

SUPREME COURT OF NIGERIA
11TH MAY, 2001. SC. 84/1996
**CORAM:- A. G. KARIBI-WHYTE, I. L KUTIGI, U. MOHAM-
MED, O. ACHIKE, E. O. AYoola, JJSC.**

CHARLES DELE IGUNBOR APPELLANT
AND
MRS. OLABISI AFOLABI RESPONDENTS
MRS. MARY OYEYEMI IGUNBOR

ADMINISTRATION OF ESTATE - Actions - Commencement - An action in an administration of estate - Must be commenced by writ (H 5)

ADMINISTRATION OF ESTATES - Co-administrator of an intestate - Application to be joined as a party in a suit - Can be brought by motion (H 7)

ADMINISTRATION OF ESTATES - Probate actions - And probate matters - Distinction between them (H 6)

ADMINISTRATION OF ESTATES - Proceedings - Governing law - Proceedings in respect of the administration of estates - Is governed by the High Court Law and Rules of procedure made thereunder (H 4)

ADMINISTRATION OF ESTATES - Probate - Interlocutory matter relating to probate - Is required to be initiated by way of motion (H 8)

APPEALS - Issues - Essence of the formulation of issues - Is to distill the points of law or fact in the grounds of appeal filed (H 1)

APPEALS - Issues - Terseness leading to obscurity of the issues for determination - Will not be encouraged (H 3)

APPEALS - Issues - Unrelated to the ground of appeal filed - Are irrelevant

1528 *Igunbor v. Afolabi* (2001) 5 KLR (pt. 121) 152; (2001) 11 NWLR
evant (H 2)

JUDGMENTS - *Final order - Interlocutory motion - To be joined as Co-administrators - An order granting such application - Determined the rights of the parties - And is therefore a final order* (H 10)

JUDGMENTS - *Order - Whether interlocutory or final - How to determine its nature* (H 9)

FACTS

In the High Court of Oyo State sitting at Ibadan, the appellant and another brought on application by way of motion to join as Co-administrators in an application for letters of administration to the Estate of late P. A. Igunbor. P. A. Igunbor died survived by five wives, fifteen children and a younger brother. On February 2nd, 1988, Mrs. Okabisi Afolabli (nee Igunbor), the oldest child and a female and Mrs. Mary Oyeyemi Igunbor, the youngest wife of the late P. A. Igunbor (the 1st and 2nd Respondents respectively) without the knowledge of the Appellant applied for letters of Administration to the estate of the deceased. Appellant became aware of this application of the Respondents for letters of Administration filed a notice by caveat to prohibit the grant of the letters of Administration to the Respondents alone. The appellant subsequently filed the application commenced by way of motion on notice in which he prayed for interalia: an order joining (1) Mr. John Ogunmola Igunbor and (2) Mr. Charles Dele Igunbor (the Appellant) as co-applicants with the Respondents to the administration of the intestate Estate of Late P.A. Igunbor. The application is suit No. M/75/88 and is sequel to an existing application for the grant of letters of Administration, that is suit No. 1/653/88. The application was supported by an eighteen paragraphs affidavit. The Respondents filed a six paragraphs counter-affidavit in opposition. The application was opposed by counsel for Respondents in an oral preliminary objection alleging that the procedure followed in bringing the application by motion was faulty and was not in compliance with the due process of law. It was contended that applicants

should have initiated the action by writ of summons and not by notice of motion

The learned trial Judge overruled the objection and granted all the prayers in the motion. Respondents appealed to the Court of Appeal. The Court of Appeal also heard and overruled the preliminary objection as to whether the appeal before the court was competent being an interlocutory matter in respect of which leave of the court had not been first sought and obtained within 14 days of the decision. It was held that the orders of the learned trial judge were final orders and that an appeal therefrom was as of right under section 220 (1) of the Constitution 1979. On the substantive appeal that court allowed the appeal, holding that the application M/75/88 was not in compliance with the rules for the commencement of probate action. Hence, the Appellant has now appealed to the Supreme Court raising five issues while the Respondents raised two issues. The Court considered only issues 1-3 formulated by the Appellant as relevant for the determination of the appeal.

ISSUES FOR DETERMINATION

"1. Whether the application before the High Court No. 3, Ibadan dated 8th day of August, 1988 was a Probate Matter or a Probate Action.

2. Whether the Order of High Court NO. 3 Ibadan made on 14th December, 1988 was an Interlocutory Order or Final Order.

3. Whether or not the appeal before the Court of Appeal was Competent.

HELD (Unanimously allowing the appeal per lead judgment of **KARIBI-WHYTE JSC**)

Issues - Essence

1. The essence of the formulation of issues is to distill the points of law or fact in the grounds of appeal filed. (p. 1539 D)

Issues - Unrelated to the grounds of appeal filled

2. It is essential to avoid proliferation of issues. However, issues unrelated to the grounds of appeal filed are irrelevant and would be ignored in the consideration of the appeal. (p. 1539 D)

Issues - Terseness

3. Whilst avoiding prolixity, terseness leading to obscurity of the issues for determination to be argued will not be encouraged. (p. 1539 E)

B *Administration of Estates - Actions*

4. Proceedings in respect of the Administration of Estates is governed by the High Court Law and Rules of Procedure made thereunder. Since “Court” in the law means the High Court. Order 35 r.16 High Court (Civil Procedure) Rules 1978 provides that suits respecting probate or administration shall be instituted and carried on as nearly as may be in the like manner and subject to the same rules of procedure as suits in respect of ordinary claims. (p. 1542 G)

D *Administration of Estates - Proceedings*

5. A careful reading of the definitions above inevitably lends support to the view that an action in an Administration of Estate must be commenced by writ, as an action herein defined if it is a civil action. Such an action will qualify as a Probate action as defined. (p. 1543 C)

Administration of Estates - Probate actions

6. Probate actions include matters relating to the grant or recall of probate or letters of administration other than common form business. All the above definitions which come within the meaning of “cause” – relate and concern matters initiated as original proceeding between Plaintiff and defendant.

“Matter” has been defined as including every proceeding in Court not a cause. By such exclusion it would seem “matter” may be defined as a proceeding not a cause. That is to say every proceeding which is not an original proceeding between Plaintiff and Defendant. Herein lies the distinction.

The law has by this definition contemplated the situation where interlocutory proceedings will arise in a cause and has provided for such eventualities. (p. 1543 D)

Administration of Estates - Co-administrator

7. It cannot be disputed both in principle and practice that if an application to be considered as a person entitled to share in the distribution of an estate can be brought by motion, there is no reason why a person seeking to join a Co-Administrator to an intestate estate cannot do so by the same procedure. (p. 1544 G)

Administration of Estates - Probate

8. There is no doubt that on the facts of the application before the learned trial Judge, applicants were not initiating a fresh action or suit which could be regarded as an original proceeding against a defendant or defendants. The application cannot be regarded as an action which must be commenced by writ. It is also not a probate action which relates to the grant or recall of probate or letters of administration. It is therefore an interlocutory matter relating to probate which is required to be initiated by way of motion. (p. 1544 H)

Judgments - Order

9. The determination of the question whether an order is interlocutory or final has never been one of mean difficulty. The test has been to look at the nature of the order made rather than the nature of the proceedings resulting in the order. What has to be considered is whether the order has finally determined the rights of the parties in the proceedings in issue appealed against, and not whether the rights of the parties in the substantive action have been finally disposed of – See Omonuwa v. Oshodin (1985) 2 NWLR (pt. 10) 924.

A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties, in the

action. However, where the order made finally determines the rights of the parties, as to the particular issue, disputed it is a final order even if arising from an interlocutory application. For instance, an order committal for contempt arising in the course of proceedings in an action is a final order – See Toun Adeyemi v. Theophilus Awobokun (1968) 2 All NLR. 318. (p. 1546 C)

Final order - Interlocutory motion

10. The instant case as rightly submitted by Appellant’s counsel, is an interlocutory motion by the Appellant to be joined as Co-Administrators with the Respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer; and without any further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial Judge is therefore a final order. An appeal on the said order is as of right under section 220(1) of the Constitution 1979. (p. 1547 B)

NOTABLE POINT OF INTEREST

ACHIKE JSC

1. *The proper form for commencing an application for joinder as co-administrators for letter of administration*

The narrow issue for determination was purely procedural, namely, whether the appellant who approached the trial High Court for joinder as co-administrators for letter of administration to the Estate of late P. A. Igunbor was right in doing so by an application commenced by motion or should it have been by writ of summons.

Speaking for myself, the matter rests on whether one subsumes the application as a Probate matter or a Probate action; if it is the former, then the application should be by motion, but if the later then, the proper approach to the court should be by writ of summons. I am persuaded by the authorities which were adequately considered in the leading judgment in this appeal, and with which I thoroughly and respectfully agree, that the learned trial judge was right to have entertained the action as a pro-

bate matter, and not as a probate action. (p. 1548 H)

REPRESENTATION

Adeniyi Akintola, Esq., for the Appellant

Jude Ebiteh, Esq., for the Respondent.

B

CASES REFERRED TO

Odjewdje & anor. v. Obenanena (1987) 3 SC.47 at p.68

U.B.A. Plc v. Akinsanya (1986) 7 SC.233

C

Omonuwa v. Oshodin (1985) 2 NWLR (pt.10) 924

Ude v. Agu (1961) 1 SCNLR 98

Ojora v. Odunsi (1964) NMLR.12

Toun Adeyemi v. Theophilus Awobokun (1968) 2 ALL NLR.318

Akunnia v. A-G. Anambra State (1977) 5 SC.161

D

Coker v. Coker (1956) 1 FSC.16

Falobi v. Falobi (1976) 9 & 10 SC.

Bozson v. Altrincham Urban District Council (1903) 1 KB.547 at 548

E

STATUTES & RULES REFERRED TO

Administration of Estates Law, cap. 1 Laws of Oyo State 1978; ss.2, 20, 21 and 26

High Court (Civil Procedure) Rules, Laws of Oyo State, 1978; O. 1 r. 2, F O.35 r.16

Constitution of the Federal Republic of Nigeria, 1979; s.220 (1)

LEAD JUDGMENT BY KARIBI-WHYTE JSC

G

The application of the Appellants by motion to the trial Judge to join as Co-Administrators in an application for letters of administration to the Estate of late P. A. Igunbor is the genesis of this appeal. The crux of this appeal is whether the procedure adopted by Applicant/Appellant is correct.

H

On the 17th July, 1992, the Court of Appeal, Ibadan Division, set aside the Ruling of Ibadapo-Obe J of the High Court of Oyo State sitting at Ibadan and granting the application of the Appellant and another

to be joined as co-applicants to the administration of the of the intestate Estate of the late P.A. Igunbor who died intestate at Ibadan on the 17th May, 1987.

The facts of this case are in the main not disputed. P. A. Igunbor died survived by five wives, fifteen children and a younger brother. On February 2nd, 1988, Mrs. Olabisi Afolabi (nee Igunbor), the oldest child and a female and Mrs. Mary Oyeyemi Igunbor, the youngest wife of the late P.A. Igunbor without the knowledge of the Appellant applied for letters of Administration to the estate of the deceased. Appellant being aware of this application of the Respondents for letters of Administration filed a notice by caveat to prohibit the grant of the letters of Administration to the Respondents alone. Appellant eventually filed an application commenced by way of motion on notice, in which he prayed for the following orders:-

“(i) *For an order extending time within which to file caveat hereby prohibiting respondents from obtaining the letters of administration alone in the administration of the estate of late Phillip Aifemianmiuwu Igunbor who died in 1987.*

(ii) *An order deeming the caveat/prohibition filed by the 2nd applicant in this matter to be properly filed.*

(iii) *An order joining (1) Mr. John Ogunmola Igunbor (2) Mr. Charles Dele Igunbor as Co-applicants with the Respondents who had already applied for letters of Administration in respect of the estate of late Philip Aifemiamiuwu Igunbor.”*

This is the suit No. M/75/88 John Ogunmola Igunbor & anor. v. Mrs. Olabisi Afolabi & anor. filed on the 8th August, 1988. The application was supported by an eighteen paragraph affidavit sworn to by Charles Dele Igunbor. It is pertinent to observe that this application is sequel to an existing application for the grant of letters of Administration. The Suit No.1/653/88. In re The Estate of Mr. Philip Aifemiamiuwu Igunbor (Deceased), Between Mrs. Olabisi Afolabi (nee Igunbor), Mrs. M. Oyeyemi Igunbor Plaintiffs and Mr. Charles Dele Igunbor Defendant, filed on the 2nd August, 1988.

The application of the Appellants was opposed in a counter-

affidavit of six paragraphs sworn to by Mrs. Olabisi Afolabi. The application was opposed by Counsel for Respondents in an oral preliminary objection alleging that the procedure followed in bringing the application by motion was faulty and was not in compliance with the due process of law. It was contended that applicants should have initiated the action by writ of summons and not by notice of motion. The learned trial Judge overruled the objection and granted all the prayers in the motion. Respondents appealed to the Court of Appeal. They filed and relied on five grounds of appeal. Out of these grounds three issues for determination were formulated in the Appellants' brief of argument. Respondent did not formulate any issues and was deemed to have adopted the formulation of the Appellant.

The issues formulated in the court below are as follows –

"1. As the law (both substantive and procedural) stands, can a caveator initiate any proceeding howsoever for the removal of his own caveat, otherwise than by its withdrawal; and moreso, having sworn to an affidavit to prohibit the grant to the appellants on 12th July, 1988 simultaneously with the entry of his caveat on the same day in reply to the warning issued by the appellants – see pages 5, lines 20-59; 14 lines 1-5; 25 of the records?"

2. Does the 1st respondent's application now appealed against constitute a probate action within the then applicable rules of court, Orders 35 rule 16 and 2 rules 1 and 13 and order 25 rule 29 of the current rules, 1988 so as to confer jurisdiction on the court to pronounce thereon howsoever?"

3. Has the 2nd respondent who never entered any caveat against the appellants' application for the grant of letter of administration of the deceased's estate, and who is neither a beneficiary nor a creditor of same any "locu standi" in this matter? OR is the competent in law in such a circumstance to be granted letter of administration jointly with the appellants who in any event are opposed to his being included in the grant; more so when the 2nd respondent is neither a brother nor sister of the deceased as borne out at pages 21, 34 to 35 of the record which show that he is not a beneficiary of the estate howsoever."

The Court below also heard and overruled the preliminary objection as to whether the appeal before the court was competent being an interlocutory matter in respect of which leave of the court had not been first sought and obtained within 14 days of the decision. It was held that the orders of the learned trial Judge were final orders and that an appeal therefrom was as of right under section 220(1) of the Constitution 1979.

On the substantive appeal, the court below considered the issue whether the learned trial Judge lacked jurisdiction to hear the application which was initiated by notice of motion rather than by the issue of a writ of summons. It was contented that there was already a pending suit for the removal of the caveat and in view of the provisions of Order 35 rule 16 and Order 2 rr.1 and 3 of the High Court (Civil Procedure) Rules, 1978 of Oyo State, the application was not properly initiated. The learned trial Judge ought to have struck out the application.

The Court after construing the provisions of the Probate Rules, as to the meaning of the words “action”, ‘Probate actions’ within the meaning of the Oyo State, High Court (Civil Procedure) Rules 1978 came to the conclusion that the law did not make the distinction between “Probate actions” and other actions suggested by learned counsel for the Respondents, now Appellant. The Court below referred to Order 35 Rule 16 of the High Court (Civil Procedure) Rules, 1978.

The Court below reading together the provisions of Order 35 rule 16 and Order 2 rule 1 held that it is mandatory for a party commencing a Probate action to do so by writ of summons. Referring to the facts of this case, it was held that the subject of this appeal is a “Probate action.” It is an action in respect of grant of letters of administration. The application is contentious and as such is not a common form probate business.

Considering section 26(1) of the Administration of Estates Law of Oyo State 1978, the Court below held that the provision applied to a formal non-contentious or common form probate business, of an application to the Probate Registrar for a grant of letters of administration. The Court held that the section does not enjoin a party to commence a probate action by a motion on notice. It was accordingly held that the application M75/88 was not in compliance with the rules for the commencement of

Probate actions. The Court below held that the non-compliance with the rules in the instant case could not be treated as a mere irregularity. It is a fundamental defect. The judgment of the Court concluded as follows –

“The trial judge has finally determined the issues in dispute before him without hearing the evidence of the parties. This is a contentious matter and in my view, it cannot be fairly and justly disposed of on affidavit evidence alone. The learned judge was therefore wrong to proceed and determine the case despite the applicant’s objection.” (See p. 139 lines 13-21).

On the above reasoning the Ruling of Ibidapo-Obe J dated 14/12/88 granting the prayers in the motion seeking an order for applicants to join as co-Applicants in the administration of the Estate of late Philip A. Igunbor was set aside. This is the decision of the Court below appealed against and which is before us. Appellant has challenged the judgment of the Court below alleging eight grounds of error. The grounds of appeal without their particulars are as follows –

“GROUNDS OF APPEAL

(1) *The learned Justices of the Court of Appeal misdirected themselves in Law in holding that Suit No. M/75/88 was a probate action and not a Probate Matter.*

(2) *The learned Justices of the Court of Appeal misdirected themselves in Law in holding in their judgment that the Ruling dated 14th December, 1988, that is, the Ruling Appealed against was not interlocutory Order but a final Order.*

(3) *The learned Justices of the Court of Appeal erred in Law in holding that suit No. M/75/88 John Ogunmola Igunbor (2) Charles Dele Igunbor v. Mrs. Olabisi Afolabi & anor. being a Probate action was not properly commenced as required by Law i.e. by writ of summons.*

(4) *The learned Justices of the Court of Appeal erred in Law in not following the decisions of Supreme Court of Nigeria in the following cases –*

1. ROWLAND ALABI COKER 7 ANOTHER V JACOB HASTING COKER 1956 1 FSC Pp 16-18

2. *AYIWE ODJEVWEDJE & ANOR. V. MADAM OBENABENA ECHANOKPE* 1987 3 SC. Pg. 47 at Pg. 68 in the appeal before them.

3. *CHUKE ARAH AKUNNIA V. ATT. GENERAL ANAMBRA STATE* 1977 5 SC. Pg. 161 at 171 to 176.

B (5) *The learned Justices of the Court of Appeal erred in Law holding that the Respondent did not aquire the irregular procedure.*

(6) *The learned Justices of the Court of Appeal erred in Law in holding in their judgment that the Respondents could lodge their appeal as of right under Sec. 220 of the Constitution.*

C (7) *The judgment of the Court of Appeal setting aside the Ruling and the Order of Ibadapo-Obe, dated 14th December, 1988 is contrary to the principle of natural justice, equity and good conscience.*

D (8) *The learned Justices of the Court of Appeal erred in law in taking or assuming jurisdiction to enforce Letter of Administration issued under the Administration of Estate Law of Oyo to the estate of Late P. A. Igunbor which is purely governed by Bini Customary Law of Inheritance and the whole process of issuance of the said Letter of Administration is a nullity."*

F In compliance with the rules of this Court, parties have filed and exchanged the briefs of argument they intend to rely upon in this appeal. Appellant has filed a brief in reply to Respondents' brief of argument. Both parties adopted the briefs of argument filed and stated they were relying on them. Appellants and Respondents formulated issues for determination arising from the grounds of appeal, whereas the Respondent formulated two issues. I herein below reproduce the issues formulated.

"Appellant's Issues-

G 1. *Whether the application before the High Court No. 3, Ibadan dated 8th day of August, 1988 was a Probate Matter or a Probate Action.*

2. *Whether the Order of High Court NO. 3 Ibadan made on 14th December, 1988 was an Interlocutory Order or Final Order.*

H 3. *Whether or not the appeal before the Court of Appeal was Competent.*

4. *Whether or not the Court of Appeal was justified in setting aside the order of the High Court No.3, Ibadan even if the proceedings in the*

Court were Administration Action (which is denied).

5. Which Law applied to the Administration of the estate in dispute? Is it Administration of Estate Law of Oyo Estate or Bini Customary Law of Inheritance?”

Respondents’ Issues –

B

“01. Whether or not the lower court was competent to entertain the appeal before it.

02. Whether or not on the authorities (i.e. *In re the Estate of A. O. Antigha, Alias Okon Antigha deceased*, 4 NLR. 136 and Order 50 rule, Rule 57 (1), (2) & (12) Oyo State High Court Rules and *Tristram & Cootes, Probate Practice*, 20th Edition page 670, the judgment of the lower Court is sustainable.”

C

I have compared the formulations of issues for determination of Appellant and Respondents. **The essence of the formulation of issues is to distill the points of law or fact in the grounds of appeal filed. It is essential to avoid proliferation of issues. However, issues unrelated to the grounds of appeal filed are irrelevant and would be ignored in the consideration of the appeal.**

E

Whilst avoiding prolixity, terseness leading to obscurity of the issues for determination to be argued will not be encouraged. The Respondents’ formulation of only two issues for determination do not adequately cover the grounds of appeal filed. In the circumstances, I prefer the Appellant’s formulation of issues for determination, and will adopt and rely on them in the determination of this appeal.

F

It is important to reiterate the fact that this appeal is against the judgment of the Court of Appeal, Ibadan, delivered on 17th July, 1992 which set aside the order of the High Court No. 3, Ibadan, joining the Appellant and another as co-Administrators of the Estate of P.A. Igunbor (Deceased) together with the Respondents. Thus limited, the only issues relevant for determination in this appeal are the substantive and procedural issues leading to the capacity of the Appellants to bring the application and for the Court to exercise jurisdiction. It would appear from the scope of the subject matter of this appeal, only issues 1-3 of the formulation by the Appellant are stricto sensu relevant in the determination of this appeal.

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H

I shall now consider the issues seriatim as argued by Appellant and Respondents in their briefs of argument.

Issues No.1 relates to the question whether the application before the learned trial Judge was a Probate matter or a Probate action. This argument was the basis of the contention in the Court below; and on which the lack of jurisdiction of the learned trial Judge was posited. Proponents of want of jurisdiction argue that there was to the knowledge of the learned trial Judge a pending suit for the removal of the caveat entered by the Appellant. Again in view of the provisions of Order 35 r.16, and Order 2 rr.1 and 3 High Court (Civil Procedure) Rules, 1978 of Oyo State, the application initiated by motion ought to have been by writ of summons. It is accordingly not properly initiated in accordance with due process.

Proponents who argue in support of jurisdiction contend that the application was initiated by due process of law; by virtue of S.6(6) and S.236 of the Constitution 1979. It was argued the application Suit No.M.75/88 is a Probate Matter and could only be initiated by motion in accordance with S.26 (1)(a) of the Administration of Estates Law Cap. 1 Laws of Oyo State. It was submitted that the question whether a matter was commenced in a proper form or not is one of mere legal technicality.

I have already referred in this judgment to the opinion of the Court below rejecting the distinction made by learned counsel between “probate matter” and “probate action” and holding that no such distinction could be found in the provisions of the Administration of Estates Law. I have also referred to the construction of the Court below of the provisions of Orders 35 r.16, 2 rules 1 and 3, and S.26 (1)(a) of Administration of Estates Law of Oyo State 1978 to hold that the combined effect of Order 35 r.16 read with Order 2 rule 1 makes it mandatory for a party to commence a probate action by writ of summons. Suit No. M75/88 the subject of this appeal is a probate action in respect of a grant of letters of administration.

S. 26 (1)(a) of the Administration of Estates Law was construed as applying only to a formal non-contentious or common form probate business. The section does not enjoin a party to commence a probate action by a motion on notice.

It is obvious from what has been stated above that the Court

below set aside the ruling of the learned trial Judge in Suit No.M.75/88 on the reasons stated above. It is necessary for a proper consideration of the argument before us to trace even if in outline the facts involved in the course of the litigation leading to the application in Suit M/75/88.

In addition to our general introduction, it is pertinent to state that the Respondents had already applied for letters of administration to the estate of P.A. Igunbor, paid the estate duty on 27th June, 1988 and the order was about being drawn up, when Appellant quickly filed a caveat, and the motion praying for a prohibition against the issuance of the letters of administration, and for an order to join Respondents as co-administrators. The motion was not intended as an independent suit vis-à-vis the administration of the intestate estate of P.A. Igunbor (deceased). It was only aimed at joining the Respondents as co-administrators in the administration of the estate.

Appellant has in the brief of argument that section 21 of the Administration of Estates Law, Cap. 1 of Laws of Oyo State 1978 does not contain any specific form for applying to the Court. Relying on Akunnia v. A-G. Anambra State (1977) 5 SC.161, Coker v. Coker (1956) E 1 FSC. 16, Falobi v. Falobi (1976) 9 & 10 SC. It was submitted that in the circumstance the only legitimate way is to apply by filing a motion.

Counsel submitted that the proceedings before the court is not an action as canvassed by the Respondents. Learned Counsel went on to consider the meaning of the expression “matter as defined in Order 1 r.2© High Court (Civil Procedure) Rules 1978, Laws of Oyo State 1978, which includes any proceedings in court and not a cause. It was submitted that Probate actions include actions and other matters relating to the grant or recall of probate or letters of Administration other than common form business like the action in Suit 1/653/88 filed by the Respondents.

Learned Counsel referred to the Counter-affidavit of the Respondents in which they admitted filing an Administration Action in this matter. It was submitted that the proceedings have been described as a Probate matter and not an Administration action.

Respondent having not answered any of these arguments in his brief of arguments, he is deemed to have accepted them.

I now turn to consideration of the arguments addressed to us by learned Counsel to Appellants. The most cogent and profound of the contentions is the question of the want of jurisdiction which is based on the issue whether the application which was brought by motion rather than by writ of summons was in accordance with due process.

It has not been disputed by either of the parties, that the action before the court is one in respect of the grant of letters of Administration of an intestate estate. It is also not disputed that application subject matter of appeal is inter alia one seeking joinder of parties as co-Administrators, to the intestate estate. It is common ground that the provisions of the Administration of Estates Law, 1978 of Oyo State is applicable. This is because Section 26 (1)(a) of the Administration of estates Law, 1978 Cap. 1 of Oyo State “where the deceased died wholly intestate as to his estate, administration shall be granted to some one or more persons interested in the residuary estate of the deceased if they make application for the purpose, and by purpose, and by Section 2, the Court means the High Court of Oyo State. Section 20, provides for applications for the grant or revocation or probate or administration to be made through the Probate Registry of the Court. Similarly Section 21 provides that caveat against a grant of probate or administration may be entered in the Probate Registry of the Court.

The words “probate action” and “probate matter” have called for interpretation in these proceedings. Learned Counsel for the Appellant has made the distinction which has been rejected by the Court below. It is necessary for the determination of the first issue to consider whether such a distinction can be gathered from the provisions of the law.

Proceedings in respect of the Administration of Estates is governed by the High Court Law and Rules of Procedure made thereunder. Since “Court” in the law means the High Court. Order 35 r.16 High Court (Civil Procedure) Rules 1978 provides that suits respecting probate or administration shall be instituted and carried on as nearly as may be in the like manner and subject to the same rules of procedure as suits in respect of ordinary claims. By Order 1, rule 2 of High Court (Civil Procedure) Rules “action” means a civil

proceeding commenced by writ or in such other manner as may be prescribed by rules of Court, but does not include a criminal proceedings, “cause” includes any action, suit or other original proceeding between plaintiff and defendant. “matter” includes every proceeding in court not a cause. “probate actions” includes actions and other matters relating to the grant or recall of probate of letters of administration other than common form business. “the Court” means the High Court of Justice of Oyo State of Nigeria and includes the Chief Judge and Judges thereof sitting together or separately.

A careful reading of the definitions above inevitably lends support to the view that an action in an Administration of Estate must be commenced by writ, as an action herein defined if it is a civil action. Such an action will qualify as a Probate action as defined. Actions so instituted will come within the definition of “cause” if it is an original proceeding between Plaintiff and Defendant. Probate actions include matters relating to the grant or recall of probate or letters of administration other than common form business. All the above definitions which come within the meaning of “cause” – relate and concern matters initiated as original proceeding between Plaintiff and defendant.

“Matter” has been defined as including every proceeding in Court not a cause. By such exclusion it would seem “matter” may be defined as a proceeding not a cause. That is to say every proceeding which is not an original proceeding between Plaintiff and Defendant. Herein lies the distinction.

The law has by this definition contemplated the situation where interlocutory proceedings will arise in a cause and has provided for such eventualities. This distinction is not without precedent. The Court below was in error to have held that the law has not made the distinction.

In Coker v. Coker (1956) 1 FSC.36 a similar situation arose in respect of proceedings initiated by way of motion asking the court for directions as to the person or persons entitled to participate in the distribution of the estate of Albert Mosebi Coker, deceased. Objection was

raised in the High Court that the application could not be made by way of motion and that the proper mode of proceeding was by way of substantive action by way of declaration that the applicants were legitimate children under native law and custom. The objection was upheld and the motion was dismissed. On appeal to the Federal Supreme Court the Court set aside the decision of the High court. The Supreme Court relied on the provisions of Order 34 rule 1 of the High Court (Civil Procedure) Rules, that “interlocutory applications may be made by motion at any stage of a cause of matter.” The Court also held that the application in that case fell within the meaning of “a cause or matter” within the meaning of section 2 of the Supreme Court Ordinance Cap. 211, where “matter” was defined as in the case before us as “every proceeding in Court, not in a cause.”

The rationale for the construction was stated as follows at p.38,
“The Court had appointed the Administrator, and I do not think that it could reasonably be argued that he could not have come to the Court by way of motion asking for directions as to who was entitled to participate in the distribution of the assets of the estate. If that is so I am unable to see why a person claiming to be entitled to share in the distribution cannot adopt the same procedure. In my view, he can”

The provisions of Order 34 r.1 of the High Court (Civil Procedure) Rules are in pari materia with the provisions of Order 33 r.1. Similarly, the definition of the expression “matter” in Section 2 of the Supreme Court Ordinance, Cap. 231 is in pari materia with the definition of “matter” in Order 1 section 2 of the High Court (Civil Procedure) Rules Cap. 46 of Oyo State. Accordingly the meaning of the expression in Coker v. Coker (1956) 1 FSC. 37 is properly applicable to the circumstances of the instant case. **It cannot be disputed both in principle and practice that if an application to be considered as a person entitled to share in the distribution of an estate can be brought by motion, there is no reason why a person seeking to join a Co-Administrator to an intestate estate cannot do so by the same procedure.**

Furthermore, **there is no doubt that on the facts of the application before the learned trial Judge, applicants were not initiating a fresh action or suit which could be regarded as an original**

proceeding against a defendant or defendants. The application cannot be regarded as an action which must be commenced by writ. It is also not a probate action which relates to the grant or recall of probate or letters of administration. It is therefore an interlocutory matter relating to probate which is required to be initiated by way of motion. I am satisfied on the reasons I have given in this judgment that the application before the High Court No.3, Ibadan dated 8th day of August, 1988 was a Probate matter, and not a Probate action. The Court below was in error to hold that it was a Probate action.

I now turn to the second issue. The issue to be determined is whether the Order of High Court No.3 Ibadan made on the 14th December, 1988 was an interlocutory or a final Order.

In his brief of argument learned Counsel to the Appellant submitted that since the application of the Respondents was pending before the Registrar, at the time the Suit No.M75/88 was filed, the application filed by the Appellant was an interlocutory application and accordingly the Order made by High Court No.3, Ibadan on December 14, 1988 was an interlocutory order. It was argued that the learned trial Judge made it clear that he made the Order joining the Applicant and his partner on the ground that there is a substantive action in Court in Suit No. 1/653/88 Mrs. Olabisi Afolabi & Anor. v. Charles Dele Igunbor. It was submitted that any application between the filing of Probate Forms and the grant of letters of Administration is an interlocutory proceedings.

Learned Counsel submitted that there is only one Probate Registrar for the High Court of Oyo State. It is therefore immaterial whether applications are made in more than one court.

It was submitted that since the Order made by the trial Judge in Suit No. M75/88 by High Court No.3 was not decisive of the rights of the parties, it was therefore an interlocutory order – Odjewdje & anor. v. Obenanena (1987) 3 SC. 47 at p. 68. It was finally submitted relying on Akinsanya v. UBA (1986) 7 SC. 233 that the determining consideration whether an order of judgment is interlocutory or final is not whether the Court had finally determined an issue before it, but whether or not it has finally determined the rights of the parties in the claim before it.

On his part learned Counsel to the Respondent has submitted in his brief of argument that the Order of the trial Judge in Suit No.M75/88 by the High Court No.3 was a final Order. He cited and relied on the dictum of Lord Alverstone in Bozson v. Altrincham Urban District Council (1903)

B 1 KB. 547 at 548 where the learned C.J. said;

“In my opinion a final order is an order that puts an end to the dispute between the parties and finally disposes of the rights of the parties. An order is final where the Court orders something to be done in answer to the enquiries, without any further reference to itself or any other Court of Co-ordinate jurisdiction...”

C Learned Counsel then submitted that the appeal is competent by virtue of section 220(1)(a) of the 1979 Constitution.

The determination of the question whether an order is
D **interlocutory or final has never been one of mean difficulty. The test**
has been to look at the nature of the order made rather than the nature of the proceedings resulting in the order. What has to be considered is whether the order has finally determined the rights of
E the parties in the proceedings in issue appealed against, and not whether the rights of the parties in the substantive action have been finally disposed of – See Omonuwa v. Oshodin (1985) 2 NWLR (pt. 10) 924, U.B.A. Plc v. Akinsanya (1986) 7 SC. 233, Ude v. Agu (1961)
F 1 SCNLR.98; Ojora v. Odunsi (1964) NMLR. 12; Western Steel Works Ltd. v. Iron and Steel Workers Union of Nigeria (1986) 3 NWLR (pt. 30) 617.

A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject
G matter of the controversy or determines the litigation as to all parties on the merits. On the other hand an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the
H parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties, in the action. However, where the order made finally determines the rights of the

parties, as to the particular issue, disputed it is a final order even if arising from an interlocutory application. For instance, an order committal for contempt arising in the course of proceedings in an action is a final order – See Toun Adeyemi v. Theophilus Awobokun (1968) 2 All NLR. 318. The instant case as rightly submitted by B Appellant’s counsel, is an interlocutory motion by the Appellant to be joined as Co-Administrators with the Respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer; and without any C further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial Judge is therefore a final order. An appeal on the said order is as of right under section 220(1) of the Constitution 1979. D

The Court below was therefore right in so holding. Having held that the Court of Appeal was right in holding that the order of the learned trial Judge granting Appellant’s application to join Respondents as Co-Administrators to the intestate estate of the late P. A. Igunbor was a final E order, consideration of the third issue formulated which is based on the premiss that the order was interlocutory no longer arises.

I have held that the application before the trial Judge was a Probate matter, within the definition of section 2 of the High Court (Civil F Procedure) Rules, 1978 and not a Probate action as held by the Court below. Accordingly, the application commenced by motion is in compliance with due process. The Court below was therefore in error to have held that the application of the Appellant to the High Court by motion for G an order to join as Co-Administrators to the intestate estate of P.A. Igunbor was not in compliance with the provisions of section 26 (1)(a) of the Administration of Estates Law of Oyo State, 1978 and the provisions of Order 35 r.16 read together with Order 2 r.1 of High Court (Civil H Procedure) Rules, 1978. The appeal of the Appellant therefore succeeds H and is allowed. The judgment of the Court of Appeal, Ibadan Division, dated 17th July, 1922, setting aside the ruling of Ibidapo-Obe J of the High Court of Oyo State, sitting at Ibadan is hereby set aside.

The Appellant is entitled to the costs of this appeal assessed at N10,000.00. Respondents shall therefore pay to the Appellant the costs herein assessed.

B

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Karibi-Whyte, J.S.C. I agree with his conclusion that this appeal lacks merit and accordingly fails. The judgment of the Court of Appeal is set aside while the Ruling of the trial High Court is restored. The Appellant is awarded costs of N10,000.00.

D

MOHAMMED JSC

I have had the preview of the judgment just read by my learned brother Karibi-Whyte JSC, in draft. I agree with him, that the Court of Appeal, Ibadan Division, was in error to hold that the application of the appellant to the High Court by motion for an order to join as Co-Administrators to the estate of P.A. Igunbor was not in compliance with the provisions of section 26(1) of the Administration of Estates Law of Oyo State, 1978 and the provisions of Order 35, Rule 16 read together with Order 2, Rule 1 of Oyo State High Court (Civil Procedure) Rules, 1978. Consequently the Court of Appeal was wrong to set aside the ruling of Ibidapo-Obe of Oyo State High Court. This appeal is allowed. I also award N10,000.00 costs to the appellant.

G

ACHIKE JSC

I have had the privilege of reading, in advance, the judgment just delivered by my learned brother, Karibi-Whyte, JSC. I agree with his reasoning and conclusion that the appeal has merit.

The narrow issue for determination was purely procedural, namely, whether the appellant who approached the trial High Court for joinder as co-administrators for letter of administration to the Estate of late

P. A. Igundor was right in doing so by an application commenced by motion or should it have been by writ of summons.

Speaking for myself, the matter rests on whether one subsumes the application as a Probate matter or a Probate action; if it is the former, then the application should be by motion, but if the later then, the proper approach to the court should be by writ of summons. I am persuaded by the authorities which were adequately considered in the leading judgment in this appeal, and with which I thoroughly and respectfully agree, that the learned trial judge was right to have entertained the action as a probate matter, and not as a probate action.

In the result, I am of the firm view that the Court of Appeal was in error to have held that the appellant's application to the trial High Court by motion for an order for his joinder as co-administrators to the intestate estate of P.A. Igunbor did not comply with the provisions of section 26(1)(a) of the Administration of Estates Law of Oyo State, 1978 and the provisions of Order 35 rule 16 read together with Order 2 rule 1 of High Court (Civil Procedure) Rules, 1978. The appeal therefore succeeds and the judgment of the lower court is hereby set aside.

The respondent shall pay N10,000.00 costs to the appellant.

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Karibi-Whyte, JSC. I agree with his decision that this appeal be allowed and for the reasons he gives for that conclusion. I do not wish to add anything. I too would allow the appeal, set aside the decision of the Court below and order costs of the appeal assessed at N10,000.00 to be paid by the respondent.

H