



AN APPRAISAL OF THE PRINCIPLES OF HAUZI (PRESCRIPTION/ ADVERSE POSSESSION) UNDER ISLAMIC LAW

INTRODUCTION: -

Ownership or title to land may generally be acquired through several means such as purchase, inheritance, gift, grant, settlement, cultivation of a barren land etc. It is well settled and trite that in the case of a dispute over land the act of ownership or claim of title may be proved in one of five ways. This position has long been settled by the Supreme Court in the case of *Idundun vs. Okumagba*.¹ The said decision has been followed and reiterated by the same Court in the case of: -

Ezennah vs. Alh. Mahmoud I. Atta.²

Where it held inter alia that for a party to succeed in a civil claim of title to or ownership of land, he must prove his title in one of the five ways laid down in *Idundun's* case i.e.

Proof by traditional evidence.

Proof by production of documents of title duly authenticated to prove title.

Proof by act of ownership extending over a sufficient length of time, numerous and positive as to warrant the inference that the person is the true owner.

Proof by acts of long possession and

Proof by possession of connected or adjacent land in circumstances probable that the owner of such connected or adjacent land would in addition be the owner of the land in dispute.

We are in this discourse particularly concerned with the third and fourth means of proof. Although the above decision was not based on Islamic law, it is however clear that the principles laid down in the third and fourth means of proof are closely related and akin to the principles of Hauzi under Islamic Law

The aim of this paper is to appraise the means/ways through which under Islamic law an individual or group of individual can acquire title to land by reason of 'Prescription' or 'Adverse possession' for a long period of time or number of years with the knowledge of the purported original owner who stood by doing nothing to assert his title. It is this act of adverse possession for a long period of time without challenge from the original owner that justifies the deduction that the original owner does not want to exercise his right over the land and thereby crowns the person in possession with title to the land he possessed or occupied at the expiration of the requisite period prescribed by law. This is popularly captioned Hauzi under Islamic law. In other words the purported original owner is deemed to have acquiesced to the action or claim of the person in adverse possession. It is thus the acquiescence that makes the law to protect the new owner.



Under the English law the new owner may be protected both in law and in equity. In law where the period of limitation prescribed by statute has elapsed, while in equity under the doctrine of laches and acquiescence.³ These principles of English law are the equivalent of the principles of hauzi under Islamic law.

Definition of Hauzi

Hauzi is an Arabic word, which has been interpreted by Writers and Judges to mean 'Prescription'. Under Islamic law the principle of Hauzi dictates that where a person of full legal capacity abandons his house or farmland for 10 years without any lawful excuse and somebody who is not a relation or partner takes possession of same for that period the original owner is said here to have lost his right.⁴

The real meaning and scope of the term 'prescription' in relation to land is disputable among Writers under the English land law. Under that law the term 'prescription' is restricted by some Writers to easementary and other non-possessory rights or property only. A learned writer on the subject observed that a critical and careful examination of the term prescription would reveal that it refers only to non-possessory rights or property. That non-possessory property means property which is not tangible, real or corporeal but which the owner can claim the right to use and enjoy. That the right to use and enjoy are property rights even though they are not tangible. He further observed that prescription refers to easements only, and easements are non-possessory interest in land such as right to free flow of light and air, the right of way, right to free flow of natural and artificial stream or river and the right to lateral support.⁵

Whereas possessory interest such as title to or ownership of land which is the focus of this paper may be acquired by adverse possession without challenge from the original owner over a long period of time. It has been submitted that the concept of adverse possession denotes possessory interest such as title or ownership of land or any tangible property. The principles of adverse possession has been defined as " a means of acquiring title to real estate where an occupant has been in actual, open, notorious, exclusive and continuous occupancy of property for the period required by state law."⁶

Adverse possession has also been explained to mean if within the number of years specified in the statute of limitations, the owner of the land does not take legal action to eject an occupant who claims adversely to the owner the owner is thereafter barred from bringing an action in ejectment. Once the owner is barred from suing in ejection the adverse possessor has title to the land.⁷

The learned writer summed up by drawing conclusion that adverse possession is focused on the acquisition of title, or ownership of land adversely meaning without permission or consent of the owner.⁸



Another writer on the concept prescription however, maintained that 'Prescription' means the peaceful, public and uninterrupted possession of a piece of land for certain number of years whereby ownership is conferred.⁹

A close examination of the two concept- 'Prescription' and 'Adverse possession' one would realized that the concept that appears to be closely related both in meaning and scope to the principles of hauzi under Islamic law is the concept of adverse possession. It seems both learned authors and judges' interpreted the principles of Hauzi as prescription. The word prescription in relation to land has no meaning in the English dictionary. It is however clear that for all intent and purposes from the context it is used in decided cases it is intended to secure and protect adverse possession where it satisfy the requisite number of years prescribed by law.

Under Islamic Law, Hauzi has been held to be a situation where a person, not being a relation or trustee, has been in clear and undisturbed possession of a piece of land for ten years and above and the lawful owner stood by doing nothing to reclaim his property. Hauzi among the blood relations is forty years and above. The defendant in such situations would acquire title by hauzi, and any subsequent action by the Plaintiff over such land against the person in possession would fail and the claim dismissed.¹⁰

The above principle can also be traced in the book of fathul aliyyu maliki vol. 2, it was stated there that where a person male or female that is not a relation abandoned a house or farmland for over 10 years without any lawful excuse his right to claim it from any person who took possession of it for that period is lost.¹¹

Simply put under Islamic Law, the principle of Hauzi is the principle which protects adverse possession of an individual who is not a relation and has been in quite and peaceful possession of a piece of land over a period of at least 10 years without challenge and in case of relations 40 years. While in the case of father and his son hauzi does not operate except if the property has been disposed of through gift or sale or change of structure in case of a house, which the other did not object up to about 60 years.

From the above it is clear that for the principle of Hauzi to operate under Islamic Law two elements must exist. Viz: - 1. Long and quite possession for a period of at least 10 years. 2. Latches and acquiescence of the original owner.

Latches and acquiescence have been submitted to be probable defences to a claim of declaration of title. In order for latches to operate as a defence there must be knowledge of all the facts giving one a cause of action and the person must have delayed in bringing an action for so long a time as to justify a deduction that he does not want to exercise his rights. Whereas, acquiescence applies to inaction and standing by which induces another person to alter his position to his detriment.¹²



It should however be noted that in the case of a partner in either a house or farmland 10 years possession is not enough to confer title on the other partner except where in the case of a house the nature & shape of the house has been constantly altered by the partner in possession and in the case of a farmland he planted trees and the other partner did not voiced any objection and that the partner in possession did not owned up or confess that the property is a partnership property.¹³

Origin and Operation of the Principles of Hauzi

The origin of the principles of Hauzi has been clearly traced in the case of: **Mati and Hajiya Binta VS Haruna Yusuf**¹⁴ Where it was observed thus: The principles of Hauzi is said to have originated from the time of the Holy Prophet. It was narrated from an authentic Hadith of the Prophet that says: "Whoever is in peaceful possession of a thing (Real property) for 10 years, he becomes its owner" The learned judge continues: "He who sees somebody in possession of his (claimant) property and claiming and using the same as his own over a long period of time without objecting to it that person in such a possession becomes automatically the legal owner. If the original owner subsequently institute an action to reclaim the land, he loses his cause of action and any evidence in respect thereof would not be admissible."

From the authority cited above it is clear that the principles of Hauzi operates to confer title to a person who has been in undisturbed possession of a piece of land for at least a period of 10 years. This position is well settled under Islamic Law and it has been clearly enumerated and applied in many decided cases by the Court of Appeal. Thus in the case of: -

HAKIMI BOYI UMARU VS AISHA BAKOSHI¹⁵

In that case the Plaintiff/Respondent instituted an action against the Defendant/Appellant claiming a number of farmlands at Tungar Gawo under the Defendant's control and possession, 30 years after the death of the Respondent's father. The Appellant denied the claim, and alleged the farmlands initially belonged to one Hakimi Bubakar, who lent the same to Respondent's father. After two years the Respondent's father abandoned the farmland, without entrusting it to anyone. As a result, he requested it from Hakimi Bubakar, and he was given as an outright gift. The Plaintiff was called to prove her case. She called two witnesses who testified to the effect that the farmlands in dispute belong to her late father. The Defendant also called four witnesses to prove his claim that he owns the land by way of hauzi, as he has been in possession for the last 30 years, and that Hakimi Bubakar gave him the land as an outright gift. The trial found in favour of the Appellant who was the Defendant. The Respondent dissatisfied with the decision of trial court appealed against same to Upper Area Court Bagudo, which affirmed the decision of the trial court. The Respondent further appealed to Kebbi State Sharia Court of Appeal, who allowed the appeal and confirmed the farmland in dispute to the Respondent. The Appellant then appealed to the Court of Appeal.



In allowing the appeal the Court of Appeal held inter alia that it is trite in Islamic Law that where a person has been in peaceful enjoyment or possession of land without Challenge for 10 years he thereby acquires a title by Hauzi (Prescription) against any person who claims to be the true or original owner of such land and who stood by without taking any action to reclaim his land during that period. Put more clearly, the law is that a person who sees somebody in possession of his or her property and claiming and using the same as his own over a long period without any objection from (the true owner) loses his ownership and that other person in possession becomes the owner.

The above dictum stands as a general rule. It will operate to crown an individual with title to land where such individual has been in possession without challenge for 10 years and above. For an individual to succeed under the principle he must be seen to be in possession as the owner not under licence or permission from the original owner. Likewise it need to be proved that the original owner duly knows or is aware of the fact that this individual has taken the possession of his land but still opted to remain quite without taking any step to assert his own title over the land; and this position continues for as long as 10 years.

It is however worthy to note that hauzi for 10 years will not operate in a situation where two persons that are not related jointly owned or bought a house or farmland except if one of them took control and he demolished the building and built another one or he changes the shape of the building in the case of a house or if he planted trees or changes the shape of the land in the case of a farmland while the other partner stood by watching him without any objection and the partner doing this did not owned up to the fact that the property is jointly owned. In such type of hauzi the right of the other partner to assert ownership is lost.¹⁶

Exceptions to the Rule

The above general rule however admits of some exceptions. Depending on the circumstances of the case it is not always and not in all cases that quite possession for 10 years will crown the possessor with title. The original owner also has some defences available to him to counter the defence of Hauzi. This may include lack of knowledge of the usurpation either due to absence, imprisonment, seclusion in the case of married women etc., absence, the existence of some relationship between the person in possession and the original owner, tenancy either free or paying tributes or rent; minority e.t.c. These exceptions have been enumerated in the case of: -

HAKIM BOYI UMORU VS AISHA BAKOSHI¹⁷

It was held that the principle of Hauzi under Islamic Law permits of exceptions. These are:

Cogent reasons are adduced for not complaining in time, for example blood Relationship or fear of harm from authority.



The claimant is a minor

The person in possession is put in possession by the claimant either as a free or paying tenant.

The person put in possession is put in possession as a trustee

The claimant is a relation or a partner or co-proprietor to the person in possession. In the case of a house, the possession is on permissive occupancy.

An Examination of the Exceptions

The above are some of the exceptions to the operation of the principles of Hauzi they are however not exhaustive, what qualifies as an exception to the rule would depend on the circumstances of each case.

By and large with regard to the first exception there is no had and past rule for determining what a cogent reason for not complaining in time is, it would therefore depend on the circumstances of each particular case. It is however cogent if a person is absent from the locality i.e. where he traveled or resides at a very far place that he do not know what is happening to the land in question or if he is for any reason imprisoned. It has been submitted that a claimant who resides in a very far place, will have a valid defence against Hauzi. The distance for the purpose of this defence should be for at least 7 to 8 days journey. A distance for a day's or two days journey however is not sufficient for the defence; such distance is regarded in the case of a male claimant as the same town.¹⁸

Likewise a married woman who observed the principles of seclusion (purdar) whose husband is the jealous type and do not allow her to go out or her representatives to institute an action will have a valid defence.¹⁹ This position received judicial recognition in the case of: -

ALU DANFAGCHI & 1 OR VS LAMI AHMADU²⁰

The learned Justice observed that the position of the law if there is evidence that during the said period of prescription of (10 years) or part of it, it was established that the claimant was married to a person who stuck to the principles of purdar (seclusion) and will not allow the female claimant his wife to institute an action against the occupier directly or through representative, then the claim of person in possession, for Hauzi will not succeed. Likewise where a female who resides in a different town sued a person who took possession of her property in another town the doctrine of 10 years hauzi will not avail the person in possession if the distance between where the female is residing with the town where the property is situated will involve a journey of a whole day or more.²¹



With regard to the second exception i.e. minority, under Islamic Law a minor has no legal capacity, thus if somebody usurped the property of a minor, Hauzi for 10 years will not avail him, the minor when he become of age can still claim his property. The minor under normal circumstances depends on his property guardian to protect his interest, thus where the guardian failed to protect the interest of the minor or he himself usurped the property, or where for any reason the minor do not have a guardian, the defence of 10 years hauzi will not succeed against such minor.

Where the property of a minor is sold in a manner contrary to Sharia either by a court, his parent, guardian, relation or trustee or where the minor sold the property himself and after attaining the age of puberty he did not raise any objection. He will not be heard to object if from the time of his attaining the age puberty the prescribed period for hauzi has expired. If immediately after attaining the age of puberty he raised objection to the sale, it can be set aside and his property restored back to him.²²

With regard to the third exception, it is a good defence if the original owner was the one that put the person claiming Hauzi in possession either as a free tenant, or fees paying tenant or he gave the property to the claimant on hire or on loan. This will go to show that the original owner retained the title to the property while the person claiming hauzi is only in possession with the permission or consent of the original owner. In the case of:- MAI AIKI VS MAI DAJI²³ The learned Justice while commenting on the defence of hauzi observed quoting the author of Bahjah Commentary on Tuhfatul Hukkam vol. 2 at Page 254 that there is need for evidence of possession, use, transfer, relationship, lack of contest and period. He added that loan defeats hauzi. Consequently, in this particular case since there is evidence that the disputed land was granted to the respondent on loan by the appellant, hauzi does not apply.

Whereas the fourth exception raises the issue of trust, this is very common especially in respect of the property of minors/orphans. Once it is established that the person in possession is holding the property in trust on behalf of the original owner the principle of Hauzi will not apply. It also applies in a situation where the original owner wants to migrate to a different locality, he may put his farmland or house in the care and trust of his friend or relation. It is not surprising after sometimes such trustee or his heirs may lay a claim of ownership over the property. In such situation once there is evidence of the trust a claim of Hauzi will not succeed.

The fifth exception is referring to the issue of relationship existing between the person claiming hauzi and the original owner of the land. This relationship may be either by reason of blood or marital ties, or partnership or co-proprietorship. The existence of any of these will be a strong defence to any claim of hauzi or it would at least extend the period of time before it can operate.



The duration required for hauzi to be absolute in the case of blood relation is 40 years.²⁴ The same number of years also goes for marital ties. It is however worthy to note that the defence of relationship will only succeed if relationship is smooth between the parties otherwise if they are not in good terms or there is evidence of enmity between them the 10 year rule will apply.²⁵ In the case of **MAI AIKI VS MAI DAJI**²⁶

In that case the Plaintiff/Appellant claimed possession of a farmland held over by the Defendant/Respondent. The Appellant claimed that the farmland was given to the Respondent on loan 15 years earlier and the Respondent was a relation by marriage. The Respondent refusal to relinquish the farmland on request necessitated the action. Evidence of the respondent's initial admission to return the farmland was given at the trial as well as his subsequent retraction of same. It was held that the period of prescription or Hauzi where the dispute over land is between parties related by marriage land should be by evidence of 40 years possession where the parties are related by marriage and there is no allegation of enmity between them.

Likewise if there is a dispute between relations male and female over an inheritable property and the relation or heir in possession of the property dies and the other heirs establish that the property in dispute is originally their inherited property that has not been shared, the hauzi of 40 years or more will not succeed in preventing the distribution of that property to all the deserving heirs.²⁷

Furthermore where there is a dispute among relations male and female over a house or farmland or economic trees whether the property in dispute is an inherited property or a property owned by one of the relations but entrusted to his brother and the brother sold or gave the property out as gift to another person and the brother(s) are aware but did not say anything. In such circumstances the right to reclaim the property is lost whether the claimants are related or not. They however reserve the right to claim the amount or their share from the amount he sold the property if there is no lawful impediment otherwise their right is lost even if the hauzi is not up to 40 years.²⁸

In the same vein the principle of Hauzi does not apply between a child and his father except if the child or father sold or gave out the property in question as a gift or where he change/altered the shape of the property through building or reshaping the building and no objection has been voiced out against the conduct for about 60 years.²⁹

With regard to the sixth exception, it concerns an already built house, if somebody occupies another person's house or farmland for 10 years and above without challenge Hauzi will operate in favour of that occupier except if it is proved that the person asserting hauzi occupies the house with the permission of the original owner either as a free tenant or as a rent paying tenant. Whereas if the property in dispute is an animal or a female slave or clothes the period required for hauzi is two years.³⁰



By and large, it is important to note that where the owner of a house or farmland migrated to a different country or locality which not nearby and he did not sale nor give out the house or farmland as a gift to any body. Any time he returns he reserves the right to collect back his house or farmland and hauzi will not operate to defeat his right.³¹ **Classification of Hauzi**

Hauzi has been classified into three types³² viz: -

The weak type of Hauzi- It is the hauzi that arise either through staying in a house, farming on a land, or using /trading in a shop. In such situations if there is a relationship between the parties, the duration of possession required for Hauzi to operate is 40 years in the absence of enmity between the parties but if there is enmity between them or if they are not in good term, the period required for hauzi to operate is the normal period i.e. 10 years.

The strong type of hauzi – It is the type of hauzi where somebody took over the slave of another person and with the knowledge of that person he freed the slave either there and then or upon a condition or the person taking over the slave sold it to another person with the knowledge of the owner and the owner did not raise any objection. In such situation the period required for hauzi to operate is 10 years. This category is relevant for mention only since slavery is no more in vogue in the contemporary world of today.

The moderate type of hauzi – It is a situation where somebody took over the possession of another person's property, and with the knowledge of that person the person claiming hauzi demolished the property, or erected a new structure thereon, or in the case of a farm land planted some crops, or give out the house or farmland on hire. In such circumstance there are two different opinions. Some group jurist hold that the duration required for hauzi to operate is the same with that of non-blood relation i.e. 10 years but other group of jurist hold the view that the law to be applied is that of blood relations i.e. 40 years.

Hauzi In Respect of Movable Property

It is not only in respect land or immovable property that the principle of hauzi operates. It also applies to movable property and in fact to any property that can be possessed. The duration required for hauzi to take effect in respect to movable property is shorter than that required for an immovable property. It has been observed that hauzi operates on movable properties such as clothes, vehicles, slaves etc. In the case of clothes the period required for hauzi to take effect is two to three years. In the case of vehicles or other means of carriage the period required is two years and above. While in the case of slaves the period required is 3 years and in the case of a slave girl the period is from the moment of cohabitation with her with the knowledge of her master.³³



Conclusion

Hauzi is a legal principle that protects adverse possession of any property that has been in the possession of the adverse party for a period of time without challenge. The essence of the principle has been beautifully stated thus: - that a man does not possess a field because he is walking about in it, unless he has the intent to exclude other persons from the use of it. It has also been further canvassed that within established communities, the consideration arising from man's social condition which bring about the protected relation called ownership are the self-same consideration which ensure that some protection is accorded to de facto possession.³⁴

It is therefore only fair and just that the law accords some protection to de facto peaceful possession of property for a long period of time without challenge and Islamic law has recognized this necessity long ago by prescribing the principles of hauzi. Litigation over land in particular is pervading and persistent in almost every locality Muslim community inclusive. It is therefore high time that people got to understand that if they are really interested in their land they must manifest their interest by looking after the land. If they decided to abandon it and somebody of interest take over they run the risk of losing it if the prescribe period expires.

ENDNOTES AND REFERENCE

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- 2 (2004) All F. W. L. R. Part 202 P. 1858 at P. 1890
- 3 statute of Limitation fixed the number of years within which action or claim must be brought otherwise they are statute barred. While in Equity the doctrine of laches and acquiescence may give rise to estoppel to prevent a purported owner of land from asserting a contrary position to what he has already made someone to believe and act upon.
- 4 Aboki Y. Prescription: Its Applicability under Native law and custom determined. Being an article in Law, Justice and the Nigerian society - Essays in honour of Hon. Justice Mohammed Bello. 1995 Nigerian Institute of Advanced Legal Studies, Lagos PP. 235 -236.
- 5 Ibid P. 234 as quoted from Friedman, Harris and Lindeman; Dictionary of Real Estate Terms, Wood-bury New York 1984 P. 11.
- 6 Ibid P. 235 as quoted from Dukemenier J. P property, 12th Ed. 1985 P. 21 section 94.
- 7 Ibid P. 235.
- 8 Oluyede P. A. O. (1989) Modern Nigerian Land Law, Evans brothers (Nigerian Publishers) Ltd, Ibadan, Nigeria P. 133
- 9 Mati and Hajiya Binta vs. Haruna Yusuf The Selected Judgements of Justice S. M. Coomassie JCA on Sharia Beccadam Nig. Ltd P.97 at P. 107.
- 10 Ahmad Abi Abdullahi Sheih Muhammad 1958 Fatahul Aliyi Almalik Vol. 2 Mustapha Babi Al-Halbi Misra P. 318
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- 16 Sheikh Abubakar Ibn Asim (N.D.) Tuhfatul Hukkam book 1 & 2 Hausa translation by Alh. U. M. Daura 1996 Hudahuda Publishing Co. Ltd, Zaria P.463 Paragraphs 1236 -1238.
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- 23 Supra at P. 1028 -1029
- 24 Ahmad A. A. Fathul Aliyul Malik Vol. 2 op. cit. P. 319
- 25 Ibid P. 314
- 26 Taswali Abu Hassan A. A. OP. CIT. P.252
- 27 Ahmad Abi Abdullahi 1958 Fathul Aliyu Maliki Vo. 2 Mustapha Babi Al -Halbi, Misra PP. 235 -236
- 28 Sheikh A. Asim op. cit. P.461
- 29 Ibid PP. 465 -466. Paragraphs 1244-1247
- 30 Oluyede P. A. O. op. cit. PP. 10-11