WHEN IS A DECISION FINAL OR INTERLOCUTORY FOR THE PURPOSE OF GIVING A NOTICE OF APPEAL AGAINST IT?*

Abstract

When a court makes a judicial pronouncement in the course of proceedings which touches on the rights of the parties, the court is said to have rendered a decision. For the purpose of re-evaluation of that decision by way of appeal, different rules apply with respect to the time for exercising that right and whether the exercise of such a right requires the leave of court to do so or will be as of right. For the reason that an error or a misconception as to whether a decision is final or interlocutory may have a devastating consequence on an appeal initiated against such a decision, it becomes pertinent that parties to an appeal and the court appreciate this dichotomy with clarity. In this regard, such considerations as the nature of the pronouncement made or nature of the proceedings in which the order is made are kept in proper perspective. Case law authorities on the tests to apply in determining what amounts to an interlocutory or a final decision for the purpose of appeal, appear to be uncertain, as different tests have been applied to different cases. The uncertainty stems not from what the tests are but from their application to given factual situations. It is this uncertainty in the application of these tests that this article reviews with a view to underscoring a workable test aimed at making the law more certain.

Keywords: *Decision, Interlocutory, Final, Test, Rights, Determination*

1. Introduction

A party who is dissatisfied with the decision of a trial or a penultimate court has the latitude to seek a review of such a decision by way of appeal against same if he so desires. This right of appeal is usually statutory. As such, where there is no statutory provision for appeal, no right of appeal exists and no such a right can be exercised. In appellate practice, a distinction between a final and an interlocutory decision is a crucial one. The significance of this distinction is essentially bifurcated; namely, determining the time within which to give notice of appeal against a decision and exercising the right of appeal either with the leave of court or as of right. Drawing this distinction is usually not a simple one. This is for the reason that it does not necessarily follow that, for instance, entire proceedings in a cause or matter must have ended with a final judgment before a decision in the matter is considered by law as a final one. Decisions of the courts, both in Nigeria and in foreign jurisdictions, as to what constitute these two categories of decisions have been, in a number of cases, everything but certain. To instill some form of certainty in the law, some tests have been evolved over the years for determining which decision is final and which is interlocutory. This article discusses the concept of interlocutory and final decisions, statutory provisions and case law authorities on significance of the distinction, and the approach of the courts in providing test(s) for ascertaining what a final or an interlocutory decision is. It also proffers a possible solution towards attaining the much desired certainty in maintaining the distinction.

2. Statutory Provisions

A decision, in relation to a court, is any judicial determination or pronouncement by a court including orders and judgments. According to the interpretation section of the Constitution,[1] a 'decision means, in relation to a court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.' It has also been defined as 'a judicial or agency determination after consideration of the facts and the law; esp., a ruling order, or judgment pronounced by a court when considering or disposing of a case.'[2]

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[1] Section 318 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (hereinafter referred to as the 1999 Constitution)

[2] B A Garner, ed, *Black's Law Dictionary*, 9th Edition, West Publishing, Minnesota, 2009, p. 467

Section 241(1) of the Constitution[3] provides that an appeal shall lie from the decision of the Federal High Court or a High Court to the Court of Appeal as of right in final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance. In instances other than those specified in the foregoing section 241(1), appeal shall lie from the decision of the Federal High Court or a High Court to the Court of Appeal with the leave of either the Federal High Court or the High Court or the Court of Appeal.[4] These other instances where appeal lies to the Court of Appeal from the decisions of the High Court include those of interlocutory decisions. This is because interlocutory decisions other than those specified in section 241 of the Constitution, by necessary implication, fall within those instances where appeals lie from the decisions of the Federal High Court or the High Court to the Court of Appeal with leave of either the High Court or the Court of Appeal.

With respect to appeals from the Court of Appeal to the Supreme Court, the nature of the ground of appeal determines whether the right of appeal should be exercised as of right or with the leave of either the Court of Appeal or of the Supreme Court. In this regard, if the ground of appeal is that of law alone, appeal is as of right.[5] An appeal to the Supreme Court becomes exercisable with leave with respect to appeal on grounds of facts *simpliciter* or mixed law and facts.[6] Further, decisions on interpretation or application of the Constitution, decisions on contravention of the provisions of Chapter IV of the Constitution, decisions on death sentence or affirmation of same, decisions on validity of election, term of office, vacancy in the office, cessation of term of office of the President, Vice – President, Governor or Deputy Governor are appealable as of right; while appeals in all other instances from the Court of Appeal to the Supreme Court must be with leave of either the Court of Appeal or of the Supreme Court. What this means is that interlocutory decisions which do not fall within the categorisations in section 233(2) of the Constitution, will necessarily be maintained with the leave of either the Court of Appeal or the Supreme Court.[7]

Another significance of the distinction between a final and an interlocutory decision is in respect of time for appealing against such a decision. Part V, section 27 of the Supreme Court Act[8] provides for fourteen (14) days and three months for appealing against interlocutory and final decisions, respectively of the Court of Appeal to the Supreme Court. That section in its pertinent part provides as follows:

> 27(1) Where a person desires to appeal to the Supreme Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by subsection (2) of this section that is applicable to the case.
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> (2) The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are –
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> (a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.
>
> (b) in an appeal in a criminal case, thirty days from the date of the decision appealed against.

Notwithstanding the foregoing prescribed timeline, there is the latitude for extension by the Supreme Court of the time so prescribed.[9]

Similarly section 24(1) and (2)(a) of the Court of Appeal Act[10] provides for periods of fourteen days and three months for giving or filing of notice of appeal against interlocutory and final decisions respectively to the Court of Appeal in civil appeals to that court. In the case of a criminal cause or matter, a period of ninety days from the date of the

[3]1999 Constitution. Similar provisions are made in the same Constitution with respect to Sharia Court of Appeal and Customary Court of Appeal in sections 244 and 245 thereof.
[4] Section 242(1) of the 1999 Constitution
[5] Section 233(2) (a) of the 1999 Constitution
[6] Section 233(3) of the 1999 Constitution. See also the cases of *Anukam v Anukam [2008] 5 NWLR (Pt 1081)* 455; *Ogbechie v Onochie [1986] 2 NWLR (Pt 23) 484*
[7] Section 233(3) of the 1999 Constitution
[8] CAP S15 Laws of the Federation of Nigeria, 2004
[9] See section 27(4) of the Supreme Court Act, *supra*
[10] Cap C36 Laws of the Federation of Nigeria, 2004

decision appealed against is prescribed.[11] There is also a provision for extension by the Court of Appeal of the time prescriptions.[12]

3. Tests for Determining whether a Decision is Final or Interlocutory

Defining a final decision in terms of a final judgment, it has been stated to mean a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs and enforcement of the judgment.[13] An interlocutory decision has also been defined in the same book in terms of interlocutory order as 'an order that relates to some intermediate matter in the case; any order other than a final order.'[14] A proceeding in an action is said to be interlocutory -

> … when it is incidental to the principal object of the action, namely the judgment. Thus interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment; or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined.[15]

According to Nnamani, JSC an interlocutory decision is 'a decision given in the course of proceedings which does not determine the issues between the parties finally'.[16] Courts in Nigeria have been faced with situations requiring that a clear distinction be drawn between a final decision and an interlocutory one. Expectedly, the courts have also come up with decisions defining that dichotomy. It is to some of these decisions that this article now turns with a view to highlighting the tests applied by the courts in arriving at their ultimate decisions. The popular tests applied are the nature of the order and nature of proceedings tests. Consistent with the history of the development of Nigerian legal system, these tests were also applied in decisions of the English courts from where Nigeria principally derived her own legal system.

Nature of the Order Test

In nature of the order test, an order is final if 'the court orders something to be done according to the answer to the enquiries, without any further reference to itself.'[17] Thus when, for instance, a court rules that it has no jurisdiction over a matter, it strikes out the matter and that is the end of the proceedings before it. The nature of the order test will regard such a decision as a final one. This is for the reason that there will no longer be any issues between the parties which the court will proceed to determine, especially a court of first instance. But where the court rules that it has jurisdiction to entertain the same action, the nature of order test treats it as an interlocutory decision because the court will proceed to determine the rights of the parties on the subject matter of litigation to conclusion. In *Bozson v. Altrincham U. D. C.*[18] *(1903) 1 K. B.54* at p. 548, Lord Alverstone C.J. had this to say: 'It seems to me that the real test for determining this question ought to be this: Does the judgment or order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not it is then, in my opinion, an interlocutory order'. The defect in this test was highlighted in the case of *D. P. P v Chike Obi*[19] as follows:

> The defect in relying on the nature of the order made (though still a workable test) as distinguished from the nature of the application from which the order is made is that the former ignores the issue or issues giving rise to the application and consequently the order, and fastens on the order which is the result of the application. All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties, (and not merely an issue) in the case. Where only an issue is the subject matter of an order or appeal, the determination of that court which is a final decision on the issue or issues before

[11] Section 24(2)(b) of the Court of Appeal Act, *supra*
[12] Section 24(3) of the Court of Appeal Act, *supra*
[13] B A Garner, ed, *Black's Law Dictionary*, 9th Edition, p. 919
[14] B A Garner, ed, *Black's Law Dictionary*, 9th Edition, p. 1207
[15] E Jowitt, *Dictionary of English Law* quoted by Nnamani JSC in *Omonuwa v. Oshodin [1985] 2NWLR (Pt.10) 924, 942*
[16] *Omonuwa v. Oshodin, supra, 942.*
[17] Brett M.R in *Ex Parte Moore, In Re Faithful*(see page 297 of Akinsanya)
[18] *(1903) 1 K B 54, 546*
[19] *(1961) All NLR 458*

> it, which does not finally determine the rights of the parties is in my respectful opinion, interlocutory.

Nature of the Proceedings Test

By the nature of the proceedings test, an order is an interlocutory one unless it is made as an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute. In *Salaman v Warner,* [20] Lord Esher, MR had this to say –

> Taking into consideration all the consequences that would arise from deciding in one way or the other respectively, I think the better conclusion is that the definition which I gave in *Standard Discount Co. v. La Grange* is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purpose of these rules, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.

At page 736 of the report, Fry L.J. stated the test thus –

> I think that the true definition is this. I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event, the action will be determined.

The foregoing dicta capture the gist of the nature of proceedings test.

Test with respect to *res judicata*

In *Onyeabuchi v. INEC,*[21] the Supreme Court held as follows:

> It is trite law (or principle) that one of the pre-conditions for a valid plea of *res judicata* is that the judgment on which the plea is raised must be final. One hardly needs citation of authorities for this basic rule. But what is a final judgment? The law distinguishes a final judgment from an interlocutory judgment. However, to import a definition of 'finality' that distinguishes a final judgment from an interlocutory judgment for the purpose of an appeal, or for the purpose of cause of action *res judicata*, into a consideration of what a decision is for the purpose of a plea of issue *res judicata* may be misleading and confusing. Counsel for the appellant's preoccupation with what a final judgment is, in terms of whether there was a decision on the merit or not, accounted for the rather lengthy submission on what was a final decision as distinguished from an interlocutory decision. In my view, the test whether an issue has been finally decided for the purpose of establishing a valid plea of issue *res judicata* does not necessarily always need to be tied to the question whether or not there has been an adjudication of the substantive suit on its merits. Since the question whether or not a court can re-open in a later case, or even at a later stage in the same case, a question it has decided on a previous occasion arises in a variety of circumstances, the test most adequate for all occasions, is whether the court which gave the decision can vary, re-open or set aside the decision. If it cannot, the decision is in that context 'final'.

[20] *(1891) 1 KB 734, 735*

[21] *[2002] 8 NWLR (Pt. 769) 417 at 438*

In England, the nature of the order test has been preferred and applied and it appears that it has overruled the nature of proceedings test.[22] In Nigeria, the nature of the order test has been approved and applied by the courts too.[23] Karibi Whyte, JSC in *Omonuwa v. Oshodin*[24] had this to say on the test which applied in Nigeria -

> In *Standard Discount Co. v. La Grange* and *Salaman v. Warner,* the test applied was the nature of the application to the Court, and not the nature of the order made. In *Salter Rex and Co. v. Ghosh (1971) 2 All ER 865,* Denning M.R. considered the test of the nature of the order applied in *Bozson v. Altrincham U. D. C. (supra)* and observed that although Lord Alverstone CJ's test in *Bozson's* case may be right in logic, Lord Esher's test of the nature of the application in *Salaman v. Warner* was right in experience. *Bozson v. Altrincham U. D. C.* (*supra*) has been approved and applied in our courts and I think this is good reasoning.

At p. 936, his lordship stated that -

> There is clearly no doubt that the principle established in all the above cited cases is that where the decision of the court does not finally determine the issue or issues between the parties or does not at once affect the status of the parties for whichever side the decision is given, it is interlocutory.

The jurist stated further at p. 938 that -

> All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties, (and not merely an issue) in the case. Where only an issue is the subject matter of an order or appeal the determination of that court which is a final decision on the issue or issues before it, which does not finally determine the rights of the parties, it is in my respectful opinion, interlocutory.

4. Decided cases

In *Omonuwa v. Oshodin,*[25] the Defendant was granted leave to argue his preliminary point of law to the effect that the suit of the Plaintiff was caught up with *res judicata* having pleaded facts in respect thereof in paragraphs 39, 40 and 41 of the statement of defence. The learned trial judge rejected the points of law relied on by the defendants and refused the application. On appeal to the Court of Appeal, one of the grounds of appeal was that the learned trial judge refused to pronounce on the issue of *res judicata* canvassed before him. The Court of Appeal allowed the appeal and remitted the case to the trial court 'for the judge to make a decision.' The plaintiff/appellant appealed to the Supreme Court against the judgment of the Court of Appeal which allowed the appeal. It is to be pointed out that as at the time of the judgment of the Court of Appeal, the substantive suit was pending and in abeyance awaiting the outcome of the appeal. One of the questions which fell for determination of the Supreme Court in the appeal was the status of the judgment of the Court of Appeal. That is, whether it is a final or an interlocutory decision.

Karibi-Whyte, JSC, in the lead judgment took occasion to review the tests for determining whether a decision is interlocutory or final and the perceived defects in them. The Supreme Court noted that the two tests are the nature of order and nature of proceedings from which the order was made tests. His lordship also noted that the 'inconvenient and anomaly in the result of the nature of the order test is that an otherwise interlocutory application ends up as a final decision ….'[26] Continuing his reasoning in the appeal leading to the ultimate decision, Karibi – Whyte, JSC at p. 398 stated thus:

> The judgment of the appeal court is a judgment on an interlocutory appeal. It can only assume the character of a final judgment when it finally determines the rights of the parties. To determine finally an issue before the court which does not finally determine the rights of the parties, does not rank as determining the rights of the parties in the case and in my opinion is not a final judgment *inter partes.*

His lordship proposed an approach at p. 939 thus -

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[22] See Ebokam v. Ekwenibe & Sons Trading Company Ltd [1999] 10 NWLR (Pt. 622) 242, 251, per Kalgo , JSC.

[23] See the cases of *Omonuwa v. Oshodin [1985] 2 NWLR (Pt 10) 924; Blay v. Solomon (1947) WACA 175; Ude v. Agu (1961) 1SCNLR 98; Chike obi v. DPP (No. 2) (1961) 2 SCNLR 164; Adegbenro v. Akintola (1962)! ALL NLR 422; Aqua Ltd v. Ondo State Sports Council [1988] 4 NWLR (Pt. 91) 622; Akinsanya v. U.B.A. Ltd [1986] 4 NWLR (Pt. 35) 273; Oguntimehin v. Omotoye (1956) 2 FSC 56; Afuwape v. Shodipe (1957) 2 FSC 62; Effon v. Fasan (1958) 3 FSc 68; Ojora v Odunsi (1964) NMLR 12*

[24] *[1985] 2 NWLR (Pt 10) 924, 937*

[25] [*1985] 2 NWLR (Pt. 10) 924*

[26] P.938

> In my opinion, the ideal approach is to consider both the nature of the application, and the nature of the order made in determining whether an order or judgment is interlocutory or final in respect of the issues before it as between the parties to the litigation. Thus where the nature of the application does not aim at finally determining the claim or claims in dispute between the parties, but only deals with an issue, both the application and the order or judgment of the court must be interlocutory. See *Isaacs & sons v. Salbestein & Anor. (supra) at p.146. Alaye of Effon v. Fasan (1958) 3 FSC. 68.* However, where an application has the effect by the order therefore of finally determining the claim before the court, the order may properly be regarded as final. See *Afuwape & Ors. v. Shodipe (1957) 2 FSC. 62 at p. 68.* This proposition is clearly consistent with the principles as enunciated in the judicial decisions and it is logical. It also accords with common sense and the practice of courts. The order appealed against in the case before us does not purport and has not finally settled the rights of the parties in the claim before the Court, and is therefore an interlocutory order. The determining factor whether an order or judgment is interlocutory or final is not whether the court has finally determined an issue before it. It is whether or not it has finally determined the rights of the parties in the claim before the court. (Underlining for emphasis)

In *Akinsanya v. U. B. A. Ltd,*[27] the appellant had a deal with a Swiss company for the importation by the appellant of 10,000 metric tons of cement. After the deal, appellant approached the respondent to open a letter of credit for the transaction in favour of the Swiss company. It turned out that the appellant did not receive the goods physically delivered in Nigeria. The main complaint of the appellant was that the Bill of Lading upon the presentation of which the Swiss company was paid was a forgery. The appellant as plaintiff lost at the High Court and he appealed to the Court of Appeal. At the Court of Appeal, the learned Justices of the Court raised the issue of the jurisdiction of the court to entertain the matter. That is, the issue was whether the subject matter of the suit was an admiralty matter which the High Court of Lagos State had no jurisdiction to entertain. By a majority decision of two is to one, Nnaemeka – Agu, JCA (as he then was) dissenting, the Court of Appeal held that the case was an admiralty matter which the High Court of Lagos State had no jurisdiction to determine. At the Supreme Court, the respondent's counsel whose notice of appeal against the decision of the Court of Appeal on the issue of jurisdiction was filed more than fourteen days of the decision appealed against, brought a motion on notice for extension of time to file his notice of appeal, because the decision of the Supreme Court in Appeal No. SC.51/84: *Omonuwa v. Oshodin* would make such a decision an interlocutory one. It is in the determination of this application that the apex court was faced with the question whether the decision of the Court of Appeal that the High Court of Lagos State had no jurisdiction to entertain the suit of the appellant was a final or an interlocutory decision.

In resolving this issue of what the decision of the Court of Appeal on issue of jurisdiction was, the Supreme Court applied the nature of order test thus:

> And applying that test to the instant case, if the order made by the majority of the Court of Appeal had been made by the trial Court itself that that trial court had no jurisdiction, that is final. And according to the nature of that order, there is no further reference to that court of trial. If the order had been by the trial court that it had jurisdiction, that is interlocutory according to the nature of the order made as there are issues still to be determined. The result will not be the same if the nature of the proceedings or application test is followed.

The Court ultimately held as follows:

> And applying that test to the instant appeal, the majority in the Court of Appeal, having determined that the court of trial had no jurisdiction, had nothing further to determine in regard to the rights of the parties (their subsequent examination of the issues (assuming they are wrong notwithstanding). The decision is therefore final as being a final decision of the Court of Appeal, and the appellant would need no leave of this court to file appeal on the grounds of jurisdiction. Their application is unnecessary and is hereby struck out.[28]

Eso, JSC stated thus

> Once there is no further reference to a court after it had made its order that something be done according to the answer to the enquiries, all the rights and not just an issue or some issues, have been determined. In which case, in a Court of Appeal, it is in regard to the proceedings before that

[27] [1986] 4NWLR (Pt. 35) 273, SC
[28] *Akinsanya v. U. B. A., supra, p. 300*

> court, and the nature of the order made thereupon by that court, that would determine whether the matter is final or interlocutory.[29]

The Supreme Court explained in *Akinsanya*'s case that the *ratio* of the decision of that Court in *Omonuwa v. Oshodin's* case should not apply to decisions in the court of first instance. In *Ugo v. Ugo,*[30] the issue of what constitutes a final decision or an interlocutory decision came up before the Supreme Court. In that case, the appellant and his wife, the respondent, renounced their Nigerian citizenship, acquired American citizenship and married under the American law and were domiciled in the USA. In 2002, the appellant's suit before the Supreme Court of State of New York, County of Bronx for dissolution of his marriage with the respondent was dismissed on the ground, among others, that the appellant failed to establish a cause of action for abandonement. Appellant did not appeal that decision. He came to Nigeria and obtained a divorce at the Upper Area Court. Upon being satisfied with particulars of fraud, a Bwari Upper Area Court annulled the divorce. The Appellant later filed a petition at the High Court of the Federal Capital Territory, Abuja for dissolution of the marriage between him and the respondent who at all times material to the suit was an American citizen. The respondent raised a preliminary objection to the competence of the petition on grounds of *estoppel*, abuse of process, bigamy, citizenship and domicile. The learned trial Judge dismissed the objection and proceeded with the hearing of the petition. Respondent appealed to the Court of Appeal against the decision refusing the preliminary objection. At the Court of Appeal, appellant raised a preliminary objection contending that the respondent's grounds of appeal contained mix law and fact and that having arisen from an interlocutory decision of the High Court, the Respondent ought to seek leave but did not do so. The Court of Appeal overruled the preliminary objection and, on the merit, allowed the appeal setting aside the decision of the High Court on the basis that the High Court lacked the jurisdiction to entertain the case. At the Supreme Court, in the lead judgment of EKO, JSC, the test for determining whether a decision is final or interlocutory was not referred to.

However, the learned law lord reasoned that issues of *estoppel per rem judicatam* and abuse of judicial process referred to are issues of law for which no leave was required. His lordship concluded thus on this issue –

> My Lords, the law is now settled that by virtue of Section 241(1)(b) of the 1999 Constitution, a decision of the High Court, whether final or interlocutory, is appealable as of right and without leave of court first sought and obtained. …This settles issue no.1 in this appeal, which I hereby resolve against the appellant.[31]

In his concurring judgment, Onnoghen, JSC (as he then was but later CJN) had this to say on what distinguishes a final from an interlocutory order –

> Once a court in considering an interlocutory application challenging its jurisdiction comes to the conclusion that it has jurisdiction to hear and determine the substantive matter, the decision is a final decision on the issue of jurisdiction as the court cannot lawfully revisit the issue again in the same proceeding. The court thereby becomes *functus officio* on the issue irrespective of the fact that the decision arose from an interlocutory proceeding. By coming to the conclusion that the court had jurisdiction to entertain the petition for divorce, it had finally decided the rights of the parties as regards its jurisdiction in the circumstances, an appeal against that decision must follow the procedure laid out in the rules of court for appeal against final judgments/decisions.

By the test evident in the *Blay v. Solomon* and *Bozson v. Altrincham* cases, a judgment or an order is final only when it finally disposes of the rights of the parties. In other words, a court makes an order which would not bring the matter further back to itself. The following dicta of Kayode Eso, JSC suggests that the preferred test in Nigeria for determining whether a decision is a final or an interlocutory one is the nature of the order test. According to the eminent jurist -

> And so, it has been that the courts in this country have adopted the test that looks at the order made as against the test that looks at the nature of the proceedings. It is also clear that before *Omonuwa v. Oshodin,* the two tests have been regarded as contradictory.[32]
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> In this country in so far as the court of first instance is concerned, the nature of the order test should be adhered to and the test pronounced by Alverstone, C.J. in *Bozson v. Altrincham* should be upheld by the courts.[33]

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[29] *Akinsanya v. U. B. A., supra, p.299*
[30] *[2017] 18 NWLR (Pt. 1597) 218*
[31] *Ugo v. Ugo, supra, p.358*
[32] Akinsanya v. U. B. A. Ltd, p.294, *Per Kayode Eso, JSC*
[33] *Akinsanya v. U. B. A. Ltd, p. 295*

> The *Bozson test* has not only always been right in logic in this country, it has also been applied or rather 'preferred' in practice.[34]

The decision to stick to the *Bozson test* may appear to have been influenced by the fact that it has been preferred for so long in Nigeria. This can be gleaned from the reasoning of ESO JSC in the following words: 'I think it is more practicable and more certain to keep to just one test – the *Bozson v. Altrincham test* which has been preferred in this country for so long.[35]

Using a decision of court on issue of jurisdiction as a focal point, it appears that the decision of the Supreme Court in the case of *Akinsanya v U. B. A. Ltd*, on the one hand, and that in the case of *Ugo v Ugo*, on the other hand, are antithetical decisions. This is so for the reason that while *Akinsanya's* case decided that such a decision will be a final one only when the court determines that it has no jurisdiction because it has no further business in the proceedings, but will be interlocutory when the court holds that it has jurisdiction because it will entertain further proceedings in the matter; the case of *Ugo v Ugo* as contained in the opinion of Onnoghen, JSC decided that a decision that a court has jurisdiction is a final decision because that decision finally determined the rights of the parties on issue of jurisdiction. In an attempt to reconcile the two decisions, one may argue that while the Supreme Court used the expression, 'finally decided the rights of the parties as regards the issue of jurisdiction in the circumstances' in *Ugo's* case, in *Akinsanya*'s case, it was stated that 'the Court of Appeal, having determined that the court of trial had no jurisdiction, had nothing further to determine in regard to the rights of the parties.' A reconciliation of the two decisions would be that 'rights of the parties' in *Ugo's* case was referable to the issue of jurisdiction; while rights of the parties in the *Akinsanya's* case was not tied to any particular issue thereby leaving it open to such interpretations as right of the parties in the claim before the court. As such, the two decisions may not be regarded as conflicting but are peculiar to, and are authorities for the facts and what was actually decided in those cases.

The above two cases bring to the fore the need for a serene appreciation of what constitutes final determination of the rights of the parties.

5. What Does Final Determination of the Rights of the Parties Mean?

For the purposes of ascertaining when an order is final or interlocutory, does the phrase, 'rights of the parties' refer to rights of the parties in the issue for determination at any given stage of the proceedings or their rights in the claim before the court? It is submitted that for the purpose of ascertaining the final determination of the rights of the parties, rights of the parties should be understood to mean rights of the parties with respect to the claim before the court. Reasoning otherwise will result in an obliquity with a possible outcome of there being many final decisions in a case before the final judgment, which in itself is the indubitable final decision. As there can be many issues in respect of which a court may be called upon to decide the rights of the parties in a cause or matter, maintaining the position that a decision on an issue by a court such as issue of jurisdiction after which the court proceeds to entertain the matter is a final decision will not be right. Rather, since a decision on an issue of jurisdiction to the effect that a court has jurisdiction only decides the issue of jurisdiction leaving outstanding the right of the parties in the claim before the court which the court will proceed to determine in the final analysis, a better approach, it is submitted, is that such a decision is an interlocutory one.

What it means to say that the rights of parties are finally disposed of in a decision has been stated in some decided cases. According to the Supreme Court, 'that is, (a court) makes an order which would not bring the matter further back to itself.'[36] This answer, as clear as it is and without more, may not apply with the same degree of ease to all situations. For instance, does a decision on jurisdiction of the court finally determine the rights of the parties? One view may be that it does since if a court determines that it does not have jurisdiction to entertain a matter, that is the end of that matter in that court. The other view may well be that since the respective rights of the parties to the suit in the claim before the court have not been determined, it cannot be rightly said that the decision that a court has no jurisdiction has finally disposed of the rights of the parties even though, as far as that court is concerned, it is incapacitated by reason of want of jurisdiction to proceed with determination on the merit of the rights of the parties. Closely related to this is the view that since a decision on an issue of jurisdiction by a court which is not the final

[34] *Akinsanya v. U. B. A. Ltd, p. 296*
[35] *Akinsanya v U. B. A. Ltd, 297*
[36] *Akinsanya v. U. B. A. Ltd (1986) at p.292*

court may be upturned by an appellate court, it is not conclusive that the decision of a High Court, for instance, that it lacks jurisdiction to entertain a matter finally disposes of the matter or rights of the parties. Indeed Obaseki, JSC appeared to have appreciated the difficulty in laying down a principle certain on what is a final or an interlocutory decision with respect to issue of jurisdiction when in *Western Steel Works Ltd v. Iron & Steel Workers Union,*[37] his lordship had this to say –Whenever the question of jurisdiction of any court is raised, it is a question that touches on the competence of the court that is raised. It does not raise any issue touching the rights of the parties in the subject matter of the litigation.

It appears that the problem is not so much that of which test applies in Nigeria as it is the proper interpretation or appreciation of the test held to be applicable. May I demonstrate. Weight of judicial authorities tends to show that the applicable test is the nature of order test. In its simplest form, this test postulates that once a decision or an order disposes of the right of the parties, it is a final one. Conversely, if after the order is made, reference may still be made to the court in the same proceedings, then the decision or order is an interlocutory one. The questions that then arise are: what does it mean to say that the rights of the parties have been determined by the Court? Does determination of the rights of the parties need to be in relation to the subject matter of the suit or claim before the court or in relation to the issue which the court has pronounced upon? If the rights of the parties in relation to an application or issue presented before the court have been determined but the substantive suit has not been determined, is it still the same thing as saying that the a decision rendered in such an instance is a final one?

Two decisions of the Supreme Court of Nigeria will make this point clearer. In *Akinsanya v. U.B. A. Ltd*, Eso, JSC explained that a decision of the High Court that it has no jurisdiction is a final decision because at such a time, the court entertains no further proceedings in the matter. But where the decision is that the court has jurisdiction, that decision is an interlocutory one because the Judge will have to continue to entertain further proceedings in the matter until final determination. On the other hand, in the case of *Ugo v Ugo*, his Lordship, Onnoghen, JSC (as he then was) did not expressly say that the nature of order test applied. However, further explanation by his lordship on the reason for deciding that the order in that case was a final one strongly suggests a predilection towards the nature of order test. This is apparent from the explanation by the eminent jurist that a decision is final when it finally determines the rights of the parties. It is submitted that if the nature of order test is understood to mean that once the rights of the parties are determined in any issue before the court, a decision arising from such an issue is final because the court has become *functus officio* in respect thereof, then there can hardly be any interlocutory decision. This is for the reason that except for such few instances as an order for consolidation which may be revisited and the consolidated suits de-consolidated, all decisions dispose in one way or the other the rights of the parties in that application. This is why the law as stated by Kalgo JSC in *Alor v Ngene* becomes very instructive and apt to the effect that rights of the parties in a case the determination of which would make a decision a final one must - '… relate to the subject matter in dispute between the parties and not the function of the court making the order. Therefore, the determining factor is not whether the court has finally determined an issue but it is whether or not it has finally determined the rights of the parties in the claim before the parties.' Supporting the view that nature of order test appears to be more applicable in Nigeria, and that rights of parties ought to mean right of parties in respect of the claim before the court, the Court of Appeal had this to say –

> Furthermore, the parties expressed discordant views as to whether that order of 27/10/2011 was final or interlocutory. Whereas, the appellants, tenaciously, took the view point that it was final, the respondent stuck to an antithetical stance, that it was interlocutory, For donkey's years, it has been a thorny exercise for the courts to determine when a decision of a court is final or interlocutory. In this wise, two tests, invented by the English courts, had competed for the attention and prominence of the Nigerian courts. The one is the nature of proceedings tests contrived by Fry, L. J. in the case of *Salaman v. Warner (1891) 1 QB 734 at 736.* The other is the nature of the order test evolved by Lord Alverston, C. J. in the case of *Bozson v. Altrincham Urban District Council* (19630 1KB 547 at 548 – 549., wherein, the law Lord stated:'It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made, finally dispose of the rights of the

[37] *[1986] 3 NWLR (Pt. 617) at 625*

> parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order.'
>
> The Nigerian courts have accepted and followed the later test, *id est,* that where an order made by a court finally determines the rights of the parties to an action, then it is final and where it does not, it is interlocutory. …
>
> Indisputably, the foregoing amply demonstrates that the lower court determined the rights of the parties before it. It dispassionately assessed the evidence before it and proceeded to put an end to the rights of the parties in the respondent's action under the summary judgment proceedings. It left no rights to the parties to warrant their return to it for adjudication. The lower court's striking out of prayer 23 (b) and (c) was: 'in its general connotation is the act of discontinuance or termination of the life span of that suit/case either temporarily or permanently.' … Going by the circumstances surrounding the order, it is my humble view that the termination of the prayer was permanent.[38]

Rights of the parties in a suit for the purpose of determining whether a decision has finally determined them or not, in order to make legal sense, ought to be referable to rights of the parties in the claim before the court and not just right of the parties in the issue decided. This is for the reason that what brought the parties to court is the claim of the plaintiff which the defendant is defending. It is not just that issue which arose in *limine litis* that principally brought the parties to court. In determining the rights of the parties in the claim, issues such as issue of jurisdiction may arise before the ultimate determination of the claim. In other words, 'rights of the parties in a case' for the purpose of a final order of the court must be determined in the light of the claim or reliefs before the court and not otherwise. As such, where a decision disposes of an issue or some issues in a case leaving the parties to go back to the substantive suit to claim other rights in that same court, that decision should necessarily be an interlocutory one. The case of issue of jurisdiction may be in a class of its own. This is because even though a decision that a court has no jurisdiction is not a decision on the merit of the rights of the parties, such a decision would be taken as a final one because the court has no *vires* to further determine the case on the merit and as far as that goes, that is the end of the road on the rights of the parties with respect to the subject matter of the suit.

6. Conclusion

Clearly, preponderance of judicial authorities indicates that the preferred test in Nigeria for determining whether a decision is final or interlocutory is the nature of order test. In that test, there is still another issue of what constitutes final determination of the rights of the parties. It is posited that final determination of the rights of the parties should not be limited to the issue decided by the court but should be viewed from the prism of the rights of the parties in the claim before the court. A decision on the issue of jurisdiction ought not be any problem but may well be treated as an exception to the general rule. This is because considering the pride of place that issue of jurisdiction occupies in adjudication by a court, even though a decision that a court has no jurisdiction to entertain a case is not a decision on the merit with respect to the rights of the parties in the claim, it is a final decision because the court is by virtue of that fact denuded of the authority to further entertain the suit and cannot proceed to determine same on the merit. To instill consistency in the system, nature of order test ought to be applied in the course of which the final determination of the rights of the parties should be with reference to the rights of the parties in the claim or relief before the court.

[38] *Ibrahim v Gwandu [2015] 5NWLR(Pt.1451)1, 28 - 29*