

Ways of Commencing Civil Action in Islamic Law Courts

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Abstract

Islam provides for the ways of commencing action in the Islamic courts. The conventional courts provide for procedure of filing matters in their courts and this filing of court processes are filed differently. The ways of filing civil action in a magistracy court is different from the way of filing criminal matters in the same courts. Islamic courts are no exceptions to this rule, the ways of filing civil matters is different from the ways of filing criminal matters in the Islamic courts and failure to follow the procedural rules will amount to dismissal of such action. This paper focuses on the ways of filing civil action in the Islamic courts and the views of the Islamic scholars are employed in order to support the procedure as laid down in Islamic law. There were efforts by the Ugandan Muslims in ensuring the Ugandan government to establish Islamic courts for the Ugandan Muslims; this paper will guide the legal practitioners in the Islamic courts to know how to file a civil matter in the Islamic courts in Uganda. The paper will also guide the law students aspiring to practice as a lawyers/legal practitioner in the Ugandan Islamic courts if established. The paper will also educate the academician and non-academician alike.

Keywords: Islam; Civil Action; Court.

Introduction

Islamic law provides the procedure through which civil action or disputes between individuals can be instituted in the court of law. Parties are encouraged to reconcile their disputes amicably if reconciliation process fails; the only option left to an aggrieved party is to institute an action in court so that the dispute can be adjudicated upon. However, Islamic law of procedure requires that before commencement of civil trial, the judge must ensure he has power (jurisdiction) to entertain the dispute. It is also paramount for the judge to identify the type of claim and subject matter before him in order to decide the proper plaintiff and the defendant between parties appearing before him. Proper identification of the parties' position will assist the judge to know on whom the burden of proof laid. The judge must ensure that the defendant has been properly served with the summons. Civil action in Islamic law is commenced by way of complaint.

It is the aim of this paper to discuss the jurisdiction of the court to entertain a suit filed before it. Competency of the parties to institute an action and the methodology involved by the jurist to determine proper position of the parties would be discussed. Service of court processes, the mode of the service and the person to bear the cost of the service is within the scope and aim of this paper. Subject matter of litigation and the conditions that must be satisfied before the subject matter can be recognized by the court under Islamic law of procedure is also within the scope of this paper. In the course of analysis in this paper, reference will be made to relevant views of the Muslim jurists, statutory provisions and case law decided by Nigerian superior courts on Islamic law of practice and procedure.

Jurisdiction

The power of judge to entertain an action depends on the subject matter in dispute and parties involved in the suit. Subject matter can either be landed property (fixed assets), chattels or money. Defendant can be resident (Muqim) or a traveler (Musafir). The popular view of the Maliki School is that a non-traveler can only be sued at his domicile notwithstanding where the subject matter is situated. In the case of the traveler, he is to be sued wherever he is found, irrespective of where the subject matter of the litigation is situated. However, Ibn Al-majishun differed from the popular opinion of the Maliki School in respect of landed property, and held for instance that if a resident of Madina owned a House (fixed property) in Makkah and a person domiciled in Makkah made a claim of ownership over the House; action should be instituted in Makkah, where the subject matter is situated. Then the judge in Makkah should take down the witnesses' testimony and other evidence of ownership the plaintiff will rely on to prove his case; thereafter, the judge in person or through a duly appointed representative to defend the action.

This is also the opinion of Sahnun and Ibn Kinana. Furthermore, Mutraf and Asbagh did not agree with the opinion of Ibn al-Majishun. The view offered by them, is in line with the popular opinion of the Maliki School; i.e. the action (in the illustration given by Ibn al-Majishun) should be instituted (in Madina) where the defendant

is resident. Mutraf and Asbagh went further to relax the rule that action must always be instituted at the defendant's place of abode. To them, the plaintiff is entitled to commence the action by lodging a complaint before the judge in his area of domicile. The judge in the plaintiff town shall take down the plaintiff's claim and evidences; thereafter, the judge should transmit the record of proceedings to the judge of defendant's place of residence, who should in turn verify the authenticity of the record of proceedings transmitted to him who if satisfied with the genuineness of the transmitted record of proceedings will be bound to act on it. The defendant shall be summoned by the judge and caused to make his defense if any. If the defendant has no defense, judgment should be entered against him.

Furthermore, Mutraf and Asbagh state that, where the plaintiff decides to institute an action at the defendant's place of residence and his witnesses are residing at his Home town i.e. (plaintiff's home town) the judge of the defendant's home town shall write to the judge of the plaintiff's residence to take down the testimonies of the said witnesses on his behalf and transmit the record of proceedings to him. It is permitted under Islamic law to have more than one court in a town. This was practice in big Muslim cities where the population density was very high and therefore a single court cannot cope with the demands of the people. Where there is more than one court in a town, each judge should be given his own jurisdiction and power i.e. to state whether the judge should try only civil or criminal cases or both. A judge may have power to entertain all kinds of cases in the part of a town or area within which he resides. He can execute judgments in the area of his jurisdiction between parties that are domiciled there and person that come in to his area of jurisdiction. The jurisdiction of a judge to entertain a matter may also be limited to an amount of claim.

Moreover, a judge can be given unlimited jurisdiction or general powers to entertain disputes, and some issues in the public interest. The judge that has general or limited jurisdiction is empowered by law to entertain ten matters as follows:

1. To determine cases either through reconciling the litigants or by delivering a verdict and force litigants to comply with it
2. The judge has power to retrieve the subject matter of a claim from a defendant, and hand it over to a plaintiff after the latter has proved his claim
3. For the purpose of wealth protection and executing contracts, the judge has power to act as guardian for an infant, insane, imbecile and bankrupt person.
4. The judge has power to manage and control trusts.
5. The judge has power to manage and control bequests.
6. The judge has power to give out an orphan's hand to marriage.
7. The judge has power to execute rights. If the right sought to be executed is that of Allah, the judge shall execute it completely (without waiver) once the right stands proved before the judge. If it is a private right to be executed, the judge shall execute the right of the claim of the person entitle to it.
8. The judge has power over matters pertaining to public interest brought to him by an aggrieved person. He is also empowered to inquire and identify such matters of public interest *suo moto* i.e. without a complainant and determine or settle it.
9. The judge has power to supervise and control auxiliary staff of his court, where he discovers such staff is wanting in character, he can change him with another or employ additional worker to assist the staff found wanting.
10. The judge has the inherent powers to ensure equality between the parties that appear before him and deliver judgment with justice. He should also not follow his personal interest as enjoined by Allah (S.W.T.) thus:
'O! Dawud We did indeed make thee vicegerent on earth: so judge thou between men in truth (and justice): nor follow that the lust (of thy heart) they will mislead thee from the path of God: for those who wonder astray from the path of God, is a penalty grievous, for that they forget the day of account''.

In the historic letter written by Khalifah Umar (RA) to his judge, Abu-musa al-asha'ri, he states the importance of doing justice between the litigants:

'... for establishing justice in the courts of law God will grant you rich rewards and give you rich reputation''.
 In Nigeria, jurisdiction of courts is a creation of law. Shari'a Courts owe their jurisdiction to the State laws establishing them. Shari'a courts have jurisdiction to hear and determine civil matters and causes where all the

parties are Muslims. Where one of the parties is a non-Muslim, the court has no jurisdiction unless the non-Muslim party gives a written consent. Territorial jurisdiction of Shari'a Courts is limited to a specified territory. The territorial jurisdiction of Shari'a Courts is limited to specific local government area while the upper Shari'a Court is empowered to assume jurisdiction in any matter or dispute that occurs within the territorial boundaries of a state. The jurisdiction of Shari'a Court of Appeal of a State in Nigeria for example, is provided for by section 277 of the 1999, Nigerian Constitution. The section provides thus:

“The Shari'a Court of Appeal of a State shall in addition to such other jurisdiction as may be conferred upon it by law of a State, exercise such appellate and supervisory jurisdiction in civil proceedings involving question of Islamic personal law which the Court is competent to decide in accordance with the provisions of (2) of this section.

From the above constitutional provision, it is clear that the Shari'a Court of Appeal has both appellate and supervisory jurisdiction; the jurisdiction is limited to proceedings involving question of Islamic personal law. This was the interpretation made in the case of *Usman V. Umaru*, (1992) 7 SCNJ p. 388 by the Supreme Court of Nigeria. In the case of *Magaji V. Matari*, (2000) 5 SCNJ p. 140., the Supreme Court reiterated its earlier position that the jurisdiction of Shari'a Court of Appeal is limited to issues covering any dispute over marriage contracted in accordance with Islamic law (Nikah), its dissolution, guardianship of children, (Hadanah), endowments made by Muslim individuals or organisations which are not registered under the perpetual succession Act (waqf), gifts made by a Muslim (Hibah) and inheritance (Meerath). Therefore, where the subject matter of a plaintiff's claim is simply a matter of declaration of title to land or sale of landed property it is quite unconnected with Islamic personal law. The Shari'a Court of Appeal lacks jurisdiction to entertain any appeal arising therefrom, like wise High Courts have no power to entertain appeals bordering on question of Islamic law.

In the case of *Muhammad Jaafaru V. Hajiya Habiba Dakata*, (2005) 3 SLR (pt.iv) p. 34, the court of appeal held that the Shari'a Court of Appeal is the only court saddled with the jurisdiction to hear and determine appeals on Islamic personal law not the High court. The fact of this case was that one Habiba Dawakin Dakata instituted an action against Malam Jafaru and Zuwaira Fanisau, praying the trial (Upper Shari'a) Court No. 2 Kano state to divide a share of Farmland they inherited in possession of Malam Jafaru. The trial court granted the relief sought by the plaintiff. The defendants became aggrieved with the decision of the trial court and filed an appeal before the High Court of Justice, Kano State. The High Court affirmed the judgment of the trial court. The duo (defendant) dissatisfied with the decision of the High Court further lodged an appeal before the Court of Appeal, Kaduna State Division. The Court of Appeal held that, the decision of Kano State High Court was given without jurisdiction.

However, the Court of Appeal is constitutionally empowered to the exclusion of all other courts to entertain an appeal as of right in any civil proceedings from the decision of a Shari'a Court of

Appeal with respect to any question of Islamic personal law which the Shari'a Court of Appeal is competent to decide. Any right of appeal to the court of appeal from the decisions of Shari'a Court of Appeal conferred by Sec. 244 of the Nigerian Constitution shall be:

- (a) Exercisable at the instance of a party thereto (i.e. to the case) or with the leave of the Shari'a Court of Appeal or of the Court of Appeal, at the instance of any other person having an interest in the matter; and
- (b) Exercised in accordance with an Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the court of appeal. Whenever the Court of Appeal is to exercise jurisdiction on matters of Islamic law it shall sit with judges learned in Islamic law.

Section 230 of the 1999 Nigerian Constitution establishes the Supreme Court of Nigeria. The court shall have jurisdiction to the exclusion of any other court in Nigeria, to hear and determine appeal emanating from the Court of Appeal in civil proceedings on question of Islamic personal law is final and is not appealable to any other court, body or person.

Parties

A valid action under Islamic law of procedure is the one which is commenced by a free person not a slave; the rational not insane or idiot; matured person not immature. A plaintiff who has one or all of the (aforementioned) negative attributes is not competent to initiate a suit as he lacks the requisite and legal capacity to do so. The same requirements apply to the defendant. The position of the law is that parties and their legal representatives must have Ahliyyah – legal capacity which presupposes the parties' ability to sustain an action before a court of law.

One complex issue in Islamic law of procedure is the task of distinguishing Al-mudda'iy, the plaintiff from the Al-mudda'iy alayhi, the defendant. It does not follow in Islamic law that he who goes to the court to lodge a complaint is necessarily the Mudda'iy (plaintiff), while the person against whom the complaint is lodged is automatically the Mudda'iy alayhi (defendant). A judge that is not sure of who is the plaintiff and who is the defendant among the parties appearing before him cannot escape miscarriage of justice in his decision. Any judge that has the knowledge to distinguish the plaintiff from the defendant has discovered the gate of justice in his decision, impliedly; a judge who fails to identify the proper position of the parties has missed the path of justice. This is because he would not know who to saddle with the onus of proof. Identification of plaintiff/defendant constitutes a Herculean task for the Court of first instance applying Islamic law.

Jurists have defined who the plaintiff and defendant are in Islamic law. According to Al-Qarafi, a plaintiff (al-mudda'iy) is the party whose claim has run counter to common sense or conventions (Urf) and it has no basis (Asl). While the defendant (al-mudda'iy alayh) is the party whose claim has the support of logic (Urf) and basis (Asl).

Ibn Shass has defined the plaintiff, as the person or party whose averment lacks support of truthfulness, or he is the person whose claim is weaker among the parties before the judge; or his claim is attached with something that make it weak. For instance, a plaintiff is a person who brings a claim which is contrary to logic and common sense such as where "X" brings a claim against "Y" who is in possession of the subject matter of the claim.

The defendant is the other person who has the support of logic. In a case where one of the parties comes with a claim which is in consonance with logic while the other party makes a claim that is contrary to common sense, the former should be the defendant while the latter is the plaintiff. Likewise, whoever brought a claim that has nothing to support it, he is the plaintiff. For example,

"X" brings an action that "Y" is in wrongful possession of his chattel. By the reasonable man test (Urf) "Y" has a better case and therefore should not be burdened with the task of proving his possession.

Moreover, Ibn Habib has summarized the definition of the aforementioned jurists thus: a plaintiff is a party whose claim has no basis while the defendant is the party who has the support of convention (Urf) or basis (Asl).

According to Abu Umar Ibn Abdil Barr, to determine who is a plaintiff and the defendant in a case, a judge should consider who is to take or collect and who is to give out. Generally, the person to take or collect is always the plaintiff while the party giving out (the right) is the defendant.

The famous jurist, Sa'id Ibn al-Musayyib, states that parties to a civil dispute are: the person who makes a claim and the person who disputes the claim. The former is the plaintiff while the latter is the defendant. A plaintiff is the person whose claim has no basis to support its authenticity or truthfulness. Where a judge cannot identify the proper standing of the parties, the party that institutes the action should be allowed to state his claim first since he is the one who filed the suit and, based on that action, the other party was summoned to the court. Where there is no clarity as to who brought the other to court, the judge should make a poll between the parties.

Asl (sound basis) and Urf (conventions) are presumptions of law. According to Ibn Abussalam, urf is natural evidence while the Asl is the basis or foundation on which a claim is placed. The word Asl is applied in personal matters and, by it, is meant that ordinary state of relations between any two persons taken at random between whom, as a general rule, there is no obligation. If then one pleads that something has occurred derogatory to this normal state, such as he who pleads that he is a creditor, he has against him the presumption resulting from Asl;

he will be the plaintiff and will have to adduce proof. Once the existence of an obligation is established, the other party who pleads a cause of extinction must support such claim with proof.

The word *Urf* contains an analogous idea but applies to chattels. Thus, where both husband and wife are claiming ownership of utensils, Mortar and pestle or mirror, it is more reasonable to suppose that these chattels belong to the wife and thus she becomes the defendant and the husband plaintiff, for she has the support of custom (*Urf*) while the husband lacks evidential backing of custom (*Urf*). In these circumstances though the wife may bring the action to court; still the burden of proof will not be on her, but the burden is on the husband. In other words, the wife is the defendant notwithstanding she is the party that instituted the action while the husband is the plaintiff although he is the party sued.

According to Kadi Ambali, apart from *Asl* and *Urf* presumption of law, Muslim jurists have designed other methods to guide the court to identify proper standing of parties in court. The first method is to identify a party that has right of withdrawal. A complainant is the party who demands a certain right due to him from the defendant. It is he whose silence means withdrawal and the suit automatically terminates. But the defendant is he whose silence does not terminate the suit. Rather the force of law shall be invoked to make him reply.

Another method to distinguish the plaintiff from the defendant is for the court to ask itself who among the parties is seeking right or redress, and from whom are the rights being sought. The person seeking the right is the plaintiff; he moves and urges the court to exercise its power in his favor to secure for him his right from the defendant. He should therefore convince the court by putting up cogent reasons why he is entitled to the judgment. The party against whom the right is sought is the defendant. He is at an advantage, because the right is in his possession. However, there is an exception to this general rule. For instance, an orphan demanding the return of his property from a trustee is not considered as plaintiff on whom the onus of proof lies. He is the defendant if the trustee asserts that he had returned the property to the orphan. Although the orphan is seeking his right from the trustee; the latter must prove that he has handed over the property to the orphan because, basically, the law requires him to call witnesses whenever he wants to handover the entrusted property of the orphan to him. It is therefore assumed that the property is in the care of the trustee till he satisfies the requirements of law.

Furthermore, another method of distinguishing proper standing of parties to civil dispute is by affirmative claims. The theory of Sa'id Ibn al-musayyib, is that he whose claim is in the affirmative form should be taken as the plaintiff. The arguments is that proofs are brought to establish what is positive that is, he who asserts must prove. It is illogical to demand proof for what does not exist, i.e. negative. For instance, 'A' claims that 'B' owes him a sum of money and 'B' denies it. The onus of proof lies on 'A' and not 'B'.

However, the general principle has an exception. 'A', a woman, who alleges that her husband 'B', with whom she resides, fails to maintain her is a plaintiff, even though her claim is not in the affirmative form. The man who denies such allegation is a defendant even though his claim is in the affirmative form. The reason is clear, the law assumes that a wife under a roof of her husband is maintained by him. So, the *Urf* favors him. It is her claim that runs counter to the presumption of regularity. She is therefore saddled with the onus of proof. But if they live in different towns or she reside outside the house in which he lives, he is the plaintiff (who has the burden) to establish that he maintains her, irrespective of who initiates the action.

Kadi Ambali concludes that, the big challenge facing trial courts is to know which of these methods of law is to be applied to a given claim. Judge has to fully understand the claim, its basis and the relationship of the two contending parties to the subject matter of the claim to determine on whom to place the burden to proof and who is at the receiving end.

It should be noted that under Islamic law of procedure, a litigant can file a claim as a plaintiff and after a thorough examination may turn out to be a defendant.

Service of Court Processes

It becomes imperative on the plaintiff to cause the defendant to be served with court process. This is the only way the defendant may become aware of the suit against him in court; and be able to put up a defense if he intends to do so. To secure the attendance of a defendant to court, the court must invite him and such invitation should be by process (summons) of court duly served on the defendant.

The mode of securing the attendance of defendant in a court is that, if a defendant is residing in a town or location that is about twelve miles away from the court, a summon should be dispatched to the defendant, inviting him to appear before the court, or a messenger be sent to him if the path or road to the defendant's location or town is safe. But where the defendant is living in a faraway town and/or the road leading to the town is not safe, such defendant should not be summoned to appear in the court, but rather a letter be sent to the judge of the defendant's home town; the content of the letter is to state the nature of the claim, and urge the judge of the defendant's town to entertain the suit in accordance with the law. If the claim is established by the plaintiff, judgment should be given accordingly.

Where the judge cannot understand or appreciate the complaint, he should reconcile the parties, but if the judge cannot appreciate the complaint and cannot reconcile the parties, the receiving judge shall request the judge of the plaintiff's home town to direct the defendant to appear at a specific place, date and time to respond to the plaintiff's claim.

Moreover, if the defendant summoned to appear before a court refuses to honor the summons or hides in his house or somewhere else, the judge should order the summons to be pasted at a conspicuous place where the defendant lives. The defendant's place of abode or business dear to him can also be sealed up to compel the defendant to attend the sitting of the court. The sealing should be made in such a way that if the defendant opens the place sealed, it would be noticed or recognized that the defendant has accessed the place and he shall be punished.

Service of court process shall be effected by any person authorized. Summons shall be handed over to the defendant. Where personal service cannot be effected, the shari'ah courts (civil procedure) rules allow for substituted service. The substituted service may be effected after the court is satisfied that it is necessary to do so. The mode of substituted service are by delivery to an agent; or by advertisement in the gazette or in any newspaper circulating within the jurisdiction or notice put up at court house or some other place of public resort of the district or at the usual or last known place of abode or business of a person to be served; or by affixing summons at the premises which is the usual or last known place of abode or business of the defendant.

However, plaintiff is the litigant to bear the cost or fees of summoning the defendant to appear before the court. But the defendant will bear the cost of service if he absolutely refuses to pay a debt to the plaintiff and the non-payment makes plaintiff to institute the action. When the defendant appears in the court, judge would order him to settle the cost incurred by the plaintiff in summoning him. It should be noted that shouldering the cost or fees of summoning the defendant by plaintiff would be made by him (the plaintiff) if the court bailiff is not on salary, if the bailiff is being paid salary, neither the plaintiff nor the defendant should bear the expenses.

Claims of the Parties

The subject matter of litigation must satisfy two conditions: the claim must be specific and supported by full explanation. Any claim that fails to satisfy the two conditions would not be accepted by the court. For instance, in a monetary claim, plaintiff must state the exact amount of money owed. If he is not sure as to the exact amount of money owed him by the defendant, such claim shall not be heard at all. If the plaintiff is doubtful whether the defendant owes him or not, the court will entertain the claim. The plaintiff must explain the circumstances that give rise to the claim. The reason for such explanation is to assist the court in knowing whether the basis of the claim is legal or not. For instance, a monetary claim that involves wine would not be accepted in court.

A clear, distinct and unambiguous claim is the basis or foundation upon which the plaintiff's case rests. Islamic law emphasizes on clarity and precision of a claim; that is why its procedure stipulates that the defendant and court should interrogate the plaintiff who fail to give a vivid picture of his claim and its basis. In other words, if the plaintiff does not give the basis of his claims, the judge and the defendant shall demand explanations from the plaintiff.

Conclusions and Recommended

From the analysis made above in this paper, it is glaring that a judge cannot commence a civil trial unless he is certain that he has the power to entertain the suit. He must also decide who is the plaintiff and defendant among the two parties. The defendant must be summoned or invited to appear before the court, and the plaintiff must state his claim clearly before the proper commencement of trial in Islamic law of procedure.

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