have any right of inheritance therein.[79] However, the abolition of slavery in Nigeria precludes the enforcement of this rule in Islamic courts in the country.[80] With regard to the estate of emancipated slaves, the position is different. Islamic law provides that a former master of a slave is a residual heir in the estate of his or her emancipated slave. This means that such a master takes the residual of the estate (if any) after all other heirs have been received their legal shares of the estate. Where an

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[71] The wife of the deceased cannot be excluded from his estate: *Salami v Salami* (2007) NNLR 290, 297.
[72] Sharu v Umma, No. 1 NWLR. (Pt. 800) (2003), 46.
[73] (1997) 11 NWLR (Pt. 529) 382
[74] Al-Mayyārah, *Sharḥ Al-Mayyārah al-Fasī Alā Tuhfat al-Hukkām*, 84.
[75] (2010) Annual Report Sharia Court of Appeal (Kwara State) 52, 68-69.
[76] Muḥammad ibn Aḥmad Ibn Juzayy Al-Kalbī Al-Gharnātī, *Qawānin Al-Fiqhiyyah Fī Talkhis Madhḥab al-Mālikiyya Wa al-Tanbih Ala Madhḥab al-Shafi'īyyah Wa al-Hanafiyyah Wa al-Hanbaliyyah* (Dār al-Gad al-Jadīd, 2017), 271.
[77] Rushd, *Bidāyat Al-Mujtahid Wa Nihayat al-Muqtasid*, 2:9.
[78] al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 280; Rushd, *Bidāyat Al-Mujtahid Wa Nihayat al-Muqtasid*, 2:437–42.
[79] al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 294; Orire, *Shari'a*, 255.
[80] (1999) 1 NWLR (Pt. 585) 105, 110-111.

emancipated slave does not leave any other heir, the former master is entitled to the estate of the emancipated slave. Where the former master predeceased the emancipated slave, the male heirs of the former master will inherit the estate left by the emancipated slave. Islamic courts in Nigeria have upheld the rules relating to the inheritance of an emancipated slave. In *Baraya v Belel*,[81] while recognizing the rights of the heirs of the former master of an emancipated slave to inherit the estate of the emancipated slave in absence of any other heir, the court ruled that the females heirs of the former master of the emancipated slave whose estate was the subject of the case cannot inherit the estate.[82] Again, in *Song v Song*,[83] the Court of Appeal upheld in principle the right of the heir of the former master of an emancipated slave to the estate of the emancipated slave who has left no other heir. However, the court held that the claimant did not prove his allegation that the deceased was an emancipated slave of his (the claimant's) father.

When a person falls within the categories of those who have right of inheritance, there are six factors that can debar him or her from the inheritance.[84] First, a murderer cannot inherit from the estate of his or her victim.[85] Secondly, stillborn child could not inherit because it is not a person but a child that was born alive but immediately dies, is entitle to inherit. Thirdly, an illegitimate child (*walad al-zinā'*) cannot inherit from his or her biological father. Fourthly, a child whose paternity was disowned through an oath of imprecation (*li'ān*) by his or her putative father cannot inherit from the father. Fifthly, a slave cannot inherit. Perhaps, the reason why a slave cannot inherit is that whatever a slave owns belongs to the master. Illegitimacy as a bar to inheritance often comes up in non-judicial distribution of inheritance in the country but complaints in such instances are rarely filed in the courts. Lastly, difference in the religion of the deceased and the prospective heir is a factor under Islamic law: a non-Muslim cannot inherit a Muslim and vice-versa.[86]

Lastly, there is the question the *Bait ul Māl* (Public treasury) as a possible heir to the estate of Muslims.[87] In compliance with the Maliki school,[88] Islamic courts in

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[81] (1999) 1 NWLR (Pt. 585) 105.

[82] Abū Bakr bin Ḥassan Al-Kashnawī, *Ashal Al-Madārik Sharh Irshād al-Masālik Fī Fiqh Imām al-A'immat Mālik*, vol. 3 (Beirut: Dār al-Fikr, n.d.), 253–54; 'Uthmān ibn Hasanayn Barī Al-Ja'alī al-Mālikī, *Sirāj Al-Sālik Sharḥ Ashal al-Masālik*, vol. 2 (Bayrut: Dār al-Fikr, 1995), 294.

[83] (2001) FWLR (Pt. 44) 447, 460.

[84] al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 293–97; al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:338–39 See also, ; Ambali, *The practice of Muslim family law in Nigeria*, 343–45; Orire, *Shari'a*, 255–56.

[85] Rushd, *Bidāyat Al-Mujtahid Wa Nihayat al-Muqtasid*, 2:436.

[86] In Ubudu v Abdul-Razaq (2001) 7 NWLR (Pt. 713) 669, the Court of Appeal lost an opportunity to make a pronouncement of this issue though the issue was "vehemently argued" by counsel before the court as the issue did not arise from the judgements of the lower courts appealed against. It is necessary to point out here that Islamic law provides that a Muslim can make provisions for his or her non-Muslim spouses, relatives or dependants through wills (waṣiyyah) and gifts inter-vivos (hibah), see I. S. Ismael and A. A. Oba, "Navigating Inheritance across Religions by Muslim and Non-Muslim Heirs in Nigeria" (International Conference on Religious Pluralism and Heritage: Legal and Social Development in Africa organized by the African Consortium of Law and Religion Studies (ACLARS), Addis Ababa, Ethiopia, 2016) hosted by the University of Addis Ababa.

[87] Ismael Saka Ismael and Abdulmumini Adebayo Oba, "LEGAL CHALLENGES CONCERNING SOME BENEFICIARIES OF ESTATES GOVERNED BY ISLAMIC LAW IN NIGERIA," *IIUM Law Journal* 25, no. 1 (July 4, 2017): 87–90, https://doi.org/10.31436/iiumlj.v25i1.306.

[88] al-Kafī, *Iḥkām Al-Aḥkām ʿalā Tuḥfah al-Ḥukkām*, 281.

Nigeria recognize the *Bait ul Māl* as a possible heir to a Muslim's estate.[89] However, since no *Bait ul Māl* exists in the country, local mosques are often substituted for *Bait ul Māl*.[90] In some states, such portion goes to the Zakat and Endowment Board.[91]

The Inheritable Estate

A heir can only inherit what was legally owned by the deceased.[92] The inheritable estate is the estate left by the deceased excluding charges on the estates such as funereal expenses, unpaid *zakāt*, and other liabilities thereon such as debts and legacies.[93] The matter of legacies and gifts often come up when the courts are trying to establish the extent of inheritable estates. A *waṣiyyah* is valid provided it does not exceed a third of the estate. In *Usman v Usman*,[94] 27 heirs opposed the legacy while only four supported it. The court in upholding the legacy held that what is paramount is the desire of the deceased to create a perpetual endowment (*wakf*) and that the opinion of his heirs are immaterial since the legacy does not exceed a third of the estate. There are fundamental differences between gifts and legacies. A person of full legal capacity can give gifts to any person. The taking of full possession/delivery of the gift by the donee legally perfects a gift. A father can give gifts to his children. Although, it is religiously reprehensible for a father to give a gift to one of his sons or to one of his daughters without giving corresponding gift to his other sons and daughters respectively, such a gift is valid and legally enforceable if the gift has been perfected. In *El-Usman v Usman*,[95] the Sharia Court of Appeal, Abuja citing Al-Zuḥailī[96] and Ibn Rushd[97] upheld this position. Gifts that the deceased give in his or her lifetime and have been perfected are not part of the deceased's inheritable estate.[98]

However, if the donor dies without the gift having been perfected by full delivery of the gift to the donee, the gift fails and is treated like a *waṣiyyah*. In *Adamu v Nda*,[99] the deceased owned many houses. While alive, she instructed her only son to choose any house he liked best from her houses which she then gave to him. She proceeded to make gifts of the other houses to her other relatives. She documented these gifts in writing which the donees also signed and had the ward heads[100] signed as witnesses. However, she continued to receive the rents in respect of these houses, which her son collected on her behalf. After her death, her son continued to collect the rents and

[89] Sharia Court of Appeal (Kwara State), "Distribution of the Estate of Gold (2006): Annual Report of the Sharia Court of Appeal (Kwara State)," 2006, 308.
[90] Sharia Court of Appeal (Kwara State), 319; Ambali, *The practice of Muslim family law in Nigeria*, 347.
[91] Section 32 (3)(m) of the Schedule to the Zamfara State Zakat (Collection and Distribution) and Endowment Board Law, 2000 lists the items to be received as endowment as "all lawful items permitted by Sharia and of any amount and quantity" and these include "inheritance of those who [do not] have heirs".
[92] Tela v Kwarago, No. 3 SLR (Pt. 3) 203 (2006), 203 ,208.
[93] Al-Nafarāwī, *Al-Fawākih al-Dawāni Alā Risālat Ibn Abī Zayd al-Ḳayrawānī*, 243–45; al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:327–28; Ambali, *The practice of Muslim family law in Nigeria*, 341–42; Orire, *Shari'a*, 256; this principle was also affirmed in Baka v Dandare, No. 4 NWLR (Pt. 498) (1997), 244, 250.
[94] Usman v Usman, No. NNLR 449, 450 (2005).
[95] El-Usman v Usman, No. 3 SQLR (Pt. 1) (2015).
[96] Al-Zuḥailī, *Al-Fiqh al-Islāmī Wa Adillatuh* vol. 1, 696 and vol. 4, 705.
[97] Rushd, *Bidāyat Al-Mujtahid Wa Nihayat al-Muqtasid*, 2:398.
[98] see also, Muhammadu v Mohammed, No. 6 NWLR (Pt. 703) (2001).
[99] Adamu v Nda, No. 2 SQLR (Pt. 1) (2014).
[100] Ward heads are traditional representatives of the emirs who supervise different quarters/sections of towns and villages.

refused to give an account of these rents to the donees. The donees as plaintiffs sued him for recovery of the gifts. The trial court confirmed the gifts. However, the Sharia Court of Appeal reversed this decision and held that the properties in dispute should form part of the estate of the deceased. On appeal to the Court of Appeal, the court upheld the decision of the Sharia Court of Appeal on the ground that the gifts were inchoate since the deceased had not fully surrendered the properties to the plaintiffs.

Undistributed inheritance properties are in a distinct legal class. In *Biri v Mairuwa*,[101] the Court of Appeal held that inheritance is different from trust (*al-amānah*) or deposit (*al-waḍī'ah*) or a loan (*'āriyya*). Thus, the court held that when a person alleges that his or her inheritance is in the hands of another person, the person in possession of the property is not asked how he or she came about the property. Rather, it is the duty of the claimant to explain how his inheritance got into the hands of that person. The right of inheritance is an inalienable right.[102] Thus, this right cannot be defeated by *ḥauz* (prescription) because the doctrine of *ḥauz* does not apply to undistributed inheritance property.[103] In *Maiwaina v Captain*,[104] a widow complained to the Emir's Court that she was not given any share in the estate of her husband which was distributed 30 years ago. The defendants said this was so because she had left to marry another husband before the estate was distributed. The court held that because of the length of time that had elapsed, the court could not review the matter. The court then advised the parties to "go and live peacefully". The plaintiff appealed to the Sharia Court of Appeal of the Northern Nigeria. The court in reversing the decision of the Emir's Court held that the time that has passed since the distribution notwithstanding, any complaint brought by a woman or any of the heirs must be heard, irrespective of the length of time that has passed since the distribution or non-distribution of the inheritance.[105] Again, in *Haruna v Idris*,[106] the Plateau State Sharia Court of Appeal cited this case and held that Islamic law does not limit time within which inheritance must be distributed among the heirs, therefore an inheritance cannot lapse because the length of time involved in the distribution or non-distribution of an estate.

Once the right of inheritance subsists in a property, the sale of such property is invalid.[107] Similarly, the right of inheritance cannot be defeated by the loaning out the property or by usurpation (*ghaṣb*).[108] However, in *Kuriri v Maidawa*,[109] Bawa sold an undistributed inheritance property belonging to his deceased father's estate to one Ali. Thirty years later, the other heirs sued Bawa and Ali asking the court to distribute the estate of their father among them as heirs. Bawa admitted that the property was part of the estate left by their father. Ali claimed that he had no knowledge that the property did not belong to Bawa. The trial court gave judgment in favour of the plaintiffs and asked Ali to seek his remedy against Bawa. Ali appealed to the Upper Area Court, which allowed the appeal without proffering detailed reasons. The heirs appealed to the Sharia

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[101] Biri v Mairuwa, No. 8 NWLR (Pt. 467) (1996).
[102] Dantani v Daji, No. 3 NWLR (Pt. 544) (1998).
[103] Gewayau v Dushi, No. 8 NWLR (Pt. 517) (1997)522, 525.
[104] Maiwaina v Captain, No. 1 Sh. LRN 8 (1989 1961).
[105] The court relies on, Abī Abdallah Muḥammad Aḥmad'Alaysh, *Fatḥ Al-Alī al-Mālik Fī al-Fatwā Alā Madhhab al-Imām Mālik*, vol. 2 (Dār al-Fikr, n.d.), 319.
[106] Haruna v Idris, No. NNLR 150 (2004).
[107] This principle has been upheld by the courts in Gewayau v Dushi525; Balarabe v Balarabe, No. 3 SLR (Pt. 1) 248, 260 (2006)248, 260; Dantani v Daji, 655; Bashir v Shayau, No. 2 SQLR (Pt. 4) 543 (2014).
[108] Dantani v Daji.
[109] Kuriri v Maidawa, No. 3 SLR (Pt. 4) 66, 77 (2007).

Court of Appeal, which set aside the decision of the Upper Area Court and restored the judgment of the trial sharia court declaring the property as inheritance property but made some amendments regarding the sale of the property. On further appeal to the Court of Appeal, the court set aside the judgment of the Sharia Court of Appeal. The court citing the exposition of *ḥauz* by al-Abi[110] and Al-Kashnawi[111] held that the fact that the heirs had not challenged the sale of the farmland for close to 30 years meant that they had been negligent and nonchalant about their rights and that it is too late for them to now seek to enforce their rights.

Procedure for Distribution of Inheritance

This procedure includes ascertaining the value of the estate, the formal division of the estate between the heirs, giving of *milk* (possession or dominion) to the heirs and other matters connected to these steps.

Ascertaining Value of the properties that form Estates

After ascertaining the inheritable estate, the court proceeds to hear evidence on the value of the estate. The judge cannot place values on the items *suo motu*. In *Ayanda v Akanji*,[112] the Omu Aran Upper Area Court valued the items in the estate without recourse to the heirs or experts. The Director of Area Courts was unhappy with this and he reported the case to the the Kwara State Sharia Court of Appeal. The court in setting aside the valuation and distribution of the estate done by the Upper Area Court, held that a judge cannot arbitrarily fix the values of the items. Since valuation of items is for the purpose of distribution of the inheritance and nothing else, it is ideal to let the heirs come to a consensus or mutual agreement regarding valuation.[113] In *Yahaya v Yahaya*,[114] the Court of Appeal citing al-Kashnawī[115] held that the values of the items of the estate are as the heirs approve and not necessarily the market value of the items. The court can also invite expert valuers but their report is subject to acceptance by the heirs. The heirs should not be unnecessarily or unduly difficult and should approve the values placed on the items.

Where the experts or the heirs give varying prices, the court should work with the aggregate or medium estimate. However, the judge must not fix an arbitrary value of the estate or any part thereof. In *Wali v Ibrahim*,[116] the court put the value of the property in issue at N7,400.00, whereas, all the valuers including those appointed by the court and those appointed by the parties variously gave the value of the property at N10,000.00, N8,500.00 and N8,000.00 respectively but none valued the property at N7,400.00. The Sharia Court of Appeal held the judge erred and fix N8,000.00 as the value of the property in line with one of the valuation. The Court of Appeal upheld the decision of the Sharia Court of Appeal.

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[110] al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:5.
[111] Al-Kashnawī, *Ashal Al-Madārik Sharh Irshād al-Masālik Fī Fiqh Imām al-A'immat Mālik*, 3:233–39.
[112] Ayanda v Akanji, No. NNLR 209, 211-212 (2002).
[113] Njidda v The Estate of Njidda, No. NNLR 20, 23 (2005), 20, 23.
[114] Yahaya v Yahaya, No. 3 SQLR (Pt 4) 708, 720–721 (2015).
[115] Al-Kashnawī, *Ashal Al-Madārik Sharh Irshād al-Masālik Fī Fiqh Imām al-A'immat Mālik*, 3:341.
[116] Wali v Ibrahim, No. 9 NWLR (Pt. 519) (1997), 160, 167.

Ascertaining the Shares due to each Heir

As noted above, in Islam, inheritance shares are Allah-given rights and no one can vary these. Islamic courts in Nigeria have consistently affirmed the immutability of the inheritance shares as fixed in the Quran. In *Balarabe v Balarabe*,[117] the Court of Appeal while emphasizing the God-fearing nature of the judicial role in distribution of inheritances as follows:

> "… the issue of succession in Islam though delicate requires detailed investigation, attention and circumspection. The judge, as an umpire, should remember that he is handling a right which must be given to the legal heirs as directed by God Himself. Where the judge fails to administer justice, in accordance with the dictates of Allah, he has certainly wrong himself, the parties and Allah the Almighty and should be ready to face the consequences of his failure"[118]

It is the duty of courts to adhere strictly to the shares as prescribed by Allah. Islamic courts in Nigeria do this. For example, the courts have held that the widow of a childless man is entitled to one quarter of his estate[119] and that the father, mother, spouse and children of the deceased cannot be excluded from partaking in the inheritance of the deceased's estate;[120] In *Dunbus v Charka*,[121] the deceased was survived by a daughter and a full sister. The Court of Appeal held that the appellant being the sole daughter surviving her father is entitled to one half only and not the whole of the estate as claimed by her. The court after citing Quran 4:11 which says "Allah commands you as regards your children's (inheritance): to the Male is a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; *if only one, her share is half*"[122] said: "…the appellant is the only daughter surviving her father. The maximum share she is entitled from the net estate of her deceased father is one-half of the estate. No one has the power to change this decision as is provided in the Quran. Thus, the net estate is divided into two one goes to the daughter and the remaining must go to the full sister [of the deceased] as a residual heir. See further Quran 4:176."

Methods of distribution of Inheritance between the Heirs

There are many ways of distribution of estates among heirs. In *Yahaya v Yahaya*,[123] the Court of Appeal explained items that form the inheritance or part thereof should if possible, be counted, measured or weighed and distributed to the heirs according to their respective shares.[124] The court explained further that distribution of

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[117] Balarabe v Balarabe, No. 3 SLR (Pt. 1) (2006), 248.
[118] Balarabe v Balarabe at 253.
[119] Sidi v Sha'aban, No. 4 NWLR (Pt. 233) (1992), 113, 118.
[120] Hamza v Yusuf167-168 (CA): "a father or mother of a deceased person cannot be excluded by any heir". .
[121] Dunbus v Charka, No. 3 SLR (Pt 4) (2007), 14.
[122] Q.S al-Nisa' (4): 11 (Emphasis by the court).
[123] Yahaya v Yahaya708, 720-721 (decided on 13 June 2014, Court of Appeal, Kaduna Division).
[124] referrencing Al-Kashnawī, *Ashal Al-Madārik Sharh Irshād al-Masālik Fī Fiqh Imām al-A'immat Mālik*, 3:342; Al-Gharnātī, *Qawānin Al-Fiqhiyyah Fī Talkhis Madhḥab al-Mālikiyya Wa al-Tanbih Ala Madhḥab al-Shafi'īyyah Wa al-Hanafiyyah Wa al-Hanbaliyyah*, 342–43.

landed properties should not be based on quantity or size but the properties should be valued and distributed according to the shares due to each heir.[125]

As noted above, another option is that landed property that form part of the inheritance could be sold and the proceeds distributed among the heirs according to their entitlements under Islamic law. In *Bako v Bako*,[126] estate agents placed the value of the house in issue at thirty million naira but the buyer they claimed to secure did not pay within the stipulated time. It turned out that the estate agents had overestimated the value of the property in hope of the commission they would get. When the heirs realized this, they renegotiated to sell the property to another buyer for Nineteen Million Naira. Of the nineteen heirs, only two expressed disagreement with the transaction by insisting that the property should not be sold at a price less than thirty million naira. The trial Upper Sharia Court approved the sale. On appeal, the Sharia Court of Appeal upturned this decision. On appeal to the Court of Appeal, the court reversed the judgment of the Sharia Court of Appeal and restored the judgment of the trial court. The Court of Appeal held that as the "rights and interests of the heirs are equal and [therefore] somewhat interwoven …, none of the heirs should be allowed to hold the others to ransom by maintaining an uncompromising, unyielding and unwieldy stance… The consensus of the majority should outweigh the dissension of the minority".[127] Where heirs decide that a landed property should be sold and the proceeds shared among them or where difficulties in sharing makes sale of landed property preferable, the court must allow the heirs to exercise their right of *shuf'a* (pre-emption) otherwise, the sale could be set aside at the instance of those who were deprived of the right to pre-emption.

Mushtarak[128] (grouping) of the heirs is another approved mode of distribution of estates. In *Kontagora v Kontagora*,[129] the court held that although the preferred method is to distribute to each heir his or her own inheritance individually, however, *mushtarak* (grouping) of the heirs can be adopted if individual sharing is not possible due to the nature of the estate and the court can compel any heir that disagrees with grouping.[130] This method would allow jointly heirs to inherit a block of flats with specific flats allotted to each heir. Unless, the heirs reach consensus on a particular mode of distribution, *qur'a* (balloting) should be adopted to decide which of the heirs take particular item of the estate. It is also common in the country for the heirs to decide not to share a particular property but agree to hold the property for "the general or common use" of the heirs. This is often the case of the property that the heirs consider as their "family house".[131] The heirs may choose to adopt *tarāḍi* whereby the heirs take portions of the estate without regard to their real legal entitlements.[132] However, this would be after a formal distribution of the estate had taken taken place so as not violate the Sharia-stipulated shares.

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[125] citing al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:165; See also, Tofa v Dandutsi, No. NNLR 329, 336 (SCA, Zamfara State) (2002).
[126] Bako v Bako, No. 3 SQLR (Pt. 3) 447 (CA) (2015).
[127] Bako v Bako at 479–80.
[128] This term is used here in its ordinary literal sense: "common, joint ... collective", see Hans Wehr, J Milton Cowan, and Hans Wehr, *A dictionary of modern written Arabic*, 2012.
[129] Kontangora v Kontangora.
[130] The court relied on Al-Kashnawī, *Ashal Al-Madārik Sharh Irshād al-Masālik Fī Fiqh Imām al-A'immat Mālik*, 3:49.
[131] Yekini, "Judicial Imbalance in the Application of Islamic Personal Law in Nigeria," 309–10 This concept of family house is rooted in the African culture.
[132] Orire, *Shari'a*, 262.

Giving *Milk* (possession or dominion) to the Heirs

The final step in the distribution of inheritance is the giving of *milk* over the properties as allotted, to the heirs accordingly. Normally, this process is smooth if the heirs are in good terms and the heirs should be able to arrange the giving of possession of the properties among themselves. Otherwise, the court officials would do it[133] or even the judge where the acrimony between the heirs prevents the court officials from carrying out the exercise. One of such cases that the judge had to interfere personally is *Yahaya v Yahaya*.[134] In this case, the trial judge painstakingly ascertained the relevant facts and correctly determined the share of each heir. Notwithstanding these, the acrimony and animosity between the heirs prevented a smooth outcome. The judge had to supervise the giving of *milk* to the heirs when the heirs frustrated court officials sent to do this. The judge's judgment and actions were upheld on appeal by all the appellate courts (the Upper Area Court, the Sharia Court of Appeal and the Court of Appeal) that subsequently heard the appeal.

Fees Payable for Distribution of Inheritance

Islamic jurists of the Maliki School agree that a person distributing inheritance can take fees for his services.[135] The distributor's fee should be divided equally among the heirs and not *in pari-passu* with their share of the estate. In inheritance cases filed before the area courts and sharia courts, the litigants pay the usual filing fees payable in these courts. In area courts in Kwara State, the filing fees for monetary claims are determined *ad valorem*. Since, claims seeking the assistance of the court to distribute estate among heirs are not claims for liquidated sums, the filing fees for such claims fall within the general category of applications for "not for recovery of money or goods but for other relief or assistance for which no fees are specified" for which ₦100 ($0.27)[136] is payable.[137] Of course, the litigants are responsible for other sundry charges such as filing fees payable on filing of application and other documents and fees for service of documents.

Conclusion

The paper has demonstrated that Islamic courts in Nigeria adhere strictly to the Maliki's school of Islamic law in matters concerning distribution of inheritance. This is consistent with the mandate of these courts. However, in citing the classical or other

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[133] for example Hamman v Ali, No. NNLR 155, 159 (2007) the Adamawa State Sharia Court of Appeal after redistributing the estate among the heirs ordered that the Director Litigation, Court Registrar and two court bailiffs "should go to the residence of the deceased ... physically and enforce [the judgement of the court] and report back to the Court". .

[134] Yahaya v Yahaya at 708.

[135] al-Azharī, *Jawāhir Al-'Iklīl: Sharḥ Mukhtaṣar al-Allāmah Shaykh Khalīl Fī Madhḥab al-Imām Mālik*, 2:165; Ambali, *The practice of Muslim family law in Nigeria*, 381.

[136] Exchange rate (Parallel market) N365 = $1 (23 June 2017): www.naij.com accessed 19 June 2017.

[137] Item 2, Part I, Second Schedule, Area Court (Civil Procedure) Rules, 1971 and KWS LN. 3 of 1985 (as amended). The Kwara State Sharia Court of Appeal has fixed charges for its extra-judicial services in distribution of inheritance as follows: (i) Estates less than one million Naira… N5,000.00; (ii) Estate of value less than 5 million… N7,500.00; (iii) Estate of value less than Ten Million … N10,000.00; and Estate of value less than Twenty Million and above … N20,000.00: see Ambali: 381-382 citing government approved memo SCA/GKC/C/77/04 dated 19 October 2005. The fees are payable to the court and not to the Kadis involved in the distribution of the estate.

texts, judges should be aware to the need to use a standard referencing format that will make it easy to trace their texts and pages cited. Better still, the Nigerian judiciary could make its own referencing system or adopt any of standard referencing formats. The important thing here is that the editions of texts used by the courts should be easy to trace. Secondly, we have shown that Islamic trial courts (area courts and sharia courts) have the original jurisdiction to adjudicate on disputes arising from distribution of inheritance concerning the estate of a Muslim. However, these courts do not have jurisdiction in the non-contentious distribution of estates, as there are no provisions for voluntary and amicable submission of estates to the court for distribution. The Sharia Courts of Appeal in some states have assumed this jurisdiction in non-contentious distribution of inheritances but this is in an extra-judicial capacity. There is the need to fill the lacuna and redress the uncertainties caused by the absence of any legal framework for non-contentious distribution of inheritance in the Nigeria legal system.

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