AN APPRAISAL OF THE APPLICATION OF THE CONCEPT OF PRE-EMPTION (*SHUF'AH*) UNDER THE NIGERIAN LAWS

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ABSTRACT

This article discusses the applicability of the Islamic concept of pre-emption (*shuf'ah*) under the Nigerian laws. Pre-emption is the first right of a neighbour to purchase an immovable property. This right is available so that a stranger is not introduced as a neighbour, which may cause a hindrance to their privacy. The aim of this article is to examine the significance of pre-emption, which includes: maintenance of a peaceful co-existence in a society; realization and protection of neighbours right; and ensuring the consent of new neighbour over the new owner. In this article, the concept of pre-emption is analysed in the context when it is applied to the Islamic law of succession. Aside from that, the article also looks into the intricacies of its application in Northern Nigeria.

Keywords: pre-emption (*al-shuf'ah*), common law, Islamic law in Northern Nigeria, Pre-emptor, Islamic law of succession

SATU PENILAIAN TERHADAP APLIKASI KEPADA KONSEP *SYUF'AH* DI BAWAH UNDANG-UNDANG NIGERIA

ABSTRAK

Makalah ini membincangkan pemakaian konsep *syuf'ah* di bawah undang-undang Nigeria. *Syuf'ah* adalah hak pertama seorang jiran

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untuk membeli sesuatu harta tidak alih. Hak ini boleh didapati oleh jiran tersebut bagi memastikan tiada orang asing yang tidak dikenali diperkenalkan didalam kelompok keluarga atau kejiranan yang asal yang boleh mengganggu privasi mereka. Tujuan utama makalah ini ialah untuk memeriksa kepentingan konsep *syuf'ah* yang meliputi: penyelenggaraan kewujudan bersama dalam masyarakat; mewujudkan kesedaran dan perlindungan hak jiran dan memastikan persetujuan jiran diperolehi sebelum membenarkan kemasukan pemilik baru. Di dalam makalah ini, konsep *syuf'ah* dianalisa didalam konteks kerangka undang-undang Islam berkaitan perwarisan. Selain daripada itu, makalah ini juga melihat kepada kerumitan dari segi perlaksanaannya di Nigeria Utara.

Kata kunci: *syuf'ah*, undang-undang am, undang-undang Islam di Nigeria Utara, ahli *syuf'ah*, undang-undang perwarisan

INTRODUCTION

It is not out of place to state that, the Nigerian legal system has two wings, a wing covers the English legal system and is applicable throughout the width and length of the country and the other wing covers the Islamic legal system and is applicable only in some parts of the northern states of Nigeria, namely, Adamawa, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kwara, Nasarawa, Niger, Sokoto, Yobe, Zamfara and Federal Capital Territory, Abuja.

Against the backdrop of the above, the doctrine of pre-emption (*shuf'ah*) otherwise called the doctrine of convenience, which gives an individual (mainly, a neighbour) a priority over all other persons to purchase an adjoining land. It is a principle of Islamic law, which is applicable in the northern states of Nigeria. The question is to what extent is the doctrine applicable in Nigeria particularly in the northern states of Nigeria taking into cognizance the position of the common law with its overriding application throughout the federation of Nigeria.

The foundation of the right of pre-emption (*shuf'ah*) is the human desire to avoid the inconveniences and disturbances which is likely to be caused by the introduction of a stranger into the land. In this article the Islamic law of pre-emption is examined in light of the Islamic law of succession. Under Islamic law, the death of a person results in the

division of his property into fractions. If any heir is allowed to dispose of his share without offering it to the other co-heirs, then it is likely to lead to the introduction of strangers into the part of the estate, which results in difficulties and inconveniences.¹

In terms of modern application, the concept of pre-emption can be said to be recognised under Nigerian Laws. For instance the concept has been adjudicated upon in Nigerian Courts despite the fact that, it does not fall under the Muslim personal laws recognized by the Constitution of the Federal Republic of Nigeria 1999 (as amended).² It is equally important to point here that, the concept is enshrined under the Petroleum Act, Cap.P 10 Laws of the Federation of Nigeria³ which is to the effect that, in the event of a state of emergency or war, the Minister shall have the right of pre-emption over all petroleum and petroleum products obtained, marketed or otherwise dealt with under any license or lease granted. Aside from that, it is also an applicable concept in what is called subscription right or what is otherwise called the “first option to buy” in company shares.

Given the above situation, it is clear that the applicability of pre-emption in Nigeria especially in the Northern part of Nigeria is analogous with its application under Islamic law. However, such application only relates to exercise of the right by the government during the time of emergency or war particularly on petroleum products as well as the right of ‘first option to buy’ in the subscription of company shares. Its applicability is thus limited and not as it is meant to be under Islamic law.

It is a well-founded principle of fundamental human right, recognized nationally and internationally that a person is entitled to own and acquire property and same can be disposed of in a manner he or she so desires. However, the right of a person to acquire property does not

¹Understanding the Concept of Pre-emption Under Muslim Law.

<http://www.shareyouressays.com/knowledge//understanding> accessed on the 29/5/2018.

² Section 277 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

³ Section 7 of the Petroleum Act Cap P 10, Laws of the Federation of Nigeria, 2004.

mean that the property can be acquired by any means whether fair or foul.⁴

The relevance of pre-emption in Nigeria stems from the fact that, the Northern part of Nigeria where Islamic law is applicable is a homogenous society consisting of an amalgam of tribes that have a minority non-Muslim population. These tribes such as the Bachamas, the Gwaris, the Zurus, the Biroms, the Tivs, the Idomas and the Kalanbaris just to mention a few have been living together for a long period of time. The concept of pre-emption stands to continue the cementing the relationship amongst these diverse tribes of the Northern Nigeria if the concept is made to apply to all residents of the region including the non-Muslims and even migrants. The applicability of the concept is also relevant in Nigeria as it promotes a sense of belonging and strengthens brotherhood amongst the Northerners and the residents of the region.

However, there is a notion that there exists a right to do what one desires with one's own property. Nonetheless, this right is subject to several limitations either in the interest of the public in general or in the interest of a section thereof. Thus, while a man may use his land as he likes, the law of nuisance says that he cannot use it in such a manner as to affect adversely his neighbour's equal right to use his own land. This is particularly evident in the common law system established in the law relating to nuisance. Indeed, the celebrated English case of *Rylands V. Fletcher*⁵ decided by the House of Lords imposes strict liability on one type of user where morality would probably have thought otherwise. The principle in *Rylands V. Fletcher* is that if 'A' brings something unto his land- provided that, the thing is not naturally there- and that thing by nature is capable of escape, and it escapes and causes damages to 'B's land, A is strictly liable to 'B' in damages whether or not 'A' has knowledge of the escape. It is submitted that the rules of morality would have said that if A has no knowledge that the thing would escape, he should not be liable.

In the same lines of the common law position of being weary of the rights of one's neighbours when using the land while one is still in ownership, similarly, one should also be mindful of one's neighbour when considering to dispose of one's property. Therefore, it could

⁴ Okunuga A. A. O "How Fundamental are Fundamental Human Rights" (Paper presented at the University of Ife, Ile- Ife , Nigeria, March 1975).

⁵ (1866) L .R. T Ex 265.

therefore be insisted that an owner of a land should at least allow his neighbour the right to buy the property over anyone else. After all, the person most affected by this decision would be the neighbour.

In addition, it is possible for the authority to specify and impose regulations relating to how an individual may use such property in compliance with existing regulations. It is pertinent therefore to note that the moment an individual acquires an immovable property through any of the means by which land can be alienated, viz, grant, transfer, conveyance, will, assignment, mortgage, allocation/allotment, he is absolutely free to dispose it to any person of his choice subject of course to satisfying some certain statutory requirements like statutory governor consent⁶ registration⁷ and stamping of the conveyancing documents.⁸

In light of the above, this article is divided into seven parts. Part one deals with the definition of the concept of pre-emption as it is practiced under Islamic law. This will then lead to part two, which continues to trace the history of the practice in Islam and how it is used in Islamic law. Parts three and four of the article continues with an explanation of the workings of pre-emption and the conditions that needs to be fulfilled for its valid application. This then leads to parts five and six, which highlights the importance of the concept and illustrates how the concept is applied in Northern Nigeria. This article is concluded in part seven, which posits that the exercise of this concept is still not legally recognised in Nigeria. This part seeks to recommend several options that could be adopted in order to ensure that it will be possible for this concept to be applied by Muslims, at least in Northern Nigeria.

WHAT IS PRE-EMPTION?

Simply put, pre-emption is the right of an individual to acquire by compulsory purchase, in certain cases, immovable property in preference to all other persons. It is the right of a third person, called the pre-emptor, to step in, when a contract is made for the sale of immovable property, and claim to take the place of the buyer, that is to take the property at the

⁶ Section 22, Land Use Act Cap N 202 Laws of the Federation of Nigeria, 2004.

⁷ Section 15, Land Instrument Registration Law of Northern Nigeria, 1963.

⁸ Stamp Duties Act, Cap S 411, Laws of the Federation of Nigeria, 2004.

same price and on the same conditions as the buyer and seller have agreed upon.⁹

The Arabic term for pre-emption is derived from the verb *shafa'a*, meaning to combine, increase or fortify. This term is used for pre-emption since the pre-emptor combines what he owns by virtue of this right to his own property, thus increasing and fortifying it.¹⁰

Also, Ayub¹¹ defines *shufa'ah* as the right of pre-emption in sale transactions, for example, a real estate sale in which some party possesses the right to force the seller to sell him all or part of the real estate in the event of sale.

The concept has also been defined by the different schools of Fiqh. The Hanafi School has defined the term legally as the right to claim ownership of a sold immovable object, thus taking it from the buyer (with or without his consent) in exchange for its price and any expenses that he paid. It is legalized to avoid the harm caused by introducing new unwanted partners or neighbours. Thus, the Hanafis establish pre-emption rights for partners and neighbours of the owner of a property offered for sale.¹²

The non-Hanafi jurists on the other hand defined pre-emption as a contract-language based entitlement of one partner to take the portion of joint immovable property exchanged by his partner, and pay its price or value in exchange. In other words, it is a right established for an older partner over a new partner, to take ownership of his share with or without his consent, with fair compensation. Thus, they established pre-emption rights only for partners and not for neighbours. The four major Sunni schools restricted pre-emption rights to immovable properties. Only the Zahiris have also allowed it for movable objects, such as animals.¹³

⁹ H Shiraz, *Islamic Banking* (London: Butterworth, 1990) 237.

¹⁰ Wahbah Al-Zahayli. *Financial Transactions in Islamic Jurisprudence*, Vol. 2, (Damascus: Dar Al-Fikr, 2003), 701.

¹¹ Ayub M, "A Comprehensive Glossary of Terms in Islamic Commercial Law" *Business, Banking and Finance, Journal of Islamic Business and Management* 2 (2) (2012): 37.

¹² Md Akther U "Principles and application of Preemption in Islamic finance: A critical analysis" MPRA Paper NO. 67713 posted 9 November, 2015 online at <http://mpra.ub.uni-muenchen.de/67713> accessed on 29/5/2018.

¹³ John Makdisi *Islamic Property Law : Cases and Materials for Comparative Analysis with the Common Law* (Durham North Carolina Caroline Academic Press 2005) 332.

Meanwhile, pre-emption is defined under international law as a contractual right to acquire certain property newly coming into existence before it can be offered to any other person or entity.¹⁴ It is also called a “first option to buy”. It comes from the Latin verb *emo, emere, emi, emptum*, to buy or purchase, plus the inseparable preposition. A right to acquire existing property in preference to any other person and it is usually referred to as a right of first option.¹⁵ In practice, the most common form of pre-emption right is the right of existing shareholders to acquire new shares issued by a company in a right issue, usually but not always public offering. In this context, the pre-emptive right is also called subscription right or subscription privilege.¹⁶

Wali JSC – Justice of the Supreme Court of Nigeria in the case of *Alkamawa v. Bello & Other*,¹⁷ defined pre-emption (*shuf'ah*) as the right by which a co-owner in an immovable property may redeem from a stranger, in consideration of compensating him, that part of the property which has been sold to him by another of the co-owners.

Based on the above discussions, it can therefore be surmised that under Islamic law, the right of pre-emption is in the nature of an easement and is annexed to a particular land. The right comes into existence on the sale of the adjacent property. The right to pre-emption is not a right of re-purchase either from the vendor or from the purchaser, but it is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the purchaser in respect of all the rights and obligations arising from the sale.

Commenting on the principle governing the right of *shuf'ah*, Wali in the case of *Alkamawa v. Bello & Others (Supra)* stated that:

“It is true that there is another Hadith which confers the right of *shuf'ah* to a neighbour. This has been interpreted by Islamic law jurists in different ways, and out of the four Sunnis schools of law, that is,

¹⁴ Bryan A. Garner, *Black's Law Dictionary* (St Paul Minnesota USA, Thomas Reuters 2009), 323.

¹⁵ Garner, A *Black's Law*.

¹⁶ Preemptive right definition on investor/Words.com (http://www.investorwords.com/3773/preemptive_right accessed on the 11/5/2018 5. 16 AM.

¹⁷ (1998) LPELR- 424 (SC).

Malik, Shafi'i, Hanafi and Hanbali, it is only Hanafi school that confers the right of *shuf'ah* on a neighbour. The majority view as stated by Maliki is that a neighbour does not possess the right"

Furthermore, the right of *shuf'ah* was further re-instated in the case of *Alkamawa v. Bello & Others (Supra)* as per Wali JSC thus-

"In Sahihul Bukhari vol. 3 page 165, paragraph 2257, the law is settled as follows- "Allah's Apostle (P. B) gave judgment on the right of pre-emption for partners in property which has not been divided up. When boundaries had been fixed between them, then there were no rights of pre-emption".

Note that, Islamic law provides for a group of persons that are entitled to pre-emption namely:

- a) A co-sharer or a partner in the property sold;
- b) A partner in the amenities and appendages of the property such as the right to water and to road, or a common access. These are persons connected with the property sold either as holders of dominant or servient heritages, or as sharing a common right;
- c) An owner of neighbouring immovable property. This right of pre-emption on the ground of vicinage does not extend to estates of large magnitude such as villages but is only confined to houses, gardens and small parcel of land.¹⁸

For example, 'A' who owns a piece of land, grants a building lease of land to 'B', 'B' builds a house on the land and sells it to 'C' can 'A' claim right to pre-emption? It will appear that 'A' will be entitled to pre-emption of the house; as he has a building and thus shares a common right on the land although, he is not a co-sharer, nor participator in the appendages of the house, nor an owner of adjoining property.

It is noteworthy to highlight that these rights to pre-emption amongst the above enumerated pre-emptor may become equal at a stage thereby posing a problem of who takes priority. Where such a situation arises the procedure to be adopted is that the first class, that is the co-sharer will exclude the second class, the partners in the amenities of the property,

¹⁸ Sayyid Sabiq, *Fiqh- S- Sunnah* (Beirut: Dar Al-Fikr, 1998), 362.

and the second class will exclude the third class, the owner of the neighbouring immovable property.

However, where there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed. Thus, a partner in the amenities and appendages of the property has priority over an owner of neighbouring immovable property.¹⁹

ORIGINS OF THE CONCEPT OF PRE-EMPTION AND ITS BASIS IN ISLAMIC LAW

The origin of the concept of pre-emption could be traced to the period before the advent of Islam and was maintained by the Prophet (s.a.w.). The right of pre-emption was prevalent in pre-Islamic Arab against the sale of house and agricultural lands.²⁰ The law of pre-emption was also recognized under the Roman law. The Roman law, sanctioned a compulsory relation between the vendor and a person determined, binding the vendor to sell to that person if offered in good condition as intended by purchaser. It arose from the protection given solely by personal action and gave no right of action against the purchaser to whom the property has been passed.

The right of pre-emption is founded in a practice of the Prophet (s.a.w.) who has been reported to have said that, “the right of Shaffa” holds in a partner who has not divided off and taken separately his share”. The establishment of it in a neighbour is also founded on a saying of the prophet. The neighbour of a house has a superior right to that house, and the neighbour of the lands has a superior right of those lands and if he is absent the seller must wait his return, provided, however, that both participate in the same period. This can be seen in the following ahadith.

On the authority of Jabir, son of Abdullahi;

¹⁹ Sabiq, *Fiqh- S- Sunnah*, 363-364.

²⁰ Imam Abul – Hussain Muslim & Nasiruddin Al- Khattab trans, *English Translation of Sahih Muslim*, Vol. 5, (Riyadh: Dar-us-Salam Publications Inc. 2007), 570.

“The Holy Prophet (s.a.w.) has ordered for pre-emption in the case of other such property that has not been divided. But when the boundaries and passages have marked out then there is no pre-emption”²¹

Also, on the authority of Amr son of Al-Sharid, who narrated:

“I was standing by Sa’ad son of Abu Waqas when there came Al-Misawar son of Makhrama, and placed his hand on one of my shoulders. Then, there came Abu Rafi, the Servant of the Prophet and said “O Sa’ad! Purchase from me the two houses that are next to your house”. Sa’ad said “By Allah, I will not purchase them. Al-Misawar said, “By Allah you shall have to purchase them. Sa’ad said, “By Allah I will give you for 4000 Dirhams and even that by instalments”. Abu Rafi said, “I am already being paid 500 Dinars for them and if I had not heard the prophet saying that the neighbours have greatest right on account of his being nearer proximity, I would have given you these houses for 4000 Dirhams, particularly when I am certain of getting 500 Dinars from them. Then Abu Rafi gave those houses to Sa’ad.”²²

WHEN DOES THE RIGHT TO PRE-EMPTION ARISE?

It is to be noted further that another important point about pre-emption is when exactly does it arise? The right of pre-emption arises only out of a valid, complete and bona fide sale, and in no other alienation such as gift and request. The right under Islamic law can only be exercised with regards to immovable property; thus. It would not apply to a sale of crops or tree intended to be removed, and in the transfer like the clothes and the animals.

It is important to note that the right of pre-emption arises only in two types of transfer of property namely sale and exchange. When it arises in respect of a sale, then the sale must be complete, bona fide and valid on the completion of sale. Similarly, the right of pre-emption arises in

²¹ Muhammed Ibn Ismail Bukhari & Muhammed Muhsin Khan trans, *The English Translation of Sahih Al-Bukhari with the Arabic Text*, Vol.5 (Virginia USA: Al-Saadawi Publications, 1996), 475.

²² Bukhari and Khan, *The English Translation*, 477.

respect of exchange when it is complete, bona fide and valid²³ According to Islamic principles²⁴ a sale is complete even if no registered instrument is made. However, the position is different under the English system, as any instrument purporting to transfer any land shall be registered for the validity of such transaction.²⁵ Then for the purpose of pre-emption; by what law is the sale to be deemed as completed? The question is important because the demands of pre-emption are to be immediately on completion of sale. It is noted that the question is to be determined with reference to the intention of the vendor and the purchaser, as to what law should apply, and what is to be taken as the date of sale, with reference to which the formalities are to be performed.

The right of pre-emption does not exist in respect of a gift, *sadaqah*, *wakf*, inheritance or lease. It does not apply to a mortgage also, but if a mortgage is foreclosed, then the right of pre-emption arises. It has been held in various cases that the court should look into the real nature of the transaction.²⁶ A deed which is called a gift, if it is, in fact, a sale, and then the right of pre-emption will arise.

It is also important to note that a transfer of property by a husband to his wife in lieu of a dower is a sale and is therefore subject to a claim for pre-emption.²⁷ More importantly, the right of pre-emption arises not only out of a private sale, but also out of a sale by the court or a receiver. Also, where the purchaser is himself in the category of pre-emptor, the property is equally divided between the purchaser and the pre-emptor.²⁸

In view of this, the law of pre-emption, imposes a limitation or disability upon the ownership of property to the extent that it restricts the owner's unfettered right of transfer of property and compels him to sell it to his co-heirs or neighbour, as the case may be. The person who is a co-sharer in the property, or owes a property in the vicinity, gets an advantage corresponding to the burden with which the owner of the

²³ Mayank Shekhar "Pre-emption (Shuffa) under Muslim Law- Concept, Rights and Effect" <http://www.legalbites.in/muslim-law-notes> accessed on 5/10/2018 9.29 A.M.

²⁴ Abubakr J. A, *The Methodology of the Muslim (English Translation)* (Lebanon: Dar-Fikr, 1994), 464.

²⁵ Ibid.

²⁶ Mayank Shekhar "Pre-emption (Shuffa) under Muslim Law."

²⁷ Shiraz. *Islamic Banking* 239.

²⁸ Sabiq, *Fiqh- S-Sunnah* 368.

property is saddled, even though it does not amount to any actual interest in the property sold. It is now an established fact that the right of pre-emption is not a mere right to re-purchase, it is akin to a legal servitude running with the land. The right of pre-emption exists in favour of a neighbour for the time being which entitled him to have an offer of sale made to him whenever the owner of pre-emptional property desires to sell it.

It is also important to note that the right to pre-emption may be lost. The circumstances under which the right may be lost are by the following:

- (a) acquiescence or waiver;
- (b) by the death of the pre-emptor;
- (c) by misjoinder; and
- (d) by release.

Acquiescence takes place when a pre-emptor fails to observe necessary formalities such as making of demands. The right of pre-emption is also lost when the pre-emptor enters into a compromise with the buyer, such as when he agrees to cultivate the land (subject matter of the pre-emption) with the purchaser. It is lost by the death of the pre-emptor where the latter dies after making both the demands but before the filling of the suit. The right of pre-emption is lost and his legal representative cannot file the suit.

The right may also be lost by misjoinder. If the pre-emptor joins himself as a co-plaintiff with a person who is not entitled to claim pre-emption, then the right is lost and the suit must be dismissed.

In addition, the right can also be lost by release. This arises where the pre-emptor releases the property for consideration to be paid to him. However, the right of pre-emption will not be extinguished, if, before the completion of the sale, the property was offered to the pre-emptor, but he refused to buy it since the right of pre-emption accrues only after the completion of the sale

CONDITIONS PRECEDENT TO EXERCISE THE RIGHT OF PRE- EMPTION

It is pertinent to note further that the right of pre-emption may also be created by contract. In construing the terms of such contract, the court will give effect to the intention of the parties as expressed therein. In the

absence of a contract to the contrary, it will be presumed that the Islamic law will govern a contract for pre-emption, and all the formalities are to be observed before a valid claim for pre-emption can be made. Where a right of pre-emption is based on a contract, a Muslim co-sharer is entitled to pre-emption even against a non-Muslim.²⁹

It is important to point out here that for a pre-emptor to succeed in his claim for pre-emption, he must have demanded from the vendor, the right to exercise the same. This requirement to demand may be in either of the following ways:

- a) A declaratory demand. This is a demand that should be made immediately after the conclusion of the sale transaction. It is the principle of Islamic law that, it must be accompanied with a declaration of intention to exercise one's right of pre-emption. The demand must not be equivocal and ambiguous as it must be made clearly and accurately.
- b) A demand made for a third party to testify as witness to the agreement. This is done in order to avoid deviance from the original owner of the property. This demand should also not be equivocal and ambiguous. Note further that, there must be two witnesses who must be of high integrity, just, honest and competent.
- c) A demand that is made in the court. In the case, the pre-emptor can join the vendor and the purchaser as co-defendants. If the pre-emptor is able to prove his rights, he is entitled to the landed property and may be required to pay the purchaser the amount in which the latter purchase the property (restitution). On the other hand, if it is to be a "Resale" then another negotiation must have to be entered in order to conclude the contract between the purchaser and the pre-emptor.³⁰

Notwithstanding the enforcement of his right as guaranteed to the emptor under Islamic law, it is pertinent to note that the right to pre-emption may be lost in some certain circumstances. The right to pre-emption may become non-exercisable in an inheritable property except

²⁹ Ibid 368.

³⁰ Ibid 357.

where there is a *lis pendens*. That is, where there is a pending suit or action particularly one relating to land.

Secondly, the right may be lost if the pre-emptor acquiesces in the sale. This may arise where the pre-emptor enters into compromise with the purchaser. The right may also be lost where the pre-emptor waives his right through laches.

Thirdly, the right may also be lost where there is lapse of time, which is usually one year. The essence of this is that the right to pre-emption as a limitation period after which the right becomes in exercisable.

On the other hand, the right to pre-emption is not lost merely because previous to the sale, the pre-emptor had refused to buy the property in respect of which the right is claimed; or that the pre-emptor had previous notice of the sale and he did not offer to purchase. It may be noted that according to some school of thought that choose to adopt a strict view, the doctrine of pre-emption strictly applies only to Muslims. Therefore, a (Dhimmi) is not allowed to benefit from this principle. However, some jurists are of the opinion that he can exercise the right of pre-emption because he is a recognised citizen. The school of thought that frowns against a Dhimmi exercising this right relied on the prophetic tradition to the effect that “No right of pre-emption to a non-Muslim.”³¹

THE OBJECTIVES OF THE DOCTRINE OF PRE-EMPTION

Having considered all the above, there remains to be examined the aims and purpose of the doctrine of pre-emption. The doctrine of pre-emption otherwise called doctrine of convenience is designed in such a way that a stranger is not allowed to take the advantage of purchasing a landed property at the expense of the neighbour of the vendor or the pre-emptor. It is to prevent any discomfort and inconveniences which may befall a family and a community from the introduction of a disagreeable stranger as a co-partner or a near neighbour.

It is also to maintain the peaceful co-existence hitherto subsisting which same may be halted by the accommodation of a stranger whose conduct may not be acceptable to the members of such community. This justifies the reason why the right of pre-emption is not sold or bestowed. That to whom the pre-emption is due for has no right to sell his right in it

³¹ Abubakr J. A. *The Methodology of the Muslim*, 468.

or bestow it to another. That selling it or bestow it are contradictory to the purpose for which the pre-emption is legally meant for.

The right of pre-emption is also a preferential right given to a buyer of an immovable property for the property to own the property absolutely. The principle was developed under the Islamic law to prevent a stranger from becoming a co-owner of the property, which may cause inconvenience. The right of pre-emption arises only when a complete sale takes place. Islam is the only religion which emphasized abundantly the rights of neighbour, even the companions of the prophet feared the Prophet (peace be on him) will make them the partner in inheritance. Its main objectives are for the realization and protection of neighbour's right; to ensure the consent of neighbour over new owner as the existing neighbour may need the land more than the stranger and could also protect it in better way.

Above all, pre-emption also prevents the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a near neighbour.

THE APPLICATION OF PRE-EMPTION UNDER THE NIGERIAN LAWS

In Nigeria, it is to be noted that, a vendor is free to alienate his land subject to satisfying some statutory requirement particularly, the consent of the governor which same must have been sought and obtained before any landed property is alienated in whatever means whether by mortgage, transfer of possession and ownership, assignment and/or allocation.³²

The purpose of the above law is that a vendor, upon satisfying the statutory requirement as laid down by the law, can dispose of his land to whosoever he wishes. Therefore, the transfer of land to a man from Sokoto State by a vendor resident in Kwara State irrespective of the religious difference will be proper and valid in law subject to the compliance of the statutory provisions.

However, it needs be noted here that, the doctrine of pre-emption though laudable for its maintenance and continuance of peace is not legally applicable in all parts of Nigeria. The objective of pre-emption may be disturbed where an unwanted stranger is allowed to become an

³² Section 22 of the Land Use Act Cap N 202 Laws of the Federation of Nigeria, 2004.

owner of real estate at the detriment of an existing neighbour in an Islamic State where Islamic law is the established judicial system governing the affairs of the subjects. The fact that pre-emption evolved as one of the principles of Islamic law where priority is vested to an existing neighbour over and above a stranger in disposing of a real estate confirms its being predominantly practised in an Islamic State. However, the application of pre-emption in Nigeria is restrictive only to some parts of the Northern Nigeria. The concept does not fall under the Muslim personal law recognized by the Constitution of the Federal Republic of Nigeria 1999 (as amended). In addition, its application under common law is also restrictive to subject-matter like petroleum products and company shares.

It is also important to note that, the application of Islamic law under which the doctrine of pre-emption falls, operates only in some parts of Northern Nigeria. To adjudicate on matters that deals with Islamic law, the 1999 Constitution specifically Section 275 provides that there shall be for any State that requires it, a Sharia Court of Appeal for that State. The Court's jurisdiction is to serve as an appellate court and act in supervisory capacity in civil proceedings involving questions of Islamic personal law, which the court is competent to decide.

There is also an established Upper Area Court, a court that is vested with unlimited jurisdiction save in cases of homicide. This Court has jurisdiction to hear and determine matters on pre-emption. However, it is not safe to conclude that an appeal from this court on the doctrine of pre-emption will be decided by the Sharia Court of Appeal in view of the fact that pre-emption is not listed as a question relating to the personal law of Muslims. Therefore, it will appear that by virtue of Section 277 of the 1999 Constitution an appeal coming from the Upper Area Court with regard to pre-emption will not be decided by the Sharia Court of Appeal but to the High Court. Also in an action to enforce a contract of sale of inherited house between co-heirs (whether or not the right of pre-emption is involved) the applicable law where both parties are Muslims is the Islamic law of contract of sale.

The above principle of law has been judiciously settled by the Court of Appeal Kaduna in *Mallam Ado & 1 other.V. Hajiya Dije*³³. The question *inter alia* that came for determination before the Court of appeal was that the Kano State High Court acted without jurisdiction when it

³³ (1990) I. L. R 19-22.

assumed jurisdiction on a matter relating to pre-emption, same being a part of the personal law of Muslims. The Court of Appeal as per D. O. Coker J. C. A. (as he then was) held that:

“... the issue falls within the jurisdiction of the Kano State High Court as provided in Section 236 of the 1979 Constitution (now 1999 Constitution). This Section of the Constitution gives the High Court jurisdiction to hear appeals, subject of the Sharia Court of Appeal as provided in Section 277 and does not include enforcement of contract. While I agree that the applicable law in the transaction between the parties could be Islamic law of contract, it is in my view, not one which falls within any of the provisions of subsection (2) of Section 277...”

It is therefore manifestly clear that even though the doctrine is applicable in some parts of the northern states of Nigeria, however, its application is limited since appeal on the subject matter relating to pre-emption cannot lie to the Sharia Court of Appeal but to the High Court the same having not been listed as part of the question relating to the Muslim personal law.

Notwithstanding this limitation, the position of the law in Nigeria is that every citizen of Nigeria should not be denied his right to reside in any part of the country irrespective of his tribe, race and religion. In other words every citizen should not be denied to own and acquire property given the homogeneity situation in Nigeria and more particularly the Northern part of Nigeria which has an amalgam of different tribes with different religious beliefs

It is also important to note that the doctrine of pre-emption is recognised under international law. However, its application is not limited to the landed property as applicable under Islamic law. Pre-emption under international law has been described as the right of purchasing property in preference to other persons. It is the right of a government to purchase, for its own use, the property of the subjects of another power in transit, instead of allowing it to reach its destination.³⁴ It is understood from the afore-stated principle that pre-emption though applicable under the international law, but transcends the ambit within which it is applicable under the Islamic law, which is only concerned with an immovable property.

³⁴ Roger B, *Concise Law Dictionary* (London: Sweet & Maxwell, 1983), 260.

CONCLUSION AND RECOMMENDATIONS

It is obvious that the doctrine of pre-emption cannot be said to absolutely applicable in Nigeria. This is because a situation whereby an individual owns and acquires a property is denied the right to dispose of the same in the manner he or she so desires. It is submitted that this contravenes the provision of the Nigerian Constitution.³⁵ The position of the law is that every citizen of Nigeria should not be denied his right to reside in any part of the country irrespective of his tribe, race and religion. In other words, every citizen should not be denied to own and acquire property given the homogeneity situation in Nigeria and more particularly the Northern part of the country which has an amalgam of different tribes with different religious beliefs.

The application of pre-emption is restricted in Nigeria vide the provision of the Constitution of Nigeria and court pronouncement.³⁶ However Muslims are not prohibited from exercising pre-emption in the disposition of their property since there is no existing law prohibiting the Muslims from applying pre-emption

However, it should be noted that one should not close his eyes to the beautiful aims and objectives of the doctrine of pre-emption which is a matter of maintaining a peaceful co-existence, convenience and comfort which has longed been built in a community. Thus, the doctrine of pre-emption although relevant, is better applied in an Islamic State. Its applicability in Nigeria where the Constitution has provided that there shall be no State religion may be inoperative.³⁷ One can but conclude that as beautiful and elegant as the doctrine of pre-emption is, its applicability under existing Nigerian law is not absolute as it may go contrary to the well laid down statutory provisions and where the latter is to prevail over the former.

It is thus suggested that Muslim owners of property be educated on practice pre-emption so as to allow them to recognize and respect the rights of their neighbours in the disposition of their property.

³⁵ Section 43 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁶ Section 277 of the 1999 Constitution (as amended); *Mallam Ado & 1 other v. Hajia Dije* (1990) *I.L. R* 22.

³⁷ Section 10 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Finally, it is suggested that every land owner is allowed to so deal with his property in a manner suitable provided that will not infringe on the right of any other citizen. That, the continued peaceful co-existence, conveniences, and comfort which has longed been built in a community be allowed to flourish and a re-instatement that, the principle is only persuasive and not absolutely binding even on the Muslims especially under the Nigeria context. Above all that the application of pre-emption in Nigeria should be broadened to embrace all other residents in the Northern Nigeria irrespective of religion affiliation as well as the migrants to the region.