**THE REGISTERED TRUSTEES OF INTERNATIONAL SECONDARY SCHOOL, ORLU & ANOR**

**V.**

**BICOZ OIL COMPANY NIGERIA LIMITED**

COURT OF APPEAL

28TH MARCH, 2014

CA/OW/231/2011

**LEX (2014) - CA/OW/231/2011**

OTHER CITATIONS

3PLR/2014/226 (CA)

(2014) LPELR-22836 (CA)

**BEFORE THEIR LORDSHIPS:**

UWANI MUSA ABBA AJI, JCA

PHILOMENA MBUA EEKPE, JCA

PETER OLABISI IGE, JCA

**BETWEEN:**

1. THE REGISTERED TRUSTEES OF INTERNATIONAL SECONDARY SCHOOL (I.S.S.) ORLU

2. SIR S.C. ELENWOKE

AND

1. BICOZ OIL COY. NIGERIA LIMITED

2. CHIEF IFEANYICHUKWU ANELE (ISIEHI)

3. HON. COMMISSIONER FOR LANDS SURVEY AND URBAN PLANNING, IMO STATE

4. THE DIRECTOR, DEPARTMENT OF PETROLEUM RESOURCES, OWERRI

**ORIGINATING COURT:**

HIGH COURT OF IMO STATE OF NIGERIA (N.B. UKAOHA, J)

**REPRESENTATION:**

G. O. DUNGA Esq. for Appellant

U. N. ANYIAM Esq. for 1st and 2nd Respondents.

NKECHI OBIOHA for 3rd and 4th Respondents

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE: Zoning - Education facility – Right of sponsors of an education facility to interfere in the development of a hotel/brothel/filling station/high-rise building beside the school - Relevant considerations

EDUCATION LAW: Education facility – Propriety of erecting hotel/brothel in close proximity – Claim that erecting same will constitute a blockage in the flow of air, inhalation of petroleum substances as well as debasement of all values, moral and social standing of students and therefore is unlawful, immoral and against public policy - Attitude of court

CHILDREN AND WOMEN LAW: Education of young people – Planned erection of hotel/brothel close to a school premises– Pre-emptive effort to stop same for the protection of the students and enhancement of their learning experience – How treated

NONPROFIT LAW: - Registered trustees – Protection of the objects for its establishment – Education charity – Whether can interfere in the development of neighbourhood facilities which may derogate from its objectives

**PRACTICE AND PROCEDURE ISSUES**

ACTION - AMENDMENT OF PROCESSES:- What is an amendment- when the court can grant an amendment - Factors to consider in granting an amendment - Aim of an amendment

APPEAL:- Grounds of appeal – Need for same to arise or flow from or be related to the Judgment or Ruling of the court appealed from

APPEAL:- Record of appeal - Bindingness of

COURT:- What is judicial discretion - Whether court can be bound by a previous decision to exercise its discretion in a regimented way - How a judicial officer should exercise his discretion

WORDS AND PHRASES: – “Appeal” – Meaning of

**MAIN JUDGMENT**

**PETER OLABISI IGE, J.C.A. (Delivering the Leading Judgment):**

This appeal is against the Ruling of the High Court of Imo State of Nigeria delivered by N.B. UKAOHA, J on 6th day of July, 2011. By their Writ of Summons issued out of he said Court the Appellants as Claimants at the court below are seeking for the following reliefs:

"WHEREFORE, the claimant claim against the defendants as follows:

1. A declaration that the sitting of a Hotel/Brothel and filling station or any high Rise building by the 1st and 2nd defendants at the boundary of the 1st claimant's institution at Ndiokwu Owerre Ebeiri, Orlu LGA will constitute a blockage the flow of air, inhalation of petroleum substances and debasement of all values, moral and social standing and well being of the 1st claimant and its students and therefore is unlawful, immoral and against public policy.

2. Injunction perpetually restraining the 1st and 2nd defendants from constructing erecting or building any high rise building, Hotel, Brothel and filling station at the boundary of 1st claimant's college at Ndiokwu Owerre Ebeiri Orlu LGA.

3. Injunction perpetually restraining the 3rd, 4th and 5th defendants from given any approval to the 1st and 2nd defendants for the construction and erection of any Hotel/Brothel, Petrol Filling Station or any other high rise building on the land of the 1st and 2nd defendants that shares boundary with the premises of the 1st claimant's institution at Ndiokwu Owerre Ebeiri Orlu LGA."

The 1st and 2nd Defendants filed joint Statement of Defence but the 3rd, 4th, and 5th Defendants/Respondents are yet to file their pleadings.

The Appellants filed an application dated 23rd day of August, 2010 wherein they sought for order of injunction to restrain the 1st and 2nd Respondents from:

"(1) ....Constructing or erecting a Hotel/Brothel or a Petrol filling station on the parcel of land sharing boundary with the 1st Claimant's institution of learning situate at Ndiokwu Owerre Ebeiri Orlu LGA of Imo State, pending the hearing and determination of the substantive Suit.

(2) Restraining the 3rd to 5th Defendants/Respondents from giving approval to the 1st and 2nd Defendants/Respondents to erect and operate a hotel/brothel and petrol filling station on the 1st and 2nd defendants land sharing boundary with the 1st Claimant's College at Ndiokwu Owerre Ebeiri Orlu LGA of Imo State pending the hearing and determination of the substantive suit."

The Appellants filed ex parte application along with the above reproduced motion on 25/8/2010 seeking for similar reliefs pending hearing of the Motion on Notice. The Learned Judge then handling the case granted the ex parte application for injunction as prayed pending the hearing of Motion on Notice for injunction (pages 26-27 of the Record)

By their application dated 14th day of June, 2011 filed on 15th day of June, 2011, the 1st and 2nd Respondents sought for leave to amend their Joint Statement of Defence in the manner laid out in their Exh. A to the said motion and that 2nd, Defendant be allowed to make further deposition on oath in support of the Defendants proposed amendment thereof.

I believe that for a clear understanding of what the appeal herein entails it is relevant to reproduce fully the lower Court's proceeding of 6th day of July, 2011 and the undertaking of the 1st and 2nd Defendants at the lower Court. The proceedings read:

"IN THE HIGH COURT OF IMO STATE OF NIGERIA  
IN THE HIGH COURT OF OWERRI JUDICIAL DIVISION  
HOLDEN AT OWERRI  
BEFORE HIS LORDSHIP HON. JUSTICE N.B. UKOHA  
THIS WEDNESDAY THE 6TH DAY OF JULY, 2011  
  
SUIT NO: HOW/359/2010  
  
The Regd. Trustees of Instl Secondary School, Orlu.     Claimant  
  
and  
  
BICOOZ Oil Nig. Ltd. & 4 Ors.     Defendants  
  
Parties absent except the claimant represented by NTABU E.C., Vice Principal of the School.

S.I. EMERIBE holding the Brief of U.C. OSUJI for the Claimant.

U.N ANYIAM for the 1st and 2nd Defendants.

Claimant's counsel says he is opposing the amendment because the document the defendants are trying to plead is over reaching.

**COURT**: Notwithstanding the objection of the claimant's counsel and counter affidavit filed, I will allow the amendment; the issue being raised by the claimant's counsel why he is opposing the amendment is premature. Defence counsel moves in terms of his motion.

Leave is granted to the Defendants/Applicants to amend their joint statement of Defence. Counsel is given 7 days to do so and serve same on the claimants.

Leave in further granted to the defendants/applicants to call upon the 2nd defendant to make further depositions in support or the amended Statement of Defence.

Relief (c) of the Applicant's prayer is hereby refused because they are yet to regularize their amended Statement of Defence. Upon service of same on the claimant, the claimant is also given the leave to file any consequential amendment of their Statement of claim if they so desire.

Claimant/Applicant's counsel adopts his address in favour of his motion on notice dated 23/8/2010 and filed on 25/8/10.

He equally adopts his reply on point of law filed along with a further affidavit dated 1/11/2010 and filed on 12/11/2010. He urges the court to grant the application and restrain the defendants from constructing a Filing station. He equally urges the court to discountenance the further counter affidavit filed after the claimant's counsel had filed his reply on points of law.

In reply defendants' counsel says in opposing the Motion the defendants filed a counter affidavit of 23 paragraphs with an annexure. Counsel applies for the leave of this court to make use of the further counter affidavit of 10 paragraphs filed on 7/1/2011. Counsel adopts his written address in support of the counter affidavit and urges the court to refuse the motion because the 1st and 2nd defendants hereby undertake not to erect/construct any Hotel, Brothel or Inn in the property in question.

Case is therefore adjourned to 12/10/2011 for Ruling.

(Sgd)

Judge, 6/7/2011"

The aforesaid undertaken reads:

"AN UNDERTAKEN BY THE 1ST & 2ND DEFENDANT NOT TO ERECT AND/OR OPERATE A HOTEL, BROTHEL OR ANY BUSINESS OR LIKE MANNER AT THE 1ST DEFENDANTS LAND IN ISSUE.

WHEREAS the 1st Defendant cleared its Land situate at Ndiokwu, Owerre-Obeiri, Orlu Local Government Area of Imo State preparatory to erecting a Petrol filling Station and probably a Hotel later, before the Claimants initiated the present suit now pending before, her Lordship Honourable Justice N.B. Ukoha, sitting at High Court No.9, Owerri.

AND whereas the 1st and 2nd Defendants have noted the strong views of her Lordship concerning the likely moral corruption of the students of the 1st claimant in having such business or concern like hotel or like manner, existing beside the 1st Claimant.

I, Chief Ifeanyichukwu Anele, the 2nd Defendant in the present suit, for myself and on behalf of the 1st Defendant hereby enter into an undertaking not to erect or operate a hotel, brothel, in or any business of like manner on the 1st Defendants Land the Subject matter of this suit.

This undertaken is made voluntarily in all sincerity to keep my bond hereunder undertaken.

Dated this 7th Day of July, 2011

Sgd  
CHIEF IFEANYICHUKWU ANELE

(2nd Defendant)

Addresses for service:

Claimants          
C/o their Counsel,

Uche Osuji & Associates,

No. 18 Rotibi Street,

Owerri  
  
1st and 2nd Defendants

C/o their Solicitors,

Opia' Egbe Chambers,

No. 89 Azikiwe Road,

Aba.  
  
3rd & 4th Defendants -M.L.S.U.P.

Imo State.

5th Defendant - The Director,

D.P.R.  
Port-Harcourt  
See pages 95-98 of the record.

The Claimants now Appellants became aggrieved by the Ruling of the lower Court. They filed Notice of Appeal dated 11th day of July, 2011 and filed on 12th day of July, 2011. It consists of two grounds of appeal couched as follows:

3. GROUNDS OF APPEAL

**GROUND ONE-ERROR IN LAW**

The learned trial judge erred in law when he granted the 1st and 2nd Defendants/Respondents application to amend their pleadings which purpose was solely to plead series of inadmissible documents, and which ruling infracted on the appellants right of fair hearing

**PARTICULARS OF ERROR**

The 1st and 2nd Respondents filed a motion to amend their statement of defence to add a new paragraph 11(a) and (b) of in their statement of defence.

The said paragraphs contain documents which are obtained from the 3rd and 4th Respondents during the pendency of this suit. The Appellants opposed the application by filing a counter affidavit and written address thereto

The Honourable Court without considering the argument of the Appellants counsel proceeded the same day the motion was fixed for hearing to deliver a ruling granting the application.

The refusal of the lower court to consider the address of the Appellants counsel which raised the issue of the documents sought to be pleaded offended section 911(3) of the Evidence Act and is a breach of the Appellants right to fair hearing and fair trial.

**GROUND TWO-ERROR IN LAW**

The learned trial judge erred in law when he during the hearing of an application for Interlocutory injunction directed the 1st and 2nd Respondents to file a written undertaking not to build a hotel/brothel on the land in dispute, which direction has pre-empted the ruling of the court and has also touched on the subject matter of substantive suit.

**PARTICULARS OF ERROR**

After granting the application of the 1st and 2nd Respondents for amendment, the trial court proceeded to hear the appellants application for interlocutory injunction despite the application of the Appellants counsel for adjournment. After hearing both sides in the motion for interlocutory injunction, the trial court ***suo motu*** directed the 1st and 2nd Respondents to file a written undertaking not to build a hotel/brothel on the land in dispute and adjourned the ruling on the motion for injunction to the 12th of October 2011.

The direction of the trial judge to the 1st and 2nd Respondents stated above clearly shows that the trial court would not grant the application come the 12th of October 2011, thereby pre-empting the ruling of the court before hand. The decision of the trial court, has also overreached the substantive suit as the 1st and 2nd Respondents in their pleadings are insisting on their right to develop hotel/brothel and filling station on the land.

The Appellants filed their Brief of Argument dated 20th day of September, 2011 on 27th day of September, 2011. The 1st and 2nd Respondents filed their Brief of Argument dated 21st day of March, 2012 on 22nd day of March, 2012.  
The appeal was heard on 13th day of February, 2014. The Appellants formulated two issues for determination and their Learned Counsel adopted their Brief of Argument.

The Learned Counsel to the 1st Respondents adopted their Brief of Argument. Though the 3rd - 5th Respondents did not file any Brief they were represented by Counsel at the hearing of the appeal. It does not matter to them whatever be the outcome of the appeal.

The two issues distilled for determination by the Appellants out of their two grounds of appeal are as follows:-

1. WHETHER THE COURT BELOW WAS WRONG WHEN IT GRANTED THE APPLICATION OF THE 1ST AND 2ND RESPONDENTS FOR AMENDMENT OF THEIR STATEMENT OF DEFENCE.

2. WHETHER THE ORAL DIRECTIVE OF THE COURT BELOW TO THE 1ST AND 2ND RESPONDENTS TO FILE A WRITTEN UNDERTAKING NOT TO BUILD A HOTEL, BROTHEL OR ANY BUSINESS OF LIKE MANNER, DOES NOT AMOUNT TO INTERFERENCE BY THE COURT BELOW ON THE CASE OF THE CLAIMANTS.

On their own part the 1st and 2nd Respondents also formulated two issues for determination of this appeal viz:

1. WHETHER THE COURT BELOW WAS RIGHT IN GRANTING THE AMENDMENT WHICH WAS NECESSARY FOR THE PURPOSE OF DETERMINING THE REAL ISSUE IN CONTROVERSY.

2. WHETHER FROM THE CIRCUMSTANCES OF THE CASE, ALLEGATION OF BIAS ALLEGED BY THE APPELLANT AGAINST THE JUDGE OF THE LOWER COURT COULD BE SUSTAINED.

I am of the opinion that this appeal can be decided on the two issues raised for determination by the Appellants as argued by their Learned Counsel U.C. OSUJI Esq. They will be treated in sequence.

**ISSUE ONE**

**WHETHER THE COURT BELOW WAS WRONG WHEN IT GRANTED THE APPLICATION OF THE 1ST AND 2ND RESPONDENTS FOR AMENDMENT OF THEIR STATEMENT OF DEFENCE, WHEN THE FACTS SOUGHT TO BE PLEADED SEEK TO INTRODUCE INADMISSIBLE EVIDENCE.**

The Learned Counsel to the Appellant U.C. Osuji Esq submitted that court will refuse an amendment where:

(a) The amendment will cause injustice.

(b) The amendment will surprise or cause embarrassment to the other party.

(c) The Applicant is acting-mala fide in bringing the application for amendment.

(d) The applicant by his blunder has done some injury to the Respondent which cannot be compensated by costs or otherwise.

(e) The amendment has the effect of changing the action into one of a substantial different character.

(f)   The amendment will not cure the defect in the proceedings.

(g) The amendment is inconsistent and useless.

(h) The amendment is capable of causing undue delay to the case.

Learned Counsel relied on the following authorities.

1. ODUWAIYE VS ORESENYE (1968) NWLR 430.

2. ABOSI VS LABIYI (1988) WRNLR 12

3. MOBIL OIL (NIG) LTD VS. COKER (1975) 3 SC 175.

4. OJAH VS OGBONI (1976) 4 SC 69 AND

5. IGRUBIA VS IGRUBIA (2009) ALL FWLR (Pt. 471) 856, 571 - 872,

He submitted that the documents introduced by the amendment granted to the 1st and 2nd Respondents were made by 3rd Respondents who are interested person in the proceeding and were made while proceeding was pending or anticipated contrary to section 91(3) of the Evidence Act Cap 112 LFN 1990 now 83(3) of the Evidence Act 2011. That the documents were made by 3rd Respondent on 16th May, 2011. He submitted that no one can be more interested in this matter than a party on record. That the court below was in error and that he acted mala fide. That the amendment is inconsistent, useless and not material as according to Osuji Esq, the documents are in admissible. He relied on the case of IBRAHIM VS DALLEY (2009) ALL FWLR (Pt 494) 1574, 1582. He urged this Court resolve issue 1 in favour of the Appellants.

In Response to the above submission on issue one, the Learned Counsel to the Respondent Uche N. Anyiam Esq referred the Court ORDER 24 RULE 8 of the High Court of Imo State (Civil Procedure) Rules 2008 to state that the only issue in controversy is the suitability or otherwise of erecting or construction of either Hotel Brothel or Petrol filling station on the land in question. That though the 3rd -5th Respondents do not show any interest in the case they responded, to the complaints of 1st and 2nd Respondent to them by their (3rd-5th) writing of letters of 16th May 2011 where Respondents stated clearly in their letters that the land in question is suitable for erection of a Petrol filling Station. That the amendment had become necessary as it will, according to Respondents, assist the lower Court in resolving the contentious issues relying on the case of IKPO Vs AZUBUIKE (2000) 14 NWLR (Pt.686) P.166 184 H and the case of ALSTHOM S.A. Vs SARAKI (2000) 14 NWLR (Pt. 687) P.415 at 427. That the lower Court followed the basic principle governing the grant of amendment in the grant of an Order in favour of 1st and 2nd Respondent to amend their pleadings. He cited the case of LAGURO Vs TOKU (1992) 2 NWLR (Pt. 233) 278 at 428-30. That all the cases cited by Appellants' Learned Counsel are inapplicable in this case and that the Appellant have not shown that the instant amendment offended any of the conditions for the grant of an amendment.

On whether the documents are inadmissible because they were made by 3rd Respondent, Anyiam Esq submitted that it is erroneous and premature for Appellants Learned Counsel to argue on admissibility of the document now as Evidence Act deals with it while amendment of pleadings is governed by the Rules of Court. On the meaning of person interested he cited on the cases of

1. ANYAEBOSI Vs R.T. BRISCOE NIGERIA LTD (1987) 3 NWLR (Pt.59) 84 at 109 per KARIBI-WHYTE, JSC.

2. GBADAMOSI Vs IGBO TRAVELS LTD (2000) 8 NWLR (Pt. 668) 243 at 278 per SALAMI, JCA.

3. HIGH GRADE MARITIME SERVICE LTD VS FIRST BANK OF NIGERIA LTD (1991) 1 NWLR (PART 167) 290 at 307.

He urged this Court to hold that the lower Court was right.

There is no doubt that a trial court like all other Courts possesses enormous powers and discretion to grant an order to any of the parties to a proceedings to amend his pleadings or other court processes to enable the court determine not only the real but all issues in controversy in the action.

Order 24 Rules 1, 2 and 3 of the High Court of Imo State (Civil Procedure) Rules 2008 provide as follows:

"24(1) A party may amend his process, pleadings and other processes, at any time before the close of pre-trial conference and not more than twice during the trial but close of the case.

(2) An application to amend may be made to a judge. Such application shall be supported by an exhibit of the proposed amendment and may be allowed upon such terms as to costs or otherwise as may be just.

(3) Where any Originating process, pleadings or other process is to be amended a list of any additional witnesses to be called together with his written statement on oath and a copy of any document to be relied upon consequent on such amendment, shall be filed with the application."

It means that the court has power to grant an amendment subject to the discretion being exercised judicially and judiciously. See CHIEF (DR) PERE AJUWA & ANOR VS. THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD (2011) 18 NWLR (Pt.1279) 797 at 828 H to 829 A-F per FABIYI, JSC who said:

"In matter of judicial discretion, since the facts of two cases are not always the same, this court does not make it a practice to lay down rules or principle to fetter the exercise of its discretion or that of the lower courts. In matters of discretion, no one case is authority for the other. A court cannot be bound by a previous decision to exercise its discretion in a regimented way, because that would be as it were, putting an end to discretion. See Akujinma v. Nwaonuma (1998) 13 NWLR (Pt.583) 632 at 647; Attorney-General, Rivers State v. Ude (2006) 17 NWLR (Pt.1008) 436 at 461; Odusote v. Odusote (1971) 1 NLR 219 at 222.

Judicial discretion is a sacred power which inheres to a Judge. It is an armour which the judge should apply judicially and judiciously to arrive at a just decision. Same should not be left to the whims and caprices of a party to the action. It is not in tandem with the dictates of public policy which demands, inter alia, that administration of justice shall be discharged without any form of prompting by the parties.

Discretion had been defined to mean a power or right conferred upon public functionaries by law or acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. See: State v. Whitman R11, 431 A. 2d 1229, 1233; Black's Law Dictionary, Sixth Edition page 466.

It is clear that a judicial officer should exercise his discretion judicially and judiciously as well. See University of Lagos v. Olaniyan (1985) 16 NSCC (Pt. 1) 98 133, (1985) 1 NWLR (Pt. 1) 156; Eronini v. Iheuko (1989) 2 NSCC (Pt.1) 503, 313; (1989) 3 SC (Pt. 1) 30, (1989) 2 NWLR (Pt.101) 46.

Let me say it is passing that this court does not condone a situation where an earlier decision is capable of fettering the exercise of judicial discretion. Judicial discretion is a vital tool in the administration of justice. See Adisa v. Oyinwola (supra)."

See also DUPE OLATUNBOSUN vs. TEXACO NIGERIA PLC & ANOR (2012) 8 SCM 183 at 192 E-G per MAHMUD MUHAMMED, JSC.

However in all exercise of judicial discretion materials sufficient to enable the court exercise its discretion must be placed before the court. From the motion on Notice filed on 15/6/11 dated 14/6/2011 by 1st and 2nd Respondents they sought to amend their Joint Statement of Defence to plead two letters that emanated from the Ministry of Lands Survey and Urban Planning of Imo State addressed to Chairman Parent/Teachers Association of 1st Appellant and another one addressed to the President Old Students Association of 1st Appellant all dated 16/5/2011 after the commencement of this action.

The main reason for the opposition of the Appellants to the amendment sought by 1st and 2nd Respondent was that those letters were written by 3rd Respondent described by Appellant as "person interested" within the meaning of Section 91(3) of the Evidence Act Cap 112 LFN 1990 now Section 83(3) of the Evidence Act 2011 and as such the documents are inadmissible and that the amendment which the learned trial judge eventually granted on 6/7/2011 are useless. That the documents were made during the pendency of this action.

The said Order 24 also provides in Rule 8 that:

"8. subject to the provisions of Rule 1 of this order, a judge may at any time and on such terms as to costs or otherwise as may be just amend any defect in any proceedings and all necessary amendments shall be made for the purpose of determining the real question or issue raise by or depending on the proceeding."

In effect what a Judge will naturally asks himself when invited under order 24 Rules 1, 2, 3 and 8 to exercise his discretion are.

1. Whether Pre Trial conference had began and closed

2. Whether the party seeking for the discretion of court to amend his pleadings had applied twice in the past and during trial to amend his pleadings.

3. Is the amendments sought geared toward amendment of defect or error, omission or other necessary amendments for the purpose of determining the real question or issue in controversy as raised by the parties.

4. Will it be just to allow the amendment.

5. Is the amendment material.

6. Is the amendment sought in good faith.

Once the Appellant satisfies the court on all the above criteria the court will grant the amendments sought and where the amendments relate to pleading of a document or documents, the admissibility or value of the documents cannot be determined at that point in time. The court will be pre-judging issue and acting prematurely if it indulges itself in considering the admissibility or otherwise of the document at the stage while application for amendment is being considered. This is because admissibility of a document is governed by the provisions of Evidence Act. The issue of admissibility would only be taken up at the point of its tendering. It is for the court at that later stage to decide if the maker of the documents in this appeal is or he is not an interested person.

The trial court is only concerned about the principles guiding the court in considering application to amend and not about principle guiding admissibility of documents at the stage of consideration of application to amend. See S. O. N. OKAFOR vs. D. O. IFEANYI & ORS (1979) 1 Federation of Nigeria Law Reports 110 at 114-115 per Bello JSC later CJN of blessed memory.

The Appellants have not shown what they stand to lose by the amendment allowed by the learned trial Judge. No miscarriage of justice has been established by them.

Interest of justice demands that this type of amendment as granted by the trial Judge ought to be granted as it is right and just. See SAMUEL OLORO & ORS. vs. BOLUWAJI FALANA & ORS (2011) 17 NWLR (Pt. 1275) 207 at 217 B - G per UWANI MUSA ABBA AJI, JCA who said:

"The issue now is, what is an amendment in our civil procedure law? I do not intend to go into academics, but the word 'amendment' has been interpreted by the Supreme Court, in a number of cases. In the case of Chief Adedapo Adekeye & Ors. v. Chief Akin-Olugbade (1987) 3 NWLR (Pt.60) 214 at 223 paras. E-F; (1987) 6 SCNJ 127 at 135, per Oputa, JSC the apex court interpreted amendment thus:

"An amendment is nothing but the correction of an error committed in any process, pleading or proceeding at law or in equity and which is done either as of course or by the consent of parties or upon notice to the court in which the proceeding is pending."

Therefore courts have very wide discretion in granting or refusing the grant of an amendment be it of pleadings, proceedings or even any notice of appeal based on an establishment principle that the fundamental object of adjudication is to decide the rights of the parties and not impose sanctions merely for mistake made by the parties in the conduct of their cases by deciding otherwise than in accordance with their right. In deciding whether to allow amendment or not, the court must exercise its discretion judicially and judiciously. Therefore the primary consideration should always be whether the amendment sought is for the purpose of determining in the existing suit, the real question or question in controversy between the parties.

It is now settled that however negligent or careless, the amendment may have been, however late the proposed amendment, it should be allowed so long as it can be done without prejudice to the other side. An amendment should also be granted unless it will entail injustice to the respondent or the applicant is acting mala fide, and a court will not refuse an amendment simply because it introduces a new cause but would only refuse where amendment will result in a complete change of action into one of substantially different character."

The rights of the Appellants were not and are not in any way jeopardized in the prosecution of their case. The grant of the application of the 1st and 2nd Respondents to amend their pleading is not an infraction of the Appellants right to fair hearing. The learned trial Judge equally gave the Appellants the right to amend their pleading. See page 95 of the record where the learned trial judge said:

"Upon service of same on the Claimant, the claimant is also given the leave to file any consequential amendment of their Statement of Claim if they so desire."

The amendment is aimed at doing substantial justice between the parties to this appeal. See CHIEF ADEDAPO ADEKEYE v. CHIEF AKIN-OLUGBADE (1987) 3 NWLR (Pt. 160) 214 at 224 G-H to 224A where OPUTA, JSC held:

"The aim of an amendment is usually to prevent the manifest justice of a cause from being defeated or delayed by formal slip which arises from the inadvertence of counsel. It will certainly be wrong to visit the inadvertence or mistake of counsel on the litigant. The Courts have therefore through the years taken a stand that however negligent or careless may have been the slips, however late the proposed amendment, it ought to be allowed, if this can be done without injustice to other side, for a step taken to ensure justice cannot at the same time and in the same breath be used to perpetuate an injustice on the opposite party. The test as to whether a proposed amendment should be allowed is therefore whether or not he party applying to amend can do so without placing the opposite party in such a position which cannot be redressed by that panacea which heals every sore in litigation namely costs."

On the stage and times amendment could be allowed OPUTA, JSC ADEKEYE vs. AKIN OLUGBADE (supra) said:

"The Court should allow all amendments that are required for the purpose of using already available evidence and what is more using the findings of facts of the trial court. The court does not set a time limit to do justice and in the same vein it does not or perhaps also cannot set a time limit to grant on amendment designed to achieve justice between the parties. In William Rain v. Alexander Bravo (1872) L.R. 4P. C.A. 287 the application to amend was made when the Judge was reading his judgment. It was refused by the trial Judge but it was ultimately granted by the Privy Council. The main concern of the court in granting or refusing to grant an amendment is the interest of justice. All amendments ought to be granted if thereby justice is done between the contending parties. The court below acted rightly in granting the amendment sought. Grounds 3 therefore fail. Ground 2 which also dealt with the Amendment also fails."

I will therefore resolve issue one against the Appellants and favour of the 1st and 2nd Respondents.

**ISSUE 2**

WHETHER THE ORAL DIRECTIVE OF THE COURT BELOW TO 1ST AND 2ND RESPONDENTS To FILE A WRITTEN UNDERTAKING NOT TO BUILD A HOTEL, BROTHEL OR ANY BUSINESS OF LIKE MANNER, DOES NOT AMOUNT TO INTERFERENCE BY THE COURT BELOW ON THE CASE OF THE CLAIMANTS.

The learned counsel to the Appellants U. C. Osuji Esq referred to the undertaken of the 1st and 2nd Respondents filed on 8th July 2011 at the prompting of the learned trial Judge. The Appellants believe that the views expressed by the trial Judge as stated in the undertaking filed by 1st and 2nd Respondents must have been ex parte communication between the Judge and the said Respondents. That with the filing of the undertaking the learned trial Judge would definitely ruled against the Appellants on their application for interlocutory injunction which Ruling the learned trial court had fixed for 12th day of October, 2011. That it is now clear that the learned trial Judge

*"...will through a misapprehension of facts or by taking irrelevant matter into account or by omitting to take relevant matters into consideration dismiss the application come 12th of October 2011 see the case of AGUOMA vs. UWAIS (2007) ALL FWLR (Pt.346) 440, 465."*

Appellants accused the trial Judge of failing to record the said directive she gave to the 1st and 2nd defendants in her proceedings of July 6th 2011 as picking and choosing what to write and to them it goes to establish a bias against one of the parties before her and the party is Appellants.

That bias is an inclination, bent, a preconceived opinion or disposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction:

See the case of RE: COMMISSIONER FOR LANDS AND ORS vs. EZE MUOKWE (1991) 3 NWLR (Pt. 181) 615. He also relied on the case of EZEOKE vs. IGWE (2001) FWLR (Pt. 54) 234, 244 to contend that a trial court has a discretion to make comments and give directives in all matters before her but that judicial discretion must be exercised according to common sense and justice that where such acts lead to miscarriage of justice a higher court will interfere with that exercise of discretion. He relied on-

1) ODUSOTE vs. ODUSOTE (1971) 1 ALL NLR 219;

2) IGBOANUGO vs. THE STATE (1992) 2 NWLR (Pt. 281) 784 and

3) IDOKO vs. OGBEIKWU (2003) at 1542 - 1543.

He further submitted that the directive or tip to the 1st and 2nd defendants/respondents to file an undertaken which they have filed is overreaching and has pre-empted the ruling of the trial court not yet given.  
Appellants urged this court to resolve issue one in favour of Appellants.  
The Respondents in reaction to issue two urged this Court to answer the question in the negative. That it is very uncharitable and devious on the part of Learned Counsel to the Appellants to argue and state that it was the court who gave directive to the 1st and 2nd Respondents.

Uche N. Anyiam Esq for the 1st and 2nd Respondents surmises that a close look at pages 95 and 96 of the record of the court below reveals that he (the 1st and 2nd Respondent's learned counsel) was instrumental to the directive relating to the undertaking before the court so as to safeguard Learned Counsel (himself) to the Respondents.

That whoever alleges bias must proof it by strong and clear evidence and not by scrapping about for complaints and making some unfounded conjectures. He relied on AKOH vs. ABUH (1988) 3 NWLR (Pt. 85) at 711 and OJEGBENDE vs. ESAN (2001) FWLR (Pt. 90) 1406 at 1420-21.

That the Appellant are just making wicked and devilish allegation against the lower court notwithstanding that Appellant did not make any allegation of pecuniary or personal interest in the subject matter of litigation. That the bias must be looked at from the standpoint of a reasonable person and not from the stand point of an aggrieved party. That the cases the Appellants cited in trying to substantiate their fanciful and mendacious allegation are irrelevant.

That on 12/10/11 when the Learned trial Judge saw the Appellant application for stay of proceedings filed in this Court she adjourned the matter sine die the pending the outcome of this appeal. He concluded his submissions by urging this court to hold that the Appellants had failed to substantiate their allegation of bias against the learned trial Judge.

I have earlier on in this judgment reproduced the grounds of appeal in this matter and I cannot find in the record of appeal the error in law the Appellants alleged in ground two without particulars which for ease of reference and understanding I reproduce here again.

*"The learned trial Judge erred in law when during the hearing of an application for interlocutory injunction directed that 1st and 2nd respondent to file a written undertaking not to build a hotel/brothel on the land in dispute which direction has pre-empted the Ruling of the court and has also touched on the subject matter of the substantive suit."*

A close perusal of the record of appeal and the Ruling the appellants are complaining about delivered on 6th day of July, 2011 do not reveal or show any directive embodied in the said Ruling directing the 1st and 2nd Respondents to file a written undertaking. It must be emphasized that the law is firmly settled that an Appellate court as well as the parties are bound by the record of appeal before the Court of Appeal and cannot and will not be permitted to say anything outside the record of appeal. See OTUNBA OGUNTAYO vs. PRINCE FATAI ADELAJA & ORS (2009) 15 NWLR (Pt. 1163) 150 at 190 H to 191A per OGBUAGU, JSC who said;

"It must be stressed that this is also settled that the record of proceedings bind the parties, counsel and the court until the contrary is proved. See the case of SOMMER vs. FEDERAL HOUSING AUTHORITY (1992) 1 NWLR (Pt.219) 548, (1992) SCNJ 73. Therefore an Appellate Court has no jurisdiction to read into the record, what is not there and equally, it has no jurisdiction to read out of the record what is there. An Appellate Court must read the record in the exact content and interpret it."

See also:

1. HON. ZAKAWANU I. GARUBA & ORS vs. HON. EHI BRIGHT OMOKHODION & ORS (2011) 75 CM 85 at 108 C-E per CHUKWUMA - ENEH, JSC.

2. SOLOMON OHAKOSIN vs. COP IMO STATE & ORS (2009) 15 NWLR (Pt. 1164) 229 per KEKERE-EKUN, JCA now JSC.

3. U. NWORA & ORS vs. NWABUEZE & ORS (2011) 17 NWLR (Pt. 1277) 669 at 720 C-E per CHUKWUMA ENEH, JSC.

More importantly, it is trite law that grounds of appeal must arise or flow from or related to the Judgment or Ruling of the court appealed from. The appeal must be directed against the ratio or the nucleus of the Ruling in question. Any ground of appeal which does not stem or emanate from the decision or action of a Judgment or Ruling being appealed against is grossly incompetent and will be struck out. See-

1) PRINCE (DR) A. ONAFOWOKAN & ORS vs. WEMA BANK PLC & ORS (2011) 12 NWLR (Pt. 1260) 24 at 39A, F-H per MOHAMMAD, JSC.

2) HOPE DEMOCRATIC PARTY (HDP) vs. MR. PETER OBI & ORS (2011) 18 NWLR (Pt. 1278) 80 at ONNOGHEN, JSC.

3) CONGRESS FOR PROGRESSIVE CHANGE vs. INEC & ORS (2011) 18 NWLR (Pt. 1279) 493 at 522 H-533A where ADEKEYE, JSC delivering the leading judgment said:

"Any grounds of appeal which do not arise from the judgment appealed against equally cannot stand for reason of incompetency. The preliminary objection is sustained and the incompetent grounds and issue are struck out. The Ground two contained in the notice of appeal and issue two formulated by the Appellants are hereby struck out for reasons of incompetency. The decision of the court below is the Ruling contained on pages 95 and 96 of the record of proceeding/appeal. See Section 318(1) of the 1999 Constitution as amended and the case of GARUBA & ORS vs. OMOKHODION & ORS Supra Page 113 E-I to 114 A per CHUKWUMA - ENEH, JSC. Ground two just struck out did not pertain to appeal against the Ruling of the lower Court.

I also call in aid the definition of what an appeal connotes in BLACK'S LAW DICTIONARY NINTH EDITION page 112 thus:

"appeal - A proceeding undertaken to have a decision reconsidered by a higher authority especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal".

Whatever the learned trial Judge said ex tempore or impromptu which is not contained in her Ruling are extraneous to this appeal and must be jettisoned. In the result the appeal fails. It lacks merit and the appeal of the Appellants herein is hereby dismissed. Appellants shall pay costs assessed at N30,000 (Thirty Thousand Naira) in favour of 1st and 2nd Respondents.

**UWANI MUSA ABBA AJI, J.C.A.:**

I was privileged to read in draft the lead judgment of my learned brother, P. O. Ige, JCA just delivered.

I completely agree with the reasoning and conclusion therein arrived that the appeal lacks merit. I have nothing more to add. I therefore adopt same as mine. The appeal is hereby dismissed. The Ruling of the lower court delivered on the 6th day of June, 2011 is hereby affirmed.

I abide the consequential orders made in the lead judgment including orders as to costs.

**PHILOMENA MBUA EKPE, J.C.A.:**

I have had the privilege of reading in advance the judgment just delivered by my learned brother, PETER OLABISI IGE, JCA. On the totality of the entire appeal and also on the comprehensive reasoning and conclusions which have been exhaustively articulated by my learned brother, I also concur that this appeal lacks merit and is hereby dismissed. I abide by His Lordship's order as to costs.

**CASES REFERRED TO-**

ABOSI V. LABIYI (1988) WRNLR 12

AKOH V. ABUH (1988) 3 NWLR (Pt. 85) 711

ALSTHOM S.A. V. SARAKI (2000) 14 NWLR (Pt. 687) 415

ANYAEBOSI V. R.T. BRISCOE NIGERIA LTD (1987) 3 NWLR (Pt.59) 84

CHIEF (DR) PERE AJUWA & ANOR V. THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD (2011) 18 NWLR (Pt.1279) 797

CHIEF ADEDAPO ADEKEYE V. CHIEF AKIN-OLUGBADE (1987) 3 NWLR (Pt. 160) 214; (1987) 6 SCNJ 127

CONGRESS FOR PROGRESSIVE CHANGE V. INEC & ORS (2011) 18 NWLR (Pt. 1279) 493

DUPE OLATUNBOSUN V. TEXACO NIGERIA PLC & ANOR (2012) 8 SCM 183

EZEOKE V. IGWE (2001) FWLR (Pt. 54) 234

GBADAMOSI V. IGBO TRAVELS LTD (2000) 8 NWLR (Pt. 668) 243

HIGH GRADE MARITIME SERVICE LTD V. FIRST BANK OF NIGERIA LTD (1991) 1 NWLR (PART 167) 290

HON. ZAKAWANU I. GARUBA & ORS V. HON. EHI BRIGHT OMOKHODION & ORS (2011) 75 CM 85

HOPE DEMOCRATIC PARTY (HDP) V. MR. PETER OBI & ORS (2011) 18 NWLR (Pt. 1278) 80

IBRAHIM V. DALLEY (2009) ALL FWLR (Pt 494) 1574

IDOKO V. OGBEIKWU (2003) 1542

IGBOANUGO V. THE STATE (1992) 2 NWLR (Pt. 281) 784

IGRUBIA V. IGRUBIA (2009) ALL FWLR (Pt. 471) 856

IKPO V. AZUBUIKE (2000) 14 NWLR (Pt.686) 166

MOBIL OIL (NIG) LTD V. COKER (1975) 3 SC 175

ODUSOTE V. ODUSOTE (1971) 1 ALL NLR 219

ODUWAIYE V. ORESENYE (1968) NWLR 430

OJAH V. OGBONI (1976) 4 SC 69

OJEGBENDE V. ESAN (2001) FWLR (Pt. 90) 1406

OTUNBA OGUNTAYO V. PRINCE FATAI ADELAJA & ORS (2009) 15 NWLR (Pt. 1163) 150

PRINCE (DR) A. ONAFOWOKAN & ORS V. WEMA BANK PLC & ORS (2011) 12 NWLR (Pt. 1260) 24

RE: COMMISSIONER FOR LANDS AND ORS V. EZE MUOKWE (1991) 3 NWLR (Pt. 181) 615

S. O. N. OKAFOR V. D. O. IFEANYI & ORS (1979) 1 Federation of Nigeria Law Reports 110

SAMUEL OLORO & ORS. V. BOLUWAJI FALANA & ORS (2011) 17 NWLR (Pt. 1275) 207

SOLOMON OHAKOSIN V. COP IMO STATE & ORS (2009) 15 NWLR (Pt. 1164) 229

U. NWORA & ORS V. NWABUEZE & ORS (2011) 17 NWLR (Pt. 1277)