NIGERIA LII (/)

# ALKAMAWA V. BELLO AND ANOTHER (SC 293/1991) [1998] 2 (19 JUNE 1998);



**Search summary:**

**IN THE SUPREME COURT OF NIGERIA**

**ON FRIDAY, THE 19TH DAY OF JUNE 1998**

**SC 293/1991**

**BETWEEN**

**ALKAMAWA ..... APPELLANT**

**AND**

**BELLO AND ANOTHER ..... RESPONDENTS**

**BEFORE:** Abubakar Bashir Wali; Muhammadu Lawal Uwais; Idris Legbo Kutigi; Emmanuel Obioma Ogwuegbu; Sylvester Umaru Onu, JJSC

## ISSUE

*Whether the right of pre-emption (the right of Shuf'ah), as recognised in Islamic law, extends to the neighbour of the seller of a house.*

## FACTS

*The appellant was the first respondent's neighbour "to the east, west and south". The first respondent decided to sell the house and approached the appellant with a view thereto. The latter considered the first respondent's offer of (₦30,000) as being too high. The first respondent thereupon looked for a suitable buyer and found one in the second respondent who purchased the house for ₦26,000.*

*The appellant relied on Shuf'ah - the right of pre-emption in accordance with Islamic law for his claim in the trial Area Court to have the sale to the second respondent set aside, entitling him to buy the property at the same price from the first respondent. He contended that Shuf'ah was applicable to him and the first respondent since they were direct neighbours, and both subject to Islamic law.*

*The trial Area Court found in the appellant's favour and ordered him to pay the purchase price already paid by the second respondent and obtain the property in question.*

*The respondents appealed to the High Court, Sokoto, in its appellate jurisdiction, and that court overturned the trial Area Court's decision and ordered a retrial. The appellant then appealed to the Court of Appeal against that decision.*

*The Court of Appeal held that the appellant had waived his right of Shuf'ah when he refused the first respondent's first tender to him to purchase the house in question and thereupon suggested to the first respondent "to go to the market overt" in order to find a purchaser willing to pay his price. The Court of Appeal held that the appellant's right of Shuf'ah had consequently become null and void.*

*The appellant appealed to the Supreme Court where the appeal was unanimously dismissed.*

**HELD (Unanimously dismissing the appeal)**

**1. On the appellant's waiver of his right of Shuf'ah**

Having found that the appellant enjoyed no right of pre-emption at any stage, there was no right to have waived by him and the Court of Appeal had accordingly erred when it held that the appellant had abandoned his right. Wali, JSC at page 233.

**2. On the recognition of "Shuf'ah" in respect of neighbours**

Of the four Sunni Schools of Law, only the Hanafi School considers the right of Shuf'ah in respect of a neighbour. The other three, including the Maliki School, extends the right of pre-emption only to a co-owner, not also to a neighbour. Wali, JSC, at page 233.

**3. On the validity of the sale to the second respondent**

As the right of pre-emption did not extend to the appellant, the sale to the second respondent was a valid and lawful sale. Wali, JSC, at page 233.

For the appellant: *Wale Adedibu Esq*

For the respondent: *Yunus Ustas Usman*

**The following statutes were referred to in this judgment:**

**Nigeria**

Sharia Court of Appeal Law Cap. 122 Vol. III Laws of Northern Nigeria: Ss 11(*c*); 14; 14(*a*)

**The following rules were referred to in this judgment:**

**Nigeria**

Area Court (Civil Procedure) (Amendment) Rules 1980: Rules 1; 5

**The following edicts were referred to in this judgment:**

**Nigeria**

Area Court Edict 1967

**The following books were referred to in this judgment:**

*Adawi* Vol. II page 229

*Al-Khirshi* Vol. 6 page 163 [*commentary on Mukhtasar el-Khalil*]

*Ashalul Madarik* Vol. 3 page 37

*Bidayatul Muytahid* Vol. II page 193

*Ihkamul-Ahkam* [*commentary on Tuhfah*] page 198

*Matn-ar-Risalah of Ibn abi Zayyid* page 189 [translated into English language by F. Amira Zrein Matraji and published by Dar El Fikr, Beirut]

*Muwatta Malik* Vol. II page 250 under heading No 35 *The Book of Pre-Emption* [Translated into English by F. Amira Zrein Matraji and published by Dar El-Fikr, Beirut]

*Ruxton-Maliki Law*

*Sahihul Bukhari* Vol. 3 page 165 paragraph 2257

**Wali, JSC (Delivered The Leading Judgment):-** The appellant as plaintiff complained before Area Court Grade IC sitting in Sokoto town as follows:-

> "I Magaji Ila Alkamawa, I am suing Hassan Bello Magajin Rafi Sokoto because I am holding his father's house Magajin Rafi Bello who loaned it to me. The house has been in my hand for more than eight years and I am a neighbour to the house from the east, west and south. Magajin Rafi is now dead. The defendant Hassan came to me and told me that they wanted to sell the house. I then told him that I want to buy the house. Already the house has been put to market as I said that after obtaining its market price which is accepted to him I will pay the money. It was later after five days I heard from him that the house was sold at the cost of ₦26,000. Infact, the wall of my own house where I formerly lived is linked to the said house, So also some of my properties including my sheep, motor spare parts and drums are kept in that house. That is why I sue him so that the court will investigate the matter because I am entitled to buy the house."

In compliance with Islamic procedural law, the facts above as stated by the plaintiff were put to the defendant Hassan Bello Magajin Rafin Sokoto who replied:-

> "I have heard the complaint but I am not aware that my father gave him the house to hold; also, I am not aware that there are his properties in that house. In the name of Allah I even don't know his house. It is also true that I sold the house to Alhaji Malami Yabo at the rate of ₦26,000 and he paid me. I know that I usually meet him near to the said house and when entering in the house he follows me.
>
> When the house is to be sold, I sent Mu'azu to go and call Alhaji Ila. When Ila met me in my house I told him that I want to sell the house, does he want to buy it? He said he does. We then arranged that he should go and find some people who are knowledgeable in pricing houses to come and estimate the value of the house. Later he sent Nasiru to me that the house has been priced as follows: ₦18,000;

> ₦19,000 and ₦20,000. Although I have already decided to sell the house at the cost of ₦30,000. I then said that he should be informed that we shall sell the house at the cost of ₦30,000 what has he got to say? He replied that the house is too costly for him let them go if somebody buys it, let him be informed. So and hearing this and to my understanding, presumed that he does not want to buy. This is because if there is an outstanding bargain you cannot negotiate another with somebody that is why I sold the house to Alhaji Malami Yaro, that is all I have to say."

At this stage it appears Alhaji Malami Yaro was brought in by the court as co-defendant, and when the claim of the plaintiff and the reply to it were read to him by the court, he replied:-

> "I have heard and it is true that I bought that house at the cost of ₦26,000 and I paid the money. That is all I have to say."

The plaintiff was called upon to prove his case which, from the statements of both the plaintiff and the defendant is "Shuf'ah" that is the right of pre-emption as a next-door neighbour to the house sold by the defendant to Alhaji Malami Yaro. The plaintiff called Atto, Abubakar Sarkin Gida, Buda, Alu, Maishinkafa as witnesses. These witnesses gave evidence that the plaintiff was a next-door neighbour to the house in dispute and same was entrusted to him by its owner late Magajin Rafi Bello and up to the latter's death, he had been looking after the house, storing therein some of his properties, including empty drums and motor spare parts for the past eight years.

The learned trial area court Judge considered and accepted the evidence adduced by the plaintiff and concluded:-

> "With regard to what happened before this Court. Therefore I ordered the sale as valid that which took place between Alhaji Malami Yaro and Alhaji Hassan.
>
> I ordered Alhaji Ila to pay Alhaji Malami Yaro his money ₦26,000, after he paid ₦26,000 I confirmed the house to him from there East to North - 98ft 2 inches, West to East 72ft 3 inches, South to North 99ft 10 inches from East to West 73ft."

Against this judgment Alhaji Hassan Bello and Alhaji Malami Yaro as defendants appealed to the High Court, Sokoto in its appellate jurisdiction.

The High Court, after hearing the parties to the appeal before it allowed the appeal, giving its reasons as follows:-

> "1. Non-identity of the subject matter in dispute contrary to the provision of Rule 1 of the Area Court (Civil Procedure) (Amendment) Rules, 1980.
>
> 2. Learned trial Judge descended into the arena of litigation by providing the missing linking evidence of the location and boundaries of the subject matter contrary to Rule 5 of the Area Court (Civil Procedure) (Amendment) Rules 1969.
>
> 3. None of the witnesses called were cross-examined."

The decision of the trial Area Court was set aside by the High Court and in its place an order for a retrial was substituted.

The plaintiff as appellant and the defendants as cross-appellants appealed to the Court of Appeal, Kaduna Division, against the decision and order made by the High Court Sokoto in its appellate capacity. In the Court

of Appeal both the appellant and the cross-appellants filed and exchanged briefs of argument.

After a careful consideration of the briefs and the oral arguments presented for and against the appeal and the cross-appeal, the Court of Appeal in its unanimous judgment came to the following conclusions among others:-

> "The right of Shuf'ah becomes null and void when it is abandoned voluntarily [Ikhtiyar].
>
> Applying this principle to the case in hand, it can be seen that the first respondent gave the first option to his neighbour the appellant herein. When the price was fixed, the appellant advised the first respondent to go to the market overt and see if he would get a buyer and if he gets one he should come back to him and he would then pay the offered price. By this condition imposed by the appellant, after he has been given the first option to purchase, the appellant has waived or abandoned his right. This is because he has allowed the first respondent to go to the market overt. This waiver renders the appellant's right null and void and I so hold. In the circumstance the trial Area Court was in error when it nullified the sale made by the first respondent to the second respondent when the Right of pre-emption of the appellant had become null and void. The court should have confirmed the said sale made to the second respondent and not otherwise."

The Court of Appeal allowed the appeal of the appellant and upheld the cross-appeal of the first and second respondents/cross-appellants. The judgment of the High Court, Sokoto sitting in its appellate jurisdiction was set aside and in place thereof, the Court of Appeal judgment concluded:-

> "I substitute our judgment which reverses that of the Area Court Grade Ic Sokoto, whereby the sale of the House in dispute by the first respondent to the second respondent is accordingly affirmed. The cross appeal also succeeds."

Dissatisfied with judgment of the Court of Appeal Alhaji Ila Alkamawa, the plaintiff and also appellant in that court further appealed to this Court. In compliance with Rules of this Court learned Counsel for the parties filed and exchanged briefs of argument. Henceforth the plaintiff and the defendants shall be referred to as the appellant and respondents respectively.

The simple facts of this case are as follows:-

The appellant is a next door neighbour to the house in dispute which house was owned by late Magajin Rafi Sokoto Bello and during the latter's life time he entrusted the same to the appellant to take care of. On the death of Magajin Rafi Bello the house in dispute became part of his estate. The first respondent, Hassan Bello and as one of the heirs to late Magajin Rafi Bello agreed with the other remaining heirs to sell the house in dispute. First respondent approached the first appellant and offered the sale of the house to him at a price of ₦30,000 which he declined by saying that the price was too high for him. Thereafter the first respondent sold the house to Alhaji Malami Yaro for ₦26,000. It was after the sale that the appellant instituted an action in the Area Court Grade 1c claiming to repurchase the house on the same price it was sold to the second respondent by exercising his right of "Shuf'ah", i.e. pre-emption, as a next door neighbour.

As I said earlier both parties filed and exchanged briefs. In the appellant's brief the following two issues were raised:-

> "(1) Can the appellant be said to have "waived or abandoned his right of Shuf'ah under Islamic Law having regard to the evidence before the trial court."

(2) Can the sale of the property in dispute by the first respondent to the second respondent be affirmed in accordance with Islamic Law having regard to the facts of the case."

In the brief filed by the respondents three issues were formulated as follows:-

"(*i*) Whether the appellant has *locus standi* to institute the action, Even if the first issue were in the affirmative, having regard to the grounds of appeal . . .

(*ii*) Whether the appeal is competent without obtaining the leave of either the court below or this Honourable Court

(*iii*) Whether the Court of Appeal was right in holding that the appellant has waived or abandoned his right of Shuf'ah having regard to the circumstance of this case."

On 24 March 1998 when the appeal came up for hearing the preliminary objection filed by learned Counsel for the respondent on 20 October 1993 attacking the *locus standi* of the appellant and the competence of the grounds of appeal was withdrawn and it was struck out. With the withdrawal and striking out of the preliminary objection, Issues (*i*) and (*ii*) in the respondent's brief have become equally incompetent and are hereby accordingly struck out. The remaining Issue (*iii*) is covered by Issue 1 of the appellant's brief. So in deciding this appeal I will adopt the two issues formulated in the appellant's brief, which I consider adequate for its disposal.

The two issues raised in the appellant's brief can be merged into one and be re-formulated as follows:-

"The appellant having admitted being a next door neighbour to the house in dispute, has he any right of pre-emption [Shuf'ah] to repurchase the house in dispute from the second respondent on the same price compulsorily under the relevant and applicable Islamic Law?"

It is the submission of learned Counsel for the appellant that the appellant, being the next door neighbour to the house in dispute has the right of first option to purchase the same under the doctrine of Shuf'ah ie pre-emption as enshrined in Islamic Law. He contended that, where the property is sold without the neighbour's permission, the neighbour can trace the property to the third party and pre-empt it, and that under Maliki Law the period within which the pre-emptor can exercise the right is fixed at one year from the time the right accrues. He submitted that in the circumstance of this case the appellant expressed in good time his intention to purchase the property and could not therefore be said to have waived or abandoned his right of pre-emption [Shuf'ah]. Learned Counsel quoted and relied on the Hadith as reported in Bukhari that:-

"O Prophet of Allah I have two neighbours, Which one of the two shall I sell the share first? The prophet replied to the neighbour whose door is nearer to your door."

In reply learned Counsel to the respondent submitted that the first respondent offered the house in dispute for sale to the appellant to which the latter gave a conditional acceptance and made a lower offer below what the first respondent was demanding. He said it was as a result of the equivocal stand by the appellant that the first respondent sold the house to the second respondent for ₦26,000. He submitted that the appellant by his equivocal stand in the transaction was deemed to have waived his right of pre-emption [Shuf'ah] to purchase the property as the next door neighbour to it. He urged the appeal to be dismissed.

The word Shuf'ah or Pre-emption is defined in *Ruxton-Maliki Law* as follows:-

"Pre-emption is the right by which a co-owner in immovable property may redeem from a stranger, in consideration of compensating him, that part of the property which has been sold to him by another of

the co-owners."

It is not disputed that the appellant is the next-door neighbour to the house in dispute. Both parties know the identity and the location of the house being litigated upon. So its identity is a non-issue, the question to be asked and answered is:-

Under the applicable principle of Islamic Law does the appellant as a next-door neighbour to the house in dispute possess the right of pre-emption over its purchase? In other words, can the appellant compulsorily repurchase the house in dispute from the second respondent who is a stranger by refunding the same price he paid for it?

In *Sahihul Bukhari* Vol. 3 page 165 paragraph 2257 the law is stated as follows:-

"Allah's Apostle [P.B.] gave judgment on the right of pre-emption for partners in property which has not been divided up. When boundaries had been fixed between them, then there was no rights of pre-emption."

In *Muwatta Malik* Vol. II page 250 under heading No 35 *The Book of Pre-Emption* [Translated into English by F. Amira Zrein Matraji and published by Dar El-Fikr, Beirut] the law is stated thus:-

"[1420] 1 Yahya narrated from Malik, on the authority of the son of Shihab, from Sai'd bn al-"Musayyib, and from Abu Salama bn Abdur-Rahman bn 'Auf [may Allah be pleased with them] that the Messenger of Allah [May peace and blessings of Allah be upon him] had judged for partners one right of pre-emption in property which has not been divided up. When boundaries had been fixed between them, then there was no right of pre-emption."

Imam Malik was reported to have said, and in confirmation of the above Tradition:-"And on that, the tradition in which there is no difference in it among us."

Imam Malik is also reported, in the same book, to have said-

"[1421] 2 Malik said: That it reached him that Said bn Al - Musayyib was asked about the pre-emption, is there any tradition in it? He said: Yes, the pre-emption in the house and the land, And it does not occur but between partners."

In *Bidayatul Muytahid* Vol. II page 193 both Malik and Shafii were reported to have opined thus-

"The right of pre-emption exists between partners in jointly owned property which has not been divided by the partners, Where it has been divided and boundaries fixed and demarcated, the right of pre-emption abates."

In *Adawi* Vol. II page 229, the author stated the law as follows:-

"Pre-emption exists in Joint property. There is no pre-emption in what had been divided: and a neighbour has no right of pre-emption."

In *Ashalul Madarik* Vol. 3 page 37 it is stated-

Pre-emption is a compulsory existing right between partners in farms and public domain commensurate to the share of each in such Joint property."

In *Ihkamul-Ahkam* [*commentary on Tuhfah*] the author also stated the law as follows on page 198 thereof:-"The majority view of the jurists is that a neighbour has no right of pre-emption."

(See also *Al-Khirshi* Vol. 6 page 163 [*commentary on Mukhtasar el-Khalil*] wherein also it is stated:-

> "It does not accrue to a neighbour who has a right in an access road. This has been construed to mean that the neighbour has no right of pre-emption even where he possesses a right in an access road to the house that had been sold.)"

In *Matn-ar-Risalah of Ibn abi Zayyid* page 189 [translated into English language by F. Amira Zrein Matraji and published by Dar El Fikr, Beirut, Liban] the author said:-

> "But pre-emption is in the public domain. No pre-emption in which is distributed, nor for a neighbour, or a road or a court of a house whose houses have been distributed, nor in the male palm-trees or a well if palm-trees are distributed, or the land.
>
> A pre-emption is but in the land and what is connected of it of the building and the tree."

This is the Islamic Law of the Maliki School which is applicable generally to Northern States of Nigeria. (See the definition of "Muslim personal law" in Area Court Edict, 1967 read together with the definition of the same law in the Sharia Court of Appeal Law (Cap. 122) Vol. III, Laws of Northern Nigeria and Section 14 of the same Law).

In the Area Courts Edict No 2 of 1967 "Muslim personal law" is defined thus:-

> "Muslim personal law has the same meaning as it has in Cap. 122 - Sharia Court of Appeal Law."

In the Sharia Court of Appeal Law Cap. 122 referred to *supra*, "Muslim Law" has been ascribed the following definition in Section 11:-

> "Means Muslim Law of Maliki School governing the matters set out in paragraphs (*a*), (*b*), (*c*) and (*d*)."

Section 14(*a*) of the Sharia Court of Appeal Law also provides thus:-

> "14. The court in the exercise of the jurisdiction vested in it by this Law as regards both substantive law and practice and procedure, shall administer, observe and enforce the observance of, the principles and provisions of:-
>
> (*a*) Muslim law of the Maliki school as customarily interpreted at the place where the trial at first instance took place;"

Section 11(*c*) of the Law further provides that:-

> "(*c*) Where all the parties to the proceedings [whether or not they are Muslims] have by writing under their hand requested the court that hears the case in the first instance to determine that case that case in accordance with Muslim law, any other question."

Reading all the provisions of the Laws referred to above, it can easily be discerned that the applicable Muslim Law in Area Courts is the Islamic Law of the Maliki School. Also going by the interpretation of the words "native law and custom" which includes Muslim Law, the applicable Islamic Law of Maliki School, from the time of establishments of these courts (both before and after the colonisation of the area today being referred to as Northern States of Nigeria and up to today) has been the applicable law in the courts. So on the principle of notoriety the law has gained acceptance and recognition by both the inferior and the superior courts in this country that judicial notice of it can be taken.

Islamic Law is not same as customary law as it does not belong to any particular tribe, It is a complete

system of universal law, more certain and permanent and more universal than the English Common Law.

It is true that there is another Hadith which confers the right of Shuf'ah to a neighbour. This has been interpreted by Islamic Law jurists in different ways, and out of the four Sunni Schools of Law i.e. Maliki, Shafi'i, Hanafi and Hambali, it is only the Hanafi School that confers the right of Shuf'ah on a neighbour. The majority view as stated by Maliki is that a neighbour does not possess that right.

In the matter before us now and from the statement of the law of Maliki School, I come to the conclusion that the appellant being a neighbour to and not a partner in the ownership of the house in dispute, has no right of pre-emption. The sale of the house by the first respondent to the second respondent is valid and in order. The appellant has nothing to waive in the matter as wrongly opined by the Court of Appeal. The appeal fails for the reasons stated above. other than those stated by the Court of Appeal, I dismiss it and affirm the conclusion reached by the Court of Appeal which set aside the decisions of both the trial court and the appellate High Court. The sale of the house by the first respondent to the second respondent is hereby declared valid and is affirmed.

Parties are to bear their own costs in this appeal.

**Uwais, CJN:-** I have had the advantage of reading in draft the judgment read by my learned brother Wali, JSC I entirely agree that this appeal is devoid of merit.

The Islamic Law principle of Shuf'ah (right of pre-emption) under Maliki School is that only a co-owner can exercise the right. A neighbour has no such right except under Hanafi School which is not predominant in Nigeria. Since the Maliki School is the jurisprudential school followed by the large majority of Nigerian Muslims, including the parties to this case, it follows that it is only the principle of Islamic Law enunciated by the Maliki School that is applicable to this case. The appellant is only a neighbour and not a co-owner of the property in dispute. He, therefore, has no right of pre-emption over the property.

It is for this and the fuller reasons contained in the Judgment read by my learned brother Wali, JSC that I too hereby dismiss the appeal and vary the decision of the Court of Appeal, I too make no order as to costs.

**Kutigi, JSC:-** I read before now the judgment just delivered by my learned brother, Wali, JSC. I agree with the conclusion that the sale of the house by the first respondent to the second respondent is valid, proper and binding.

I also agree with him that the appellant who is not a co-owner of the house in question but a mere next-door neighbour, has no right of pre-emption (or Shuf'ah) over the house under the prevailing laws of Maliki School. I make no order as to costs.

**Ogwuegbu, JSC:-** I have had the advantage of reading in advance, the judgment just delivered by my learned brother Wali, JSC with which I fully agree. I can find nothing which I can usefully add. I will dismiss the appeal, There is no order as to cost.

**Onu, JSC:-** I had a preview of the judgment just read by my learned brother Wali, JSC and with it I am in entire

agreement that the appeal lacks substance and must fail.

The main grouse of the appellant leading to this appeal has to do with the exercise of his right of pre-emption called Shuf'ah under Islamic law. He had sued the respondents at the area court Grade 1c, Sokoto over a house of which he was the caretaker for eight years and which the first respondent sold to the second respondent without first offering it to him, being the next door neighbour to the north of the building which first respondent inherited from his father.

The first respondent's defence was to the effect that when he contacted the appellant when he wanted to sell the house, the latter asked him (first respondent) first to ascertain from the market overt the current market value of the building and let him know. That having done so, he communicated same to him but he (appellant) complained that the price fixed was excessive and that if perchance anybody offered to buy it at the price fixed he should be informed. The first respondent having construed this naturally to mean a refusal by the appellant to purchase the property, sold same to second respondent for ₦26,000. A turn around by the appellant on hearing of the sale to the second respondent that he was ready and willing to pay that price having been duly turned down, he (appellant) brought the suit culminating in the appeal herein. The trial Area Court found in favour of the appellant, thus nullifying the sale to second respondent. An appeal by the second respondent to the High Court of Justice, Sokoto culminated in the judgment of the trial Area Court being reversed, and an order for retrial made thereof, "The appeal by the appellant to the Court of Appeal Kaduna Division (*Coram*: Uthman Mohammed, JCA as he then was, Aikawa JCA (of blessed memory) and Okunola, JCA) resulted in the appeal being allowed in part while the cross-appeal also succeeded. The appellant has appealed to this Court contending that under Islamic Law he had the right of first option to buy when the property was to be sold as neighbour of the appellant.

I cannot but share the views expressed by my learned brother Wali, JSC that no such right of pre-emption (Shuf'ah) resided in the second respondent and I too affirm the decision of the court below for reasons other than those stated.

It is for these and the fuller reasons proffered in the leading judgment of my learned brother Wali, JSC that I too dismiss this appeal. I abide by the consequential orders made.

Appeal dismissed.

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- Michael Ezenwa v. I.O. Olalekan Kareem (SC 153/1985)[1990] NGSC 95 (18 May 1990) (/ng/judgment/supreme-court/1990/95)
- CHIME AND 4 OTHERS v. CHIME AND 3 OTHERS (SC 179/1991) [2001] 8 (26 January 2001);

(/ng/judgment/supreme-court/2001/8)

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