REVISITING THE CAUSES OF DELAY IN THE ADJUDICATION OF ISLAMIC PERSONAL LAW CASES IN NIGERIAN JURISPRUDENCE [*•]

Abstract

The Nigerian legal system consists of English-style courts, Islamic courts and customary courts. The Islamic courts do not have exclusive jurisdiction in Islamic law matters as the jurisdiction of the English-style courts also extend to Islamic law matters. Before 1979, the Sharia Court of Appeal of the defunct northern Nigeria was the highest appellate court for Islamic law cases in northern Nigeria. The defunct 1979 Constitution created appeal from the Supreme Court of Appeal of the States to the Court of Appeal and finally to the Supreme Court, and allowed lawyers into Islamic courts. While English-style courts are generally notorious for delay in the disposal of cases, Islamic courts are known for speedy dispensation of justice. The developments introduced by the 1979 Constitution into the administration of Islamic law in the country have brought many factors that are now occasioning delays, and often, inordinate delays, into the final disposal of Islamic cases in northern Nigeria. The paper, using the case study method identifies the causes of delay in the adjudication of Islamic personal law cases in both Islamic and English-style courts in Nigeria with particular reference to northern Nigeria. The paper suggests ways of overcoming the challenges responsible for these delays.

Keywords: Courts, Delay, Adjudication, Cases, Pluralism, Nigeria

1. Introduction

The Nigerian legal system is pluralistic with the common law, Islamic law and customary law as the major legal traditions in the country.[1] This pluralism is reflected in the judiciary which consists of three types of courts, namely English-style courts, Islamic courts and customary courts that are traceable to these three legal traditions respectively. However, State law accommodates Islamic law and customary law not as autonomous legal systems but legal systems whose norms are legally enforceable by State courts only to the extent permitted by the State. Nigerian courts enforce only Islamic and customary law norms that are not (a) unconstitutional,[2] (b) contrary to public policy,[3] (c) incompatible with any statute in force,[4] and (d) repugnant to equity, natural justice and good conscience.[5] Islamic courts (namely, area courts,

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1 See generally A. A. Oba, 'Harmonisation of Shari'ah, Common Law and Customary Law in Nigeria: Problems and Prospects' (2008) 35 *JMCL*, 119-145.

2 Constitution of the Federal Republic of Nigeria 1999, s. 1(3).

3 Evidence Act 2011, s. 14.

4 See the various High Court Laws of the states, for example High Court Law, Cap. H2, Laws of Kwara State, s.34 (1).

5 *Ibid.*

Sharia courts and the Sharia Courts of Appeal) and customary courts do not operate as autonomous systems of courts since the Nigerian judiciary is a unified hierarchical system with a single final court. Islamic courts do not have exclusive jurisdiction in Islamic law matters as the jurisdiction of English-style courts (High Court, Court of Appeal and Supreme Court) also extends to Islamic law (and customary law) matters.[6]

The constitution recognizes Islamic personal law which it defines as consisting of matters relating to family law (marriage, divorce, child custody), wills, inheritance, gifts, and *waqf*).[7] In addition, the constitution makes provisions for the establishment of Sharia Courts of Appeal in the states with an appellate jurisdiction on Islamic personal law matters. In northern Nigeria, area courts/Sharia courts are the courts of first instance in Islamic law cases, appeals from these courts lie to the Sharia Court of Appeal in matters relating to Islamic personal law and to the High Court in all other Islamic law matters.[8] In the southern states, there are no Sharia Courts of Appeal and the High Court is the court of first instance for Islamic law cases.[9] Appeals from the Sharia Courts of Appeal and the High Court respectively go to the Court of Appeal and finally to the Supreme Court.[10] What emerges from these is that Islamic courts and English-style courts adjudicate variously on Islamic personal law cases. While the practice and procedure applicable in Islamic courts are premised on Islamic law,[11] the applicable procedural rules in English-style courts are based largely on English common law.[12]

Prior to the enactment of the 1979 Constitution, was the highest appellate court for Islamic personal law matters in northern Nigeria. In addition, English-style lawyers were barred from Islamic and customary courts during the colonial era because the colonial administrators considered lawyers as not knowledgeable in the laws applicable in these courts and that 'the touts of native lawyers have constantly fomented litigation among the illiterate people of the interior'.[13]

However, the defunct 1979 Constitution changed these. First, the 1979 constitution created appeals from the Sharia Courts of Appeal to the Court of Appeal and finally to the Supreme Court,[14] Secondly, the 1979 Constitution allowed lawyers into Islamic courts. However, this was not through express provisions of the constitution but by judicial interpretation of the

6 See A. A. Oba, 'Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) 52, (4) *AJCL* 859, 865.

7 Constitution of the Federal Republic of Nigeria 1999, s. 277(1) and (2).

8 See Constitution of the Federal Republic of Nigeria 1999 s. 257& 262; and Area Courts Law, Cap. A9, Revised Edition of Laws of Kwara State 2007 s. 54(3).

9 The Constitution provides that, 'There shall be for any State that requires it a Sharia Court of Appeal for that State' see Constitution of the Federal Republic of Nigeria 1999 s. 275 (1).

10 Constitution of the Federal Republic of Nigeria 1999 s. 233 and 240.

11 For example, Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State 2004, s. 13(a) provides that the court shall in matters of "both substantive law and practice and procedure" shall follow inter-alia, the "Islamic law of the Maliki school". In the Area courts, 'Moslem' cases are conducted in accordance with 'Moslem practice and procedure': see Area Courts (Civil Procedure) Rules, Cap. A9, Laws of Kwara State 2004, Order 11, Part I.

12 See the Supreme Court Rules, 2004, the Court of Appeal Rules, 2002 and the various High Court (Civil Procedure) Rules.

13 L. Lugard, *The Dual Mandate in British Tropical Africa* (5th Ed., London: Frank Cass, 1965) p. 544-545.

14 Constitution of the Federal Republic of Nigeria 1979 s. 213 and 219,

constitutional right to counsel.[15] These changes which came after a hot controversy between the Muslim and Christian members of the Constituent Assembly responsible for making the 1979 Constitution,[16] were also retained in the 1979 Constitution.[17] In addition, the 1999 Constitution made lawyers appointable as Kadis of the Sharia Court of Appeal.[18] Delays and high cost of litigation have been of immerse concern in common law jurisdictions across the world.[19] Although the Constitution stipulates the right to "fair hearing within a reasonable time by a court"[20] in civil cases, and judicial decisions in Nigeria have repeatedly affirmed that justice delayed is justice denied,[21] English-style courts in Nigeria are still notorious for delay in the disposal of cases before them.[22]

Prior to the advent of the 1979 Constitution, the adjudication of Islamic personal law cases were outside the jurisdiction of English-style courts and Islamic courts were known for speedy dispensation of justice.[23] However, the position has changed. The developments introduced by the 1979 Constitution into the administration of Islamic law which ushered a more intrusive presence of English-style courts and lawyers into the administration of Islamic personal law in the country have brought many factors that have exacerbated delays in the conclusion of Islamic personal law cases in Nigeria.[24] While there is a vast literature on delays in courts in Nigeria generally, the focus had been on English-style courts and little attention has been given to how the post-1979 developments has introduced delays into the administration of Islamic personal law in Nigeria.

This paper uses the case of *Opobiyi v Muniru* (a case that commenced in 1979 and is stilling pending in the courts) as a case study in identifying the causes of delays in both Islamic

15 See A. A. Oba, 'Lawyers, Legal Education and Shari'ah Courts in Nigeria' (2009) 49 *JLP&UL,* 127-128

16 See an account of this controversy in A. R. Doi, 'The Impact of English Law Concepts on the Administration of Islamic law in Nigeria' in E. Breitinger (Ed), *African and Western Legal Systems in Contact* (1989) p. 44 - 48.

17 See Constitution of the Federal Republic of Nigeria 1999 s. 233 and 240.

18 See Constitution of the Federal Republic of Nigeria 1999 s. 276 (3) (a).

19 See C. Elliot and F. Quinn, *English Legal System* (8th Ed, Harlow: Pearson Longman, 2007), 478-479, 478-479

F.H. Monek, 'Court Delay: Some Causes and Remedies', available at <http://www.iatl.net/files/public/82_court_i4a.pdf> accessed on 26 February 2017, A. Humphreys, 'The System Is Sick': Canada's Courts Are Choking On An Increase In Evidence', *National Post* May 3, 2013 available at< http://news.nationalpost.com/news/canada/canadas-courts-are-choking-on-an-increase-in-evidence> accessed on 26 February 2017.

20 .Constitution of the Federal Republic of Nigeria 1999 s. 31(1). In *Ariori v Elemo* (1983) 1 SC 13, the Supreme Court defines "reasonable time" as "the period of time, in which the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done".

21 For example, see *Salu* v *Egbeibon* (1994) NWLR (Pt. 348) 27.

22 See T. A. Aguda, *The Crisis of Justice* (Akure: Eresu Publishers, 1976) 12-14, A. A. Sanda, *Justice Delayed is Justice Denied* (Ibadan: Spectrum Books 2001), and P. Anyebe, 'Towards Fast Tracking Justice delivery in Civil Proceedings in Nigeria' in E. Azinge and C. J. Dakas (Eds.), *Judicial Reform and Transformation in Nigeria: A Tribute to Hon Justice Dahiru Musdapher* (Lagos: Nigerian Institute of Advanced Legal Studies, 2012) 141-143.

23 S. M. A. Belgore, 'Development in Appellate Practice in the Apex Courts' (1998/1999) 5 *The Jurist*, 45, 48.

24 See I. S. Ismael, 'Consequences of Delaying Distribution of Estate in Islamic Law of Inheritance: The Nigerian Experience' (2016) 24 *Shariah Journal* 307.

courts and English-style courts having jurisdiction in Islamic personal law cases in Nigeria. The paper suggests ways of overcoming these delays.

2. The *Opobiyi V. Muniru* Saga[25]

The case concerns an alleged non-distribution of the estate of one Tukur who died in 1924 leaving behind a son and three daughters. Contrary to Islamic requirements, his estate was not distributed to his children. Consequently, the estate fell into the hands of the son and subsequently, to his own daughter (Masingba) upon his death. The case was filed at the Ilorin Area Court II in 1979 by two of Tukur's grand children against Masingba. The relief sought in the case by the Plaintiffs is that they want "[their] share of the land that belonged to our grandfather of the mother side from the [the defendant] who selflessly held the whole land without [releasing] our share".[26] At the time of filing the suit, all Tukur's children had died.

The case commenced at the Ilorin Area Court II on 16 May 1979. Several witnesses were called upon to testify before the court based on which the court delivered its judgment on 5 February 1980.[27] An appeal was filed at the Ilorin High Court but the court ruled that it had no jurisdiction to hear the appeal and that the Sharia Court of Appeal is the proper appellate court for the case.[28] Therefore, the court ordered that the appeal be transferred to the Sharia Court of Appeal.[29] A further appeal was filed at the Court of Appeal in 1982 and the court delivered its judgment on 23 November 1982 affirming the decision of the High Court.[30] From the commencement of the case to the judgment of the Court of Appeal was less than four years. It was after this that the real delays began. The case was not entered at the Sharia Court of Appeal until 1987, five years after the order of the Court of Appeal. On 22 August 1990, the Sharia Court of Appeal allowed the appeal and ordered a retrial of the case by the Upper Area Court.[31] However, the retrial commenced four years later at the Upper Area Court on 12 October 1994.

The Upper Area Court delivered its judgment dismissing the plaintiff's case slightly over a year later on 8 December 1995.[32] An appeal was filed in 1996 at the Sharia Court of Appeal which delivered its judgment remitting the case back to the Upper Area Court in the same year.[33] The defendant was out of time so filed an application for extension of time within which to appeal to the Court of Appeal. The application filed in 1996 was finally granted by the court but the appeal was not listed in the Court of Appeal until 1999. The Court of Appeal delivered its judgment on 11 July 2002.[34] The court struck out the appeal on the ground that the plaintiffs were not the direct children of Tukur and thus, had no *locus standi* to sue the defendant.

25 The facts in this section is substantially derived from Dr. Ismael Saka Ismael as a practising lawyer with wide experience of Islamic family law litigation in northern Nigeria generally and especially as Counsel in *Opobiyi v. Muniru*.

26 See the record of proceedings of the court on 16 May 1979, on file with the authors.

27 *Opobiyi v. Masingba* (Ilorin UAC No. 2, 5 February 1980).

28 See the jurisdictional conflicts between the High Court and the Sharia Court of Appeal discussed below.

29 We are unable to ascertain the date of filing of the appeal and the date that the court delivered its judgments.

30 *Masingba v. Opobiyi* (1982) 11 CA (Pt. 1) 206.

31 *Opobiyi v. Muniru* (SCA Ilorin, August 22, 1990).

32 *Opobiyi v. Muniru* (UAC 2 Oloje, December 8, 1995).

33 *Opobiyi v. Muniru* (1996) KW State SCA Annual Report 215-31.

34 *Opobiyi v. Muniru* (CA Ilorin, 11 July 2002).

Dissatisfied with this decision, the plaintiffs filed an appeal to the Supreme Court on 31 July 2002. The appeal was in abeyance until the Supreme Court issued a hearing notice in 2010. On the 16 December 2011, the Supreme Court delivered its judgment ordering a re-hearing at the Court of Appeal.[35] On 11 November 2014, the Court of Appeal granted an application to substitute a deceased party with another person and eventually delivered judgment in the substantive appeal on 18 May 2016.[36] The judgment affirmed the decision of the Sharia Court of Appeal given in 1996. The case is now being remitted to the Upper Area Court for retrial as ordered by the Sharia Court of Appeal in 1996. Meanwhile, on 13 January 2017, the plaintiffs/Appellants filed a motion at the Supreme Court for an extension of time within which to appeal against the judgment of the Court of Appeal delivered in 2016. If the Supreme Court grants the application and decides to hear the substantive appeal, the pending retrial at the Upper Area Court will be suspended pending the outcome of the appeal. In essence, the case that commenced in 1979 is still pending in the courts in 2017.

The case of *Opobiyi v. Muniru* is apt as a case study into the causes of delay in concluding Islamic cases in Nigeria. First, the case had passed through all the relevant hierarchies of courts from the lowest to the highest and all possible courts in Nigeria's plural legal system. Secondly, the case spanned the eras of important constitutional changes in the country from the era of the 1979 Constitution to the current 1999 Constitution. Thirdly, since its inception, the parties have vigorously contested the case; their lawyers have raised many legal issues including a wide range of legal technicalities and have deployed many legal strategies. Fourthly and lastly, although there are other cases whose history show inordinate delays but the reasons for the delays are not always apparent from the law reports and thus the detailed reasons for the delays are not known to us.

However, we are intimately familiar with the circumstances of *Opobiyi v. Muniru* because one of us had been counsel for the defendants in the case since 2001. Thus, we have access to the records of proceedings and the other facts beyond the knowledge of a participant observer who is unconnected with the case as counsel or parties. Although the case commenced long before he became involved as counsel, he ascertained the causes of the delays from his clients. In addition, the longest delays in the case occurred after he became counsel in the case. The position now is that the rather simple case that commenced in 1979 is yet to be resolved by the courts in 2016. The case has transverse both Islamic courts and English-style courts. The time that it took to determine the case or appeal from the filing to judgment in Islamic courts were largely reasonable, the case suffered inordinate delays in the English-style courts. Thus, the case offers a clear insight into all known causes of delay in concluding Islamic law cases in Nigeria. What were the causes of this inordinate delay? The causes are many. Some of these causes are present in the Nigerian courts system generally; others are peculiar to common law courts while some are due to the peculiar framework for adjudication of Islamic personal law cases in the country.

3. Causes of The Delays in Nigerian Courts Generally

3.1. Clogs in the Appeal Process

In 1982 when the Court of Appeal delivered its judgment ordering that the appeal be transferred to the Sharia Court of Appeal, the processing of papers thereafter was delayed. It took five years

35 *Opobiyi v. Muniru* (2011) 18 NWLR (Pt. 1278) 387 (SC).
36 *Opobiyi v. Muniru* (CA Ilorin, May 18, 2016).

before the case commenced in the Sharia Court of Appeal in 1987. Again in 1990 when the Sharia Court of Appeal ordered retrial of this case at the Upper Area Court, it was four years later in 1994 that the retrial at the Upper Area Court actually commenced. Processing of appeal papers between courts constituted the major reason for the delay in the case. It also took another three years before appeal from the judgment of the Sharia Court of Appeal and the commencement of hearing of the appeal at the Court of Appeal (and another three years before the Court of Appeal gave its judgment). Again, eight years lapsed from the filing of appeal against the decision of the Court of Appeal in 2002 and the entering of the appeal at the Supreme Court in 2010. In essence, the case languished for years awaiting the attention of appellate courts. Of this, the most years were taken by appeals to English-style courts.

A major cause of delay in the appeal process is the problems connected with the preparation of record of proceedings of the lower court for the use of the appellate court. Judges write courts' proceedings in long hand. Due to the sheer volume of what needs to be recorded, it is not uncommon to find judges who have devised their own personal shorthand codes. In addition, handwritings of judges being hurriedly scribed are often illegible to typists who are responsible for typing out judges' handwriting when preparing record of proceedings. Such typists have to be going forth and back to the judges for deciphering and clarifications. Until recently, typists used manual typewriters to type records of courts proceedings and when there are typing mistakes or textual errors, the whole pages affected must be retyped and this was time-consuming. The use of computers has simplified the process and has alleviated some of these problems but the proceedings are still recorded by judges in long hand and have to be typed manually. Records of proceedings are usually bulky since the court records verbatim what takes place in the courtroom. In addition, multiple copies of the records are required. One certified true copy of the record of proceedings of the court below is required to be sent to the Sharia Court of Appeal for the use of the court and 'necessary copies' on the application of parties,[37] Court of Appeal requires 20 copies of records of proceedings[38] while in appeals from the Court of Appeal, 10 copies are required to be sent to the Supreme Court.[39]

In appeals to the Court of Appeal, it is the duty of the Registrar of the court below (Sharia courts of appeal and high courts) to compile and transmit the record of appeal to the Court of Appeal within sixty days after the filing of a notice of appeal.[40] In order to do this, the Registrar summons the parties and settles the documents to be included in the record of appeal and fix the amount payable by the appellant to cover the cost of making up and forwarding the record of appeal.[41] However, if the registrar fails and or neglects to compile and transmit the records of appeal after 60 days after the filing of the notice of appeal, it becomes mandatory for the Appellant to compile the records of all documents and exhibits necessary for his appeal and transmit to the Court within 30 days after the registrar's failure or neglect.[42]

This rule places the burden on the appellant to ensure that the records get to the appellate court even if the appellant had paid all the official fees for preparation of the same. Registrars are generally nonchalant over preparation of records of appeal since there is no sanction attached to their failure. The rules not only delay preparation of records of appeal, it also opens litigants to

37 Order 3 rule 1(3) & 6(a) and (c), Sharia Court of Appeal Rules, Cap S4, Revised Edition Laws of Kwara State, 2006.

38 Order 8 rule 10(1)(b), Court of Appeal Rules 2011, SI 2011/3.

39 Order 7 rule (4)(1)(c), Supreme Court Rules 1985 (as amended in 1999).

40 Order 8 rule 1, Court of Appeal Rules 2011, SI 2011/3,

41 *Ibid*., Order 8 rule 2.

42 *Ibid*., Order 8 rule 4.

extortion by unscrupulous registrars. The rules in respect of preparation of records of appeals in appeals to the Court of Appeal are similar to those in respect of appeals to the Supreme Court.[43] A major difference is that the burden does not shift to the appellant in the event of the failure of the registrar to prepare the records of appeal.

3.1.2 Delays Due to Clustered Dockets

Another major reason for the delays is the large numbers of appeals pending before the Court of Appeal and Supreme Court respectively. The sheer number of appeals pending before them bogs down both courts. It takes several years for an appeal to be listed for hearing in the Court of Appeal after the filing of the appeal. The position is worse at the Supreme Court where it often takes close to a decade to fix hearing dates for appeals filed in the court. The workload of the Supreme Court is too heavy. The major reason for this is probably that all cases filed at all subordinate courts could find their way to the Supreme Court if the parties are so willing as there is no law or mechanism that prevents any category of cases from ending up in the court.

Again, after the general (presidential, gubernatorial and legislative) elections that take place every four years, there is usually a high number of election petition cases before the Court of Appeal and the Supreme Court.[44] The courts try to decide these petitions expeditiously and this delays the hearing of other cases. There is also the issue of number of judicial personnel. The Constitution states that the number of justices of the Supreme Court shall '*not exceed twenty-one*' while the Court of Appeal shall have '*not less than 49 justices … as may be prescribed by an Act of the National Assembly*'.[45] The National Assembly increased the number of justices of the Court of Appeal to 70 in 2005 and to 90 in 2013.[46] The Supreme Court sits in panels of five justices in ordinary appeals and seven justices in appeals that involve interpretation of the constitution while the Court of Appeal sits in panels consisting of three justices for regular appeals and panels of five justices for appeals that raise constitutional questions.[47] While the Court of Appeal currently has 16 Divisions and a total of 89 justices,[48] the Supreme Court that hears appeals from all these Divisions has only one court that sits randomly in panels of five (seven for appeals on constitutional issues)[49] and has a total of 17 justices.[50]

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43 See Order 7, rules 1-4, Supreme Court Rules 1985 (as amended)

44 A Anon, "Senate Increases Number of Appeal Court Justices to 90" *The Nigerian Voice News*, January 19, 2012 available at <http://www.thenigerianvoice.com/news/80338/1/senate-increases-number-of-appeal-court-justices-t.html> accessed on 2 November 2014.

45 Constitution of the Federal Republic of Nigeria 1999, sections 230(2)(b) and 237 (2) (b),(Supreme Court and Court of Appeal respectively) (emphasis ours).

46 See Court of Appeal Act No. 15 of 2005, section 1, and Court of Appeal (Amendment) Act 2013 section 2.

47 Constitution of the Federal Republic of Nigeria 1999, Sections 234 and 247 (Supreme Court and Court of Appeal respectively).

48 See *The Court of Appeal* website available at <http://www.courtofappeal.gov.ng> accessed on 2 November 2014.

49 Section 234, 1999 Constitution.

50 See *The Court of Appeal* available at <http://www.courtofappeal.gov.ng/index.php?option=com_content&view=article&id=74&Itemid=7 > accessed on 2 November 2014.

Recently, the Supreme Court and the Court of Appeal respectively issued practice directions to 'fast track' appeal before their courts. However, only appeals which fall under the offences of Terrorism, Rape, Kidnapping, Corruption, Money Laundering and Human Trafficking or relates to interlocutory applications benefit from these practice directions.[51] The Court of Appeal also has a practice direction meant to fast track election cases.[52] While the practice directions have speeded up the hearing of those cases they are meant for, they have contributed to the delay in hearing the other categories of cases such as Islamic law cases that are not included within the ambit of the practice directions.

3.1.3 Delays Caused by Lawyers

There are some delays caused by the carelessness of lawyers. These include carelessness in filing cases or appeals before the wrong courts [53] and in not seeking leave of court where necessary and in filing papers that do not comply with court rules. Often, lawyers do these deliberately to benefit in terms of fees or to please clients who want to delay a case in order to wear out or frustrate opponents.

Again, lawyers are apt to file frivolous cases either in order to please clients or to multiply the fees chargeable. For instance, after the Court of Appeal delivered its judgment in 2002, the lawyers for both parties filed what the courts considered as frivolous cases. The Plaintiffs filed an application for stay of execution of the judgment of the Court of Appeal which application the Court of Appeal refused on 13 January 2004.[54] There was also a claim for damages for destruction of a building under construction then on the disputed land filed by the defendant(s) at the District Court on 19 August 2002 which action was dismissed by the court on 17 February 2003 for want of jurisdiction.[55] Again, on 4 October 2004, the Plaintiffs filed at the Court of Appeal an application for committal to prison for an alleged contempt of order of the court that the parties should maintain *status quo* on the disputed land which action was dismissed by the court on 6 February 2006.[56] In dismissing the application as frivolous, the court rebuked both counsel for delaying the substantive case by filing the unnecessary application.[57]

3.1.4 Delays Caused by Litigants

Unlike litigation in Islamic courts in the pre-1979 era, litigation is an expensive venture now. Lawyers are expensive and lawyers would generally not go on with the case of a client who has not perfected the lawyer's brief (that is, has not paid the lawyer's professional charges). Courts will normally grant an adjournment where a lawyer alleges that his brief has not been perfected. In addition, there are also a multiple of court fees and cost of preparing the records of proceedings in the event of an appeal. The appellant is responsible for the cost of preparing the multiple copies of the records of proceedings and for sending them to the appellate court. The

51 Rules 1(1)(b) and 2(1)(a), Supreme Court (Criminal Appeals) Practice Directions 2013 and sections 1 and 2 (b), Court of Appeal Practice Direction 2013.

52 Election Tribunal and Court Practice Directions 2011, Statutory Instrument No. 4 of 2011.

53 See I. S. Ismael, "An Examination of Causes of Delay in the Distribution of Estates in Ilorin and Its Environs" 3, 2 *J I TC* 2-3 (2013).

54 *Opobiyi v. Muniru* (2005) 15 NWLR (Pt. 948) 320 (CA).

55 *Muniru v. Okeodo* (DC Ilorin, February 17, 2003).

56 *Opobiyi v. Muniru* (CA Ilorin, February 6, 2006).

57 *Opobiyi v. Muniru* (CA Ilorin, February 6, 2006) 1, 3. See also Ismael Saka Ismael, *Influence of Culture on Islamic Law of Inheritance: A Case Study of Estate Distribution among the Muslims of Kwara State* (2012) (PhD Thesis, Usmanu Danfodiyo University, Sokoto).

official fees payable are fixed by the registrars of courts on case by case basis.[58] Appellants generally have to pay much more than the official fees charged for preparation of records of proceedings and are often entirely at the mercy of court officials in this respect.

3.1.5 Requests for Adjournments

The case study suffered adjournments at various levels and in various courts. The adjournments were at the instance of the courts, lawyers and litigants for such reasons as absence from court, sickness, death, fatigue, and in particular for lawyers, commitment at superior courts, and for litigants, sheer weariness and/of financial limitations. In both Islamic and common law courts, granting adjournments are at the discretion of judges who will reject frivolous request for adjournments by the parties. In addition, Islamic scholars have fixed the maximum numbers of days that can be granted as adjournments to the parties to enable them take necessary steps.[59] However, judges of Islamic courts who feel that they are bound in matters of adjournment by statutory rules of court rather than by the rules formulated by classical Islamic scholars, no longer adhere to these limits. Incessant adjournments are still major causes for delays particularly in the common law courts. Adjournments are generally much shorter and less frequent in Islamic courts than in the common law courts.

3.1.6 Poor Institutional and Infrastructural Facilities

According to a former Chief Justice of Nigeria, Justice **Mariam Mukhtar,** '*the poor institutional and infrastructural facilities associated with the nation's justice system*' are responsible for the slow administration of justice in the country.[60] Institutional wise, there are a dearth of qualified personnel such as translators, interpreters and research assistants to assist the courts. The country is in crisis concerning infrastructure especially irregular power supply, and this adversely affects courts. For instance, modern courts are generally designed to be used with air conditioners and erratic power supply makes hearing of cases impossible in heated and stuffy courts. There are other factors beyond the control of court, such as lawyers and litigants' protests and strikes by court staff that prevented the courts from sitting, thereby forcing adjournments of the case.

3.1.7 Corruption

It is well-known that corruption is endemic in Nigeria. The courts are no exception in this regard.[61] It is often difficult to get the processes going in a case without having to bribe court officials who deliberately frustrate anyone who does not pay bribes. This they do with impunity.

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58 For example, see Order 14 rule 2, Sharia Court of Appeal Rules (Kwara State), Order 8 rule 2, Court of Appeal Rules 2011, SI 2011/3 and Order 7 rule 3, Supreme Court Rules 1985.

59 A. Orire, *Shari'a: A Misunderstood Legal System* (Zaria: Sankore Educational Publishers, Zaria, 2007) p. 295-296.

60 A Anon, 'Nigeria's Chief Justice Blames Slow Administration of Justice on poor Infrastructure' (2014) *The Court of Appeal* available at< http://www.courtofappeal.gov.ng/> accessed on 12 October 2014.

61 O O Iruoma, *Eradicating Delay in the Administration of Justice in African Courts: A Comparative Analysis of South African and Nigerian Courts* (2005) (Unpublished LL.M. Dissertation, University of Pretoria) available at <http://repository.up.ac.za/bitstream/handle/2263/942/obiokoye_io_1.pdf?sequence=1.> accessed on 27 December 2016.

3.1.8 Jurisdictional Conflicts between the Sharia Court of Appeal and the High Court

As noted above, under the 1979 and 1999 Constitutions, the Sharia Court of Appeal has appellant jurisdiction in matters relating to Islamic personal law while the High Court has appellant jurisdiction in all other Islamic law matters. It was the fault of the appellants to have filed in the appeal against the judgment of the trial is court at the High Court instead of filing it at the Sharia Court of Appeal. Probably, the appellants believed that the case is a customary law matter in which case the proper forum would be the High Court whereas as the Court of Appeal rightly pointed out, the case is one of Islamic personal law within the jurisdiction of the Sharia Court of Appeal. In addition, given the wide 'unlimited' jurisdiction that the 1979 Constitution appears to have conferred on the High Court,[62] there was a general confusion about the jurisdiction of the High Court in relation to Islamic personal law cases.

Opobiyi v Muniru was one of the first cases that raised the issue at the Court of Appeal.[63] The Court of Appeal and Supreme Court subsequently resolved this conflict by holding that the jurisdiction of the Sharia Court of Appeal is limited to appeals on matters relating to Islamic personal law and that this jurisdiction is exclusive to the court while the High Court has exclusive jurisdiction in all other matters of Islamic law.[64] In spite of this, cases of jurisdictional crisis between both courts have not abated as questions often arise as to which Islamic cases are actually outside the ambit of Islamic personal law and this leads to delays in the final adjudication of those cases.[65]

3.1.9 The 'Sharia Panel' at the Court of Appeal

The Constitution provides that a panel of the Court of Appeal consisting of not less than three Justices of the court learned in Islamic personal law shall hear appeals from the Sharia Court of Appeal.[66] However, the panel is not a standing one with specific justices; it is an ad hoc one formed as and when necessary. The problem is that the few justices of the Court of Appeal who are qualified to be part of the Islamic law panels are serving Divisions of the court across the country. The justices are primarily regular justices of the court when in deploying them to Divisions of the court, the issue of their expertise in Islamic law is not usually a major factor. Thus in practice, these justices are scattered in the various Divisions of the court and have to be brought together to constitute Islamic law panels of the court when so needed at any Division of the court. In the case under consideration, the delay between the listing of the appeal before the Court of Appeal Ilorin Division in 1999 and the actual hearing at the court in 2002 was due partly to the difficulties encountered by the President of the Court of Appeal in arranging for qualified justices to constitute the panel of three justices to hear the appeal.[67]

Additional delay in listing *Opobiyi v Muniru* for hearing at the Court of Appeal was occasioned by the proposal to establish Division of the Court of Appeal at Ilorin after the appeal was filed at the Kaduna Division of the court in 1996. The Ilorin Division took sometime before it was established. Although the appeal was filed at the Kaduna Division, given the anticipated

62 See Constitution of the Federal Republic of Nigeria 1979 s. 236 (1) now s. 272 (1), Constitution of the Federal Republic of Nigeria 1999.
63 *Masingba v. Opobiyi* (1982) 11 CA (Pt. 1) 206, 211-212.
64 *Abuja v. Bizi* (1989) 5 NWLR (Pt. 119) 120 (CA).
65 See *Garba v. Dogon* (1991) 1 NWLR (Pt. 165) 107 (CA); *Abdulsalaam v. Salawu* (2002) SCNJ 388 (SC); and *Bamamu v. Yaro* [2015] 3 SQLR (Pt. 2) 235 (CA).
66 *Ibid.,* section 247(1)(a).
67 Comments made by the justices at the commencement of the hearing of the appeal.

establishment of the Ilorin Division, the Kaduna Division was no longer interested in hearing the appeal and hearing notices were issued for the appeal to be heard at the Ado Ekiti Division of the court which is closer to Ilorin. However, the hearing of the substantive appeal was frustrated by the non-availability of Islamic law experts at this Division of the court and the hearing of the appeal was adjourned several times for this reason. Eventually, the hearing of the appeal commenced at the Ilorin Division on 20 May 2002 and judgment was delivered on 11 July 2002. Even then, we believe that contrary to constitutional provisions, a justice who is not learned in Islamic law joined the panel that heard the appeal. Such arrangements are usual when for whatever reason it is impossible logistically to secure the participation of the required number of justice learned in Islamic law.[68] It is significant that the interlocutory applications in the case study (application for stay of execution,[69] contempt of court proceeding[70]) and main case (substantive appeal[71]) at the Court of Appeal were heard and determined between 2002 and 2006 at the Ilorin judicial Division by different panels of justices. The court gets away with non-compliance with the constitutional requirement regarding expertise in Islamic law because as noted above, all the justices of the court are appointed without specifying whether they are also experts in Islamic law and it is therefore difficult to tell which justice is also an Islamic expert except if one knows the academic qualifications and pre-judicial appointments of the justices.

3.1.10 Common Law Technicalities and Want of Knowledge of Islamic Law

Common law is a very technical law full of procedural technicalities. Lawyers often invoke these technicalities in order to delay and frustrate justice. These include filing of formal applications for almost everything a party wants from the court. These formal applications entail motion papers, affidavits in support of the motion, counter-affidavits by the respondent, listing of the application for hearing, adjournments of hearings, preliminary objections to motion papers, form and averments in the affidavits that invariably contribute to the delay in hearing the application and the substantive suit.

Incompetence among lawyers is a well-known cause of delays in the judicial process in Nigeria.[72] While this is a factor in common law cases in common law courts, this problem is exacerbated in Islamic courts. Islamic law is different from common law. Since the lawyers' training in Nigeria is focused on producing lawyers in the common law mould, many fully qualify as lawyers with little or no knowledge of Islamic law.[73] However, as noted above, all lawyers in Nigeria have right to audience before all courts in the country. Thus, there is nothing preventing lawyers who have no training in Islamic law from appearing in Islamic courts in the country. When such lawyers appear in Islamic courts, their inability to articulate the proper legal issues and principles result in unnecessary delays.

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68 For example, see *Jimoh v. Adunni* (2001) 14 N.W.L.R. (Pt. 734) 519 (CA); *Sharu v. Umaru* (2003) 1 N.W.L.R. (Pt. 800) 46 (CA) and *Bargoni v. Kiru* (2006) 3 SLR (Pt. 3) 12 (CA);

69 *Opobiyi v. Muniru* (2005) 15 NWLR (Pt. 948) 320 (CA).

70 *Opobiyi v. Muniru* (CA Ilorin, 6 February 2006).

71 *Opobiyi v Muniru* (CA Ilorin Division, 11 July 2002).

72 See J Jibueze, December 11, 2014, 'How Sabotage, Blackmail, Undue Delays are Killing the Judiciary (2)', *The Nation,* available at <http://thenationonlineng.net/sabotage-blackmail-undue-delays-killing-judiciary-2/.> accessed on 20 December .2016.

73 AA Oba (n. 15)

The introduction of lawyers into Islamic courts is compounded by the new trend of appointing lawyers rather than the previous practice of appointing persons with Islamic law or Islamic studies qualifications but are not lawyers as judges in these courts.[74] Some states now appoint only legal practitioners as judges of area courts.[75] The development has increased the invocation of common law technicalities in Islamic courts with resultant delays.[76]

3.1.11 Delay Breeds Delay

Several consequences of the delay also become further reasons for delays. For example, with delays came deaths of parties and valuable time is wasted on the formal applications for substitution of other persons in place of the deceased litigants. On 11 November 2014, such application was brought before the Court of Appeal.[77] In the case, such applications had been filed at least thrice by each of the parties making a total of six times that the names of the parties have changed. As at now, all the original litigants are dead. Changes in the names of the parties make such cases difficult to track for research purposes. With delays the purse of the litigants are often overstretch and cases lie in abeyance until they can accumulate more funds to continue the prosecution of the case.

4. The Way Forward

Delays in the justice system have many negative effects. It puts unnecessary stress and tensions on litigants that can result in sicknesses. It leads to loss of interest in particular cases, general aversion to litigation and a distrust of the courts. In not having recourse to litigation, where desirable to do so, parties to conflicts are compelled to put up with injustices that ought to have remedies in the courts. Delayed justice often means that the outcome becomes meaningless to the parties if they are still alive or to their heirs and successors if they have died in the course of the litigation. Thus, it is pertinent that the causes of delay in the adjudication of Islamic law cases in the Nigerian legal system are removed.

First, it is important to appreciate the fact that the remedy does not lie in the establishment of more courts or in the appointment of more judges. Justice Belgore rightly pointed out that even though courts have multiplied several folds over in the country, delays in the dispensation of justice persist.[78] According to His Lordship, the remedy for delays in justice delivery cannot be that of more courts opened and certainly not in the appointment of more judges, but in streamlining procedures whereby 'archaic and obstructive adversaries' will be removed.[79] Below are some suggestions towards achieving these objectives.

4.1 Appeals Beyond the Sharia Court of Appeal

As noted above, one of these changes brought by the 1979 Constitution is the introduction of the appeal channels to the Court of Appeal and the Supreme Court from the decisions of the Sharia Court of Appeal. As the case study shows, the major delays occur when appeals are filed in the

74 S. 276(3)(a), 1999 Constitution paved way for this by allowing lawyers to be appointed a Kadis of the Sharia Courts of Appeal.

75 For example in Kwara State, since 2006, only legal practitioners are qualified for appointment as Area Court and Upper Area Court judges: see s. 4A (1)(a), (b) Area Court Law, (as amended by the Kwara State Law Revision (Miscellaneous) (Amendment) Law, 2006).

76 SMA Belgore (n. 23) p.46.

77 See the Motion on Notice in *Opobiyi v. Muniru* dated and filed on 13 October 2014 (On file with the Respondent's Counsel).

78 SMA Belgore (n. 23) p. 46.

79 *Ibid.*

Court of Appeal and the Supreme Court. The case has in fact been variously pending before both courts since 1996.

Also inherent in appeals to the Court of Appeal is the requirement of special Islamic law panels at the Court of Appeal to hear appeals from the Sharia Courts of Appeal. It is obvious that constituting this special panel has been problematic for logistic reasons. Thus, the suggestion that a standing Sharia panel at the Court of Appeal should be put in place to avoid these problems, which are caused essentially by the ad hoc nature of the Sharia panels. Better still, the establishment of the Federal Sharia Court of Appeal suggested by the Constitution Drafting Committee (CDC) responsible for the drafting of the 1979 Constitution which was rejected by the Constituent Assembly that finalized the 1979 Constitution is more pertinent now. The CDC suggested that the court should be an intermediate court of appeal between the Sharia Courts of Appeal of the states and the Supreme Court.[80] Perhaps, the best solution is the suggestion by the All Nigerian Judges Conference held in Lagos in 1972 that Islamic law cases terminate at a Federal Sharia Court of Appeal to be established for that purpose.[81] This suggestion is more pertinent given the lack of expertise of Islamic law among the justices of the Supreme Court.[82]

4.2 Jurisdictional Conflicts between the Sharia Courts of Appeal and the High Court

The law should be amended so that appeals in all Islamic law matters go exclusively to the Sharia Court of Appeal. This will eliminate the jurisdictional conflicts between the Sharia Court of Appeal and the High Court. However, this had proved to be difficult from political and legal angles. Attempts at constitutional conferences after 1979 to extend the jurisdiction of the Sharia Courts of Appeal were rejected by non-Muslims who formed the majority in the various Constituent Assemblies even though Muslims are in the majority in the country.[83] The constitutional amendment effected by the Military regimes in 1986 and 1993 to extend the jurisdiction of the Sharia Courts of Appeal were frustrated by the courts which held that the amendment did not achieve that purpose.[84] Again, Statutes that were promulgated in the post 1999 era by some northern States to enlarge the jurisdiction of the Sharia Courts of Appeal to all Islamic cases were declared unconstitutional by the courts.[85]

4.3 Introduction of Lawyers into Islamic Courts

80 Constitution Drafting Committee, *Report of the Constitution Drafting Committee,* 108 & 113 *Vol. II* (Lagos: Federal Ministry of Information, 1976).

81 See AR Doi, (n. 16) p. 46-47.

82 It is not mandatory to have any justices of the court who is also learned in Islamic law. The Constitution merely provides that when appointing justices to the Supreme Court and the Court of Appeal, the President shall have regard to the need to ensure that there are among the holders of such offices persons learned in Islamic personal law and persons learned in Customary law: Constitution of the Federal Republic of Nigeria 1979, s 288(1).

83 AA Oba (n. 6) p.872-874. There are no official census figures in Nigeria, however, the Central Intelligence Agency (CIA) estimates that the religious distribution in Nigeria is Muslim 50%, Christian 40%, and indigenous beliefs 10%, See Central Intelligence Agency: *The World Factbook* 2015 available at< https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> accessed on 22 October 2016.

84 See *Abuja v. Bizi* (1989) 5 NWLR (Pt. 119) 120 (CA) and *Maida v. Modu* (2000) 4 NWLR (Pt. 659) 99 (CA).

85 See *Kanawa v. Mai Kaset* (2007) 10 NWLR (Pt. 1042) 283 (CA) and *Faransi v Noma* (2007) 9 N.W.L.R. (Pt. 1041) 202 (CA).

The way forward here is that courts should adhere strictly to Islamic law procedures rather than common law procedures. This will mean that the laws governing procedures in Islamic and English-style courts have to be amended to reflect this. In addition, only lawyers who are also learned in Islamic law should be allowed to practice and adjudicate in Islamic courts. The oft-repeated call for a 'Sharia bar' that will admit only those who have undergone the proper Islamic law training and examinations is one deserving of consideration by the Nigerian legislature.[86]

4.4 Reform in Preparation of Records of Appeal

The preparation of records of proceedings of the courts should be made litigant friendly. Once the parties paid the official fees, the burden should be on the registry of the court below to ensure that the records get to the appellate court and registrars should face disciplinary measures if they fail to meet up with the deadline for forwarding the records to the appellate court.

5. Conclusion

Delays in the disposal of Islamic personal law cases in Nigeria are due largely to the massive Anglicization of Islamic courts that the 1979 Constitution introduced. More significantly, from the comparative law perspective, the delay in the adjudication of Islamic law cases in Nigerian courts highlights some of the differences between the judicial processes and procedures under the common law and Islamic law. There is also the need to improve the infrastructure of the courts and to strengthen the court registries to ensure speed processing of record of court proceedings. Lastly, there is the need for the establishment of a specialized professional body for Islamic law practitioners so that only those who are learned in Islamic law can participate as judges and lawyers in the administration of Islamic law.

86 AA Oba (n. 15).