**OLUFEMI ADENIYI AND OTHERS**

**V.**

**HERBERT ADEYINKA ADEOLU OYELEYE AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 23RD DAY OF MAY, 2013

CA/IL/9/2011

**LEX (2013) - CA/IL/9/2011**

OTHER CITATIONS

2PLR/2013/146

(2013) LPELR-21387(CA)

**BEFORE THEIR LORDSHIPS**

HUSSEIN MUKHTAR, JCA

OBANDE F. OGBUINYA, JCA

TIJJANI ABUBAKAR, JCA

**REPRESENTATION**

D. A. ARIYOOSU, Esq. with O.W. AKANBI, Esq., O.T. MOHAMMED, Esq. and O. A. AJAYI, Esq. - For Appellant

AND

ANIMASHEUN ABIDUMI, Esq. with A.S ASONIBARE Esq. and O.A OBAFEMI, Esq.)

S. R. ASHAOLU, Esq. with B ABDULLAHI, Esq.), KAMALDEEN ABDULQUADRI, Esq. with K. MOGAJI - For Respondent

**BETWEEN**

1. OLUFEMI ADENIYI

2. DEBORAH IYABO ADENIYI

3. BOLANLE OLAREWAJU

4. OLAJUMOKE ABOLARIN

5. BOSEDE ADENIYI

(On behalf of themselves and other members of the family) - Appellant(s)

AND

1. HERBERT ADEYINKA ADEOLU OYELEYE

2. ABRAHAM ASHAOLU

3. YUSUF OMOWUMI MOMODU - Respondent(s)

**ORIGINATING COURT**

KWARA STATE HIGH COURT (H. O. Ajayi, J., Presiding)

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

REAL ESTATE AND PROPERTY LAW - LAND:- Claim for declaration of title and ownership of land – How treated

CONSTITUTIONAL LAW:- Section 242 and 241 of the Constitution – Grounds of appeal and when leave is required to approach the Court of appeal

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Preliminary objection - Aim of

APPEAL – GROUND OF APPEAL:- Ground of Law and Ground of Fact or Mixed Law and Ground of Law- Distinctions – Principles for determining same - Duty of court thereto – When leave is required - Effect of filing an appeal without the requisite leave

APPEAL - LEAVE OF COURT**:-** Where leave of court is required for filing an appeal and an appellant ignores seeking and obtaining the requisite leave before filing same – Whether the appeal is rendered incompetent

PLEADINGS - AMENDMENT**:-** Rules of Court – Whether most rules of courts do not circumscribe the number of times a party can apply to a court for amendment during the pendency of proceedings – Whether amendments could be effected before trial courts as well as appellate courts – Power of courts to make amendments suo motu – Applicable guidelines

**MAIN JUDGMENT**

OBANDE F. OGBUINYA, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This appeal grew out from the decision of the High Court of Kwara State, Ilorin, presided over by H. O. Ajayi, J., in suit No. KWS/91/2009 and delivered on 27/10/2010.

Flowing from the available record and processes filed, the facts of the case, which metamorphosed into this appeal, are brief. The appellants and the respondents were the respective claimants and defendants before the lower court. On 14/05/2009, the appellants took out and filed a writ of summons, alongside a statement of claim, wherein they claimed, against the respondents, a declaration of title to and ownership of a parcel of land situated at Tanke Village, Ilorin, Kwara State, trespass on the land, damages and perpetual injunction over the said land. The writ of summons and statement of claim, initiating the action, were both franked by David Alabi, Esq. of No.10,Christ Avenue, off University Road, Tanke, Ilorin.

Subsequently, the appellants debriefed David Alabi, Esq.and briefed the legal firm of Dr. J. O. Olatoke & Co. to prosecute their suit. The change in counsel was, at the behest of the appellants, via a motion on notice, sanctioned by the lower court on 01/4/2010 as found on page 154 of the record. Sequel to that change, the appellants, on 07/06/2010, through their counsel, applied to the lower court for an order for: "LEAVE to amend the originating process and the statement of claim with the accompanying documents in this case by substituting the proposed amended writ of summons and statement of claim with other accompanying documents... LEAVE to file another written statements on oath..." The application was supported by affidavits and further affidavits as shown on pages 39 - 41, 110 -111 and 116 -117 of the record. In stiff opposition to the application, the first and third respondents each filed a counter-affidavit as evidenced on pages 92-93 and 100-102 of the record respectively. The application was, duly, argued by counsel's adoption of the written addresses for their respective parties on 19/07/2010. The lower court, in a considered ruling, delivered on 27/10/2010, refused the application and dismissed it in its entirety.

The appellants were dissatisfied with the ruling/decision of the lower court. Hence, on 19/11/2010, they filed a three-ground notice of appeal, occupying pages 189-193 of the record, wherein they prayed this court for: "(a) AN ORDER of this Honourable Court allowing the appeal in its entirety. (b) AN ORDER of this Honourable court setting aside the ruling of trial court delivered refusing the amendment and rather grant the amendment. (c) AND FOR SUCH FURTHER ORDER (S) as this Honourable court my (sic) deem fit to make in the circumstance of this case." Thereupon, parties filed and exchanged their briefs of argument in line with the provisions of the Rules of this court.

Thereafter, the appeal was heard on 26/03/2013. Before the hearing of the appeal, learned counsel for the first respondent, Animashaun, Esq., argued his preliminary objection, filed on 23/12/2011, with the arguments thereon incorporated in his brief of argument which was settled by Y. A. Dikko, Esq. In the same vein, learned counsel for the second respondent S. R. Ashaolu, Esq., argued his preliminary objection, filed on 17/02/2012, with the arguments thereon factored into his brief of argument. Learned counsel for both objectors urged the court to uphold their objections and strike out the appeal. After that, learned counsel for the appellants, D. A. Ariyoosu, Esq., adopted the appellants, brief of argument, filed on 14/03/2011, the appellant's reply briefs to the first respondent's brief, filed on 19/12/2011, the appellant's reply brief to the second respondent's brief, filed on 30/01/2013, the appellants' reply brief to the third respondent's brief, filed on 07/09/2012, all deemed filed on 18/03/2013, as representing his arguments against the two preliminary objections and in support of the appeal. Learned counsel prayed the court to overrule the objections and allow the appeal.

Similarly, learned counsel for the first respondent adopted his brief of argument, filed on 25/11/2011, but deemed filed on 18/03/2013, as forming his arguments against the appeal which he prayed the court to dismiss. Also, the learned counsel for the second respondent adopted his brief of argument, filed on 06/02/2012, but deemed filed on 18/03/2013, as representing his submissions against the appeal. He urged the court to dismiss it.

Lastly, learned counsel for the third respondent, Kamaldeen Abdulquadri Esq., adopted his brief of argument, filed on 01/02/2012,but deemed filed on 18/03/2013, as representing his arguments against the appeal. Learned counsel prayed the court to dismiss it.

**Consideration of the Preliminary objections:**

The first respondent prayed the court to strike out the appeal on the ground that leave of the lower court was not sought and obtained pursuant to Section 242 of the 1999 Constitution, as amended, and thereby robbed this court of the vires to hear the appeal.

The second respondent urged the court to strike out grounds 1, 2 and 3 of the appellants' notice of appeal and the sole issue formulated from them on grounds of incompetency for noncompliance with Section 242 of the Constitution, as amended. The grounds upon which the objection was predicated were that the decision of the lower court was interlocutory in nature, the appellants' grounds of appeal were grounds of facts or, at best, mixed law and fact and they failed to obtain leave of the lower court or this court before filing the appeal. It is discernable from the two preliminary objections that they have one common target, to terminate the appeal without hearing it.

Learned counsel for first respondent submitted that the appellants' appeal is an interlocutory appeal and that Section 241(1) of the Constitution, as amended, provides the circumstance whereby an appeal from the decision of the lower court will lie as of right to this court. He posited that the provision of Section 241(1) is not applicable to the appeal, being an interlocutory one. He noted that the appellants' grounds one, two and three of the appeal are grounds based on facts or mixed law and fact. He took the view that ground one bordered on issue of amendment which called for exercise of judicial discretion and as such leave of the court must be sought and obtained. He placed reliance on the cases ofUBA Plc vs. Sogunro (2006) ALL FWLR (Pt. 337) 402; FBN Plc v. T. S. A. Industries Ltd. (2010) 25(sic) NWLR (Pt. 1216) 247 to support his contentions. He added that whether the amendment would change the character of the case was an issue of fact as the court would have to consider the facts before applying the law to them. He cited the case of Ankpa vs. Makarfi (2010) All FWLR (pt. 506) 1977 to support his view. He posited that when a ground of appeal touches on an issue of mixed law and fact, leave of the trial court is a condition precedent pursuant to Section 241(2) of the constitution, as amended.

Learned counsel repeated the same arguments on grounds two and three; adding that whether the amendment would overreach the respondents was an issue of fact. He relied on the cases ofC.C.C.T.C.S. Ltd vs. Ekpo (2008) 6 NWLR (Pt. 1083) 362; UBN Plc v. Sogunro (supra); Audu vs. INEC (2010) 13 NWLR (Pt.1212) 431 to support his submissions.

For the second respondent, learned counsel contended that a ground of appeal could be on law alone, facts alone or mixed law and fact provided it was against a final decision of the court of first instance. He cited Section 241(1) (a) of the Constitution, as amended, Nafiu Rabiu vs. The State (1981) 2 NCLR 29; Aqua Ltd. v. Ondo State Sports Counsel (sic) (1988) 4 NWLR (Pt.91)622.

He drew a distinction between a final and an interlocutory decision, relying on the case of Mohammed vs. Olawumi (1990) 2 NWLR (pt. 133) 458. He posited that one test for determining whether an order is interlocutory or final is the nature of the application and the order made. In support of that postulation, he cited the case of Alor vs. Ngene (2007) 17 NWLR (Pt. 1062) 163. He added that it was not in dispute that after serious evaluation of the affidavit evidence, the lower court dismissed the application. He stated that the rests to be used to identify a ground of appeal based on law alone, facts alone or mixed law and fact had been laid down in the cases of Dairo vs. UBA Plc. (2007) 11 MJSC 74. Garba vs. Omokhodion (2011) 15 NWLR (Pt. 1269) 146; Akinsanya vs. UBA Ltd (1996) 4 NWLR (pt. 35) 273. He persisted that the effect of failure to obtain leave of court when a ground of appeal involved mixed law and fact is that the appeal is incompetent. He relied on the cases of Marcus Opuiyo vs. Johnson Omoniwari (2007) 9 MJSC 187 and Mohammed vs. Olawumi (supra) to buttress his postulation.

On behalf of the appellants, learned counsel argued, per contra, that the three grounds of appeal are grounds of law simpliciter, competent and no leave of court is required. He placed reliance on Section 24(1) of the Constitution, as amended, Guardian Newspaper Ltd vs. A. - G., Fed. (1995) 5 NWLR (Pt. 398) 703; Attama vs. Anglican Bishop of the Niger (1999) 9 SCNJ; FBC Plc. vs. Tsokwa (2004) 5 NWLR (Pt. 866) 271. He posited that it is for the court to determine the nature of the grounds of appeal and not on what the objectors may have misconceived to be the question involved in the grounds. He relied on the case of M.D.P.D.T. vs. J.E.N. Okonkwo (2001) 3 SC 76.

Learned counsel further argued that ground one, with its particulars, complained of misapplication of the law to the facts of the case. He explained that, the lower court stated the position of the law that amendment would not be granted where it would change the character of the case; adding that the amendment would never change the character of the case from land to any other matter. He relied on the cases of FBN Plc v. T.S.A. (supra); Arum v. Nwobodo (2004) 9 NWLR (pt. 878) 411; Shanu vs. Afribank (2000) 10 - 11 SC 1 to buttress his arguments. He insisted that the facts before the lower court was undisputed, but it failed to apply the correct principle of law so that the issue before it was one of law not fact. He sought in aid the cases of Ene vs. Asikpo (2010) 10 NWLR (Pt. 1203) 477; B.A.S.F. (Nig) Ltd vs. Faith Ent. Ltd. (2010) 1 SCM 41.

Learned counsel reasoned that the cases of UBA Plc vs. Sogunro (supra) and FBN Plc vs. T.S.A. Industries Ltd (supra) were inapposite to the first respondent's submissions. He conceded that granting or refusing an application for amendment is at the discretion of the court, but the grounds of appeal never challenged how the lower court exercised its discretion. He maintained that the grounds of appeal challenged the lower court's misapplication of the law to the facts, not evaluation of facts so as to make the case of Ankpa v. Makarfi (supra) applicable. He added that a ground of appeal which challenges the conclusion of a court or undisputed facts is a ground of law which no leave is required. He relied on the cases of Mako vs. Umoh (2010) 8 NWLR (Pt. 1195) 82; Samuel Okedare vs. Oba Ahmadu Adebara (1995) 6 SCNJ 254. He insisted that ground two is a ground of law. He explained that hearing had not commenced in the case in the lower court so that the respondents could make consequential amendment to their pleadings.

Regarding ground three, learned counsel adopted his submissions on ground two. He postulated that by the sole issue of law formulated by the first respondent,his objection was utter, disingenuous, relying on the case of M.D.P.D.T vs. Okonkwo (2001) 3 SC 76 to support his postulation. He reasoned that the objection bordered on technicality rather than substantial justice as the objectors were not misled about the purport and intendment of the grounds. In support of his view, he relied on the case of Odinigi v. Oyeleke (2001) 1 SC 194. He stated that the right of appeal is a constitutional one which the court cannot deny a party under any guise such as this objection. He cited the unreported case of CA/IL/M81/2010: Suleman A. Omokayode & 2 Ors vs. Alhaji W. Bolakale Lawal to support his argument.

In reaction to the second respondent's preliminary objection, learned counsel for the appellants dubbed his submissions against the first respondent's preliminary objection adumbrated above. He added that the cases cited by the second respondent were hanging and could not support his preliminary objection.

Resolution of the Preliminary objections:

A preliminary objection is, invariably, aimed at terminating the lifespan of an appeal in limine. To this end, the law compels the courts to deal with preliminary objections first whenever they are raised against appeals, see Uwazurike vs. A-G. Fed. (2007) 8 NWLR (Pt.1035) 1; B.A.S.F. (Nig) Ltd vs. Faith Enterprises Ltd. (2010) 4 NWLR (Pt. 1183) 104; SPDCN Ltd v. Amadi (2011) 14 NWLR (Pt. 1266) 157; FBN Plc v. T.S.A. Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247; Okereke vs. James (2012) 16 NWLR (pt. 1326) 339. In due obeisance to this immutable position of the law, I will treat the two preliminary objections first.

As already observed earlier, the two preliminary objections filed by the first and second respondents (hereunder abbreviated to "the respondents") are intertwined with a common object to exterminate the appellants' appeal at its infancy. On this premise, I will, for time conservation and convenience, fuse their consideration. A resume of the two terminal preliminary objections is that the appellants' appeal is incompetent because their three grounds of appeal are grounds of facts or mixed law and facts and same filed without the leave of the lower court or this court authorities, that to differentiate between a ground of law, on the one hand, and a ground of fact or mixed law and fact, on the other hand, is a stubborn and perennial judicial exercise. The dichotomy between them, though slim and subtle, has agitated the well informed legal minds in this country and tons of ink expended on it.

A ground of appeal does not translate into a ground of law or fact or mixed law and fact because it is so couched by the appellant. In other words, the manner an appellant has labelled a ground of appeal does not bring out the class of ground it belongs, id est, law, fact or mixed law and fact. To decipher whether a ground of appeal is of law or fact or mixed law and fact, a court has the bounden duty to, thoroughly and assiduously, examine the ground with its accompanying particulars. These cardinal principles on classification of grounds of appeal have been sanctified in an army of authorities, see Opuiyo v. Omoniwari (Supra) or (2007)? NWLR (Pt. 1060)?; MDPDT vs. Okonkwo (supra); Thor Ltd vs. FCMB Ltd (2008) 4 SCNJ or (2002) 4 NWLR (Pt.757) 427; Akanbi v. Salawu (2003) 13 NWLR (Pt.838) 637; Garuba v. K.I.C. Ltd. (2005) 5 NWLR (pt.917) 160; FBN Plc v. TSA Ind. Ltd (supra); General Electric Co. v. Akande (2011) 18 NWLR (pt. 1225) 596; Odumkwe v. Ofomata (2010) 18 NWLR (pt. 1225) 404; Okwuagbala v. Ikwueme (2010) 19 NWLR (Pt. 1226) 54; Garuba v. Omokhodion (supra); Ababukar v. Waziri (2008) 14 NWLR (Pt. 1108) 507; Ugboaja v. Akitoye-Sowemimo (2008) 16 NWLR (Pt. 1113) 278; Ehinlanwo v. Oke (2008) 16 NWLR (Pt. 1113) 357.

In order to curb or ameliorate the incessant difficulties associated with drawing a distinction between a ground of law and a ground of fact or mixed law and fact, the Supreme Court, in myriads of decided cases, had evolved certain principles that would assist the courts. Some of the paramount governing principles have been, recently, re-echoed by the apex court in the case of Akinyemi v. Odu'a Inv. Ltd (2012) 17 NWLR (pt.1329) 209 at 230-231 as follows:

"1. The first and foremost is for one to examine thoroughly the grounds of appeal in the case concerned to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted.

2. Where a ground complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law.

3. Where a ground of appeal questions the evaluation of facts before the application of the law, it is a ground of mixed law and fact.

4. A ground which raises a question of pure fact is certainly a ground of fact.

5. Where the lower court finds that particular events occurred although there is no admissible evidence before the court that the event did in fact occur, the ground is that of law.

6. Where admissible evidence has been led, the assessment of that evidence is entirely for that court. If there is a complaint about the assessment of the admissible evidence, the ground is that of fact.

7. Where the lower court approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.

8. Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law.

9. Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume that there has been a misconception of the law.

This is a ground of law.

10. Where the conclusion of the lower court is one of possible resolutions but one which the appeal court would not have reached if seized of the issue, that conclusion is not an error in law.

11. Where a trial court fails to apply the facts which it has found correctly to the circumstances of the case before it and there is an appeal to a Court of Appeal which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law not fact.

12. When the Court of Appeal finds such application to be wrong and decides to make its own findings such findings made by the Court of Appeal are issues of fact and not of law.

13. Where the appeal court interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law not of fact.

14. A ground of appeal which complains that the decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses, it is purely a ground of fact."

Hitherto, the Supreme Court had stated and restated those considerations in a galaxy of authorities, see Ogbechie & Ors v. Onochie & Ors (No.1) (1986) 1 NSCC vol. 17. 443/(1986) 3 SC 54/(1986) 2 NWLR (Pt.23) 484; C.C.C.T.C.S v. Ekpo (supra); Dairo v. UBN Plc (Supra)/(2007) 16 NWLR (pt. 1059) 99; FBN Plc v. TSA Ind. Ltd (supra); NNPC v. Famfa Oil Ltd. (2012) 17 NWLR (pt. 1328) 148; Atago v. Nwuche (2013) 3 NWLR (Pt. 1341) 337; Nwadike v. Ibekwe (1987) 4 NWLR (pt.67) 718 or (1987) 2 NSCC (vol. 18) 1219; Ajuwa v. S.P.D.C.N Ltd. (2011) 18 NWLR (pt. 1225) 797; M.M.A. Inc v. N.M.A (2012) 18 NWLR (1333) 506.

A question of law connotes one of three meanings, to wit: (a) A question a court is bound to answer in accord with a rule of law. (b) A question which explains what the law is. (c) A question which normally answers questions on law only and, invariably, fall within the judicial power of a Judex to answer. Contrariwise, a question of fact denotes one of three meanings, viz. (a) A question which is not determine by a "rule of law. (b) Any question except one as to what the law is. (c) Any question which is to be answered by the Jury and not the Judge. These triumvirate meanings of questions of law and fact have received the imprimatur of the apex court in an avalanche of cases, see Ogbechie v. Onochie (No.1) (supra); C.C.C.T.C.S vs. Ekpo (supra); General Electric Co. vs. Akande (supra); Ehinlanwo v. Oke (supra).

The appellants' three grounds of appeal, which are being derided and sought to be impugned by the respondents, are encapsulated between pages 190- 192 of the printed record. At the expense of prolixity, but borne out of necessity, I will pluck out those grounds from the record, verbatim ac litteratim, thus:

"3. GROUNDS OF APPEAL

GROUND ONE;

The learned trial judge erred in law and misdirected himself when he held that amendment would not be granted where the amendment will change the character of this case.

PARTICULAR OF ERROR AND MISDIRECTION

(1) It is the prerogative discretion of the Claimant to determine how he is going to prosecute his case.

(2) The character of the case will not change when comparing the processes to be amended and/or substituted with the one before the court.

(3) The character of the case still remains title to land when comparing the process before the one sought to be amended and/or substituted.

(4) It has been held by plethora of judicial authorities including Supreme Court that party can amend his entire pleadings to make a new case.

(5) No injustice is occasioned against the respondent.

(6) The ruling of the trial judge is perverse in the circumstance of this case.

GROUND TWO

The learned trial judge erred in law and misdirected himself when he held that the court will not grant amendment that will overreach the other parties since the Defendants have filed counter claim against all the Claimants/Applicants in this suit.

PARTICULAR OF ERROR AND MISDIRECTION

(a) Hearing has not commenced in this case

(b) No evidence whatsoever has been led before the lower court.

(c) If the amendment sought by the claimant/Appellants is granted, the Defendants/Respondents are not shut out from making consequential amendment.

(d) Nothing from the amendment precluding the Defendants/Respondents from continuing with their counter claim.

(e) The title documents attached by the claimants/appellants bear only the name of the 2nd claimant/Appellant.

(f) The Defendants/Respondents in law can still validly pursue their counter claim against only the 2nd Claimant/Appellant's.

(g) The counter claim of the Defendants/Respondents borders strictly on declaration of title and nothing more.

(h) In no way will any of the Defendants/Respondents be prejudiced by the amendment.

(i) The claimants/Appellants have changed their counsel from David Alabi Esq. to Messrs Kayode Olatoke & Co.

(j) The new counsel is not bound in law to follow what the former counsel has filed.

GROUND THREE

The learned trial judge erred in law and misdirected himself when he held that the processes sought to be substituted is not the same with the one earlier filed by the claimants/appellant's counsel and amendment will be refused on the fact that the pleadings and originating process filed did not state that the land belongs to the 2nd claimant/appellant alone but to the family.

PARTICULAR OF ERROR AND MISDIRECTION

(a) The 2nd claimant/appellant alone is sufficient to prosecute this suit.

(b) Whatever grievances that the defendants/respondents might have had against the claimant's/appellant could be redressed through the 2nd claimant/appellant who is the bonafide owner of the land or rather file fresh action against the remaining claimants/appellants if the respondents have anything against them.

(c) The 1st, 3rd and 4th claimants/appellants are merely 2nd claimants/Appellants' children.

(d) A party is at liberty to change the contents and, reliefs in his pleadings.

(e) A party is at liberty to abandon some claims and, add some in civil suit.

(f) The court did, not show in the ruling any miscarriage of justice the defendants/ respondents will suffer if the amendment is granted.

(g) Amendment is for doing substantial justice and, can be made any time before judgment.

(h) The process sought to be brought in by the claimants/Appellants will determine the real issue in controversy between the parties."

For a dispassionate consideration of the two objections, I have situated the appellants' three grounds, including the particulars appended to them, sought to be decimated by the respondents, with the above displayed guiding principles. The reason is plain. It is to ascertain which of the categorized grounds, law, fact or mixed law and fact, these castigated grounds fall into, using the outlined principles as the necessary compass/yardsticks.

In consonance with the prescription of the law, I have given an indepth/intimate reading to the three grounds of appeal, adumbrated above, alongside their particulars. The appellants' grouse in ground one is against the lower court's finding that the amendment sought would change the character of the case. Hence, they, stoutly, argued that the case would still remain a land matter even after amendment. A consideration as to whether the character/colour of a case is changed or retained will, ultimately, turn on its facts and circumstances. It follows that whether the nature of the appellants' case would mutate, from its present land matter status, would, heavily, depend on the facts counted in their pleading. It is facts that will determine whether the appellants' case, founded on land matter, will metamorphose into any other matter, such as negligence, contract, etc or another land matter of any other colouration. Put, simply, a court will examine the facts in the pleadings in conjunction with the law in a bid discover the character of a case. The law cannot act **in vacuo**, it must be predicated on facts. After all, it is trite that facts are the forerunners and arrowheads of the law. Facts are the substrata or plinth upon which the law perches and, ipso facto, determine the nature of any case. Since a determination of the character of the appellants' case will elicit or entail a conjoined examination of admixture of facts and law, their ground one, amply, qualifies, at best, as a ground of mixed law and fact. It is, totally, divorced from ground of law.

In ground two, the appellants' grievance is against the lower court's refusal of the amendment sought on the ground/premise that it would overreach the other parties who had counter-claimed against them. The verb, overreach, implies "to circumvent, outwit or get the better of something by cunning or artifice" see N.I.W.A v. S.P.D.C.N. Ltd (2008) 13 NWLR (Pt.1103) 48 at 68, Per Tobi, JSC; Akaninwo v. Nsirim (supra) at 621, Yusufu v. Adegoke (supra).

Thus, overreaching, within the four walls of litigation, evinces unscrupulous or crafty conducts or methods contrived by a party against an opponent. In point of fact, being within the realm or province of human conducts, a consideration of whether an adverse party will be overreached or not will, necessarily and inescapably, evoke references/ allusions to facts in a case by a court. A consideration of the appellants' ground two will, unavoidably, invoke looking at the entire facts and circumstances of the case, conjunctively, with the law. It is from the available and furnished facts before a court, that it will use as launchpad for determining if the other parties will be overreached. In this wise, the court will examine the pleading in the main action and the counter-claim and marry them with the law before forming an opinion on whether or not the opponents will be overreached. That is to say, to deduce overreaching involves a symbiosis of law and facts. In legal parlance, that translates to mixture of law and facts. In the result, I hold that the appellants' ground two falls within the domain of mixed law and fact.

The appellants' chief complaint in their ground three, which is both wordy and woolly in its connotations, is that the lower court was wrong to refuse the amendment on the reason that the processes they sought to substitute were not the same with the once earlier filed. It does not require the acuity of a legal mind to know that ground three is, wholly, dependent on construction of facts. To determine whether or not the appellants' new processes, the writ and statement of claim, were identical with those previously filed, a court will as a matter compulsion, juxtapose them and dig into the facts embedded in each of them. It is after such factual comparison, with the judicial lens of a court, that it can reach a finding as to the symmetry or differentials in the two set of processes. In a word, I christen the appellants' ground three as ground of fact or, at best, mixed law and fact.

Indisputably, some of the particulars of each of these three grounds of appeal are particulars of law. Nevertheless, in the face of the grounds being grounds of fact or mixed law and fact, the law has rendered them impotent so that they are incapable of transforming the grounds to ones of law. In the case of Nwadike v. Ibekwe (supra), at 1238, Nnnaemeka-Agu JSC, opined:

"There can be no doubt but that some of the particulars in ground 4 as they stand raise issue of fact, or mixed law and fact. For quite apart from the rather confused manner in which the general proposition in the ground is worded, the clear particular of law revealed in particular (3) of ground 4, is mixed up with particulars of fact or mixed law and fact in some of the other particulars. Caught in this unenviable predicament, the learned counsel for the appellants requested us to strike out those particulars which raise particulars of fact or mixed law and fact in order to leave particulars of law alone to stand. In my view, such a surgical operation on grounds of appeal filed by the appellants is a task which this court is not expected or empowered to do. In the ipsissima verba of the constitutional provision the right of the appellants to appeal as of right on the points in issue is limited to "where the ground of appeal involves question of law alone." It does not extend to where such a ground has been converted into questions of law alone by reason of a benevolent surgical operation by the court."

In keeping with this pronouncement, I will be loath to expunge those particulars that smack of facts or mixed law and facts to make way for particulars of law. Those particulars that reek of fact or mixed law and facts must sink with the three grounds of appeal.

Indeed, to do otherwise will constitute a defilement of the law as enunciated in Nwadike's case (supra). I am least prepared to annoy the law.

It was part of the appellants' lustly contention that the facts were admitted so that their quarrel was with the lower court's misunderstanding of the law or misapplication of that law to those admitted facts. I find it, extremely, difficult to buy the appellants, submission. With due respect to them, that argument is not only idle, but flies in the face of the copious conflicting affidavits, freely, filed by both parties for and against the application as shown on pages 39-41, 92-93, 100-102, 110-111 and 116-117 of the record. I have read those affidavits with a fine toothcomb. I make bold to state that their contents are quite irreconcilable to lend credence to the appellants' view point of undisputed facts in the application.

The facts in the incompatible affidavits were world away from being established to attract the lower count's misapplication of law to them. In a nutshell, it is my humble view that the facts in the application, which generated the appeal, are highly disputed or contested.

It remains to add that the law is settled, beyond any iota of equivocation, that an application for amendment is, deeply rooted in the province of equitable remedies which, to all intents and purposes, appeal to the discretion of the court, see Mamman vs. Salaudeen (2005) 18 NWLR (Pt. 958) 478. It flows that the appellants' application solicited for the exercise of the discretionary power of the lower count, albeit judicially and judiciously. The lower court, with the aid of the law as exemplified/manifested in its judgment, turned down the appellants' supplication or invitation to exercise its discretion in their favour. It is for that reason that the appellants challenged its decision, a decision, wholly, based on exercise of discretion.

It is trite that a ground of appeal that calls to question such exercise of discretion is, at best, of mixed law and fact. In the case of FBN Plc vs. Abraham (2008) 18 NWLR (Pt. 1118) 172 at 189, the Supreme Court, Per Aderemi, JSC, held;

"The important consideration in the determination of the nature of a ground of appeal is not the form of the ground rather it is the question it raises. Indeed, a ground of appeal questioning the exercise of discretion by a lower court is a ground not of law, but at best, of mixed law and fact."

See, also, Garuba vs. Omokhodion (supra); Williams vs. Mokwe (2005) 14 NWLR (Pt. 945). It stems from the foregoing position of the law, that another albatross around the appellants' three grounds is that they have launched vitriolic attacks against an exercise of discretion by the lower court. The law on its own brands such grounds as mixed law and fact. The appellant's grounds must, willy-nilly, accept the legally-imposed appellation without any protestation.

I have, after due consultation with the current position of the law, arrived at a solemn finding that the appellants three grounds of appeal are, of best, grounds of mixed law and facts. Put the other way round, the grounds are not ones of law so as to come within the purview of the provision of Section 241 (1)(b) of the 1999 Constitution, as amended. The decision of the lower court, being castigated, is not a final decision, but interlocutory in the sense that the rights of parties are not finally determined, see Igunbor vs. Afolabi (2001) 11 NWLR (Pt. 723) 148; Ogolo vs. Ogolo (2006) 5 NWLR (Pt. 972) 163; Owoh vs. Asuk (2008) 16 NWLR (pt. 1112) 113; Gomez v. C. & S.S. (2009) 10 NWLR (Pt. 1149) 223; General Electrical Co. v. Akande (supra); UBN Plc. vs. Sogunro (supra). That interlocutory status takes the decision outside the remit of the provision of Section 241(1)(a) of the Constitution, as amended.

Since the decision was an interlocutory one, coupled with the fact that the grounds have been adjudged as mixed law and fact, the prescription of Section 242 (1) of the Constitution, as amended, mandates the appellants to appeal to this court with its leave or that of the lower court. In the eyes of the law, leave in this context imports/signifies permission, see S. U. Ojemen & Ors vs. His Highness William O. Momodu II & Ors (1983) 1 SCNLR 188 at 203; Nwadike vs. Ibekwe (supra) at 1234; Otu vs. ACB Int'l ltd. (2008) 3 NWLR (Pt. 1073) 179; Garuba vs. Omokhodion (supra). Where leave of court is required for filing an appeal and an appellant ignores seeking and obtaining the requisite leave before filing same, the appeal is rendered incompetent, see Ogbechie vs. Onochie (No. 1) (supra); UBN Plc vs. Sogunro (supra)/(2006) 16 NWLR (Pt.1006) 504; Garuba v. Omokhodion (supra); Thor Ltd. v. FCMB Ltd. (supra); Ugboaja v. Akitoye-Sowemimo (supra); Akinyemi v. Odu'a Inv. Co. Ltd (supra). The appellants filed their notice of appeal, carrying grounds of mixed law and facts, without procuring the requisite leave of the lower court or this court. Their failure to obtain the mandatory leave is offensive to the provision of Section 242(1) of the constitution, as amended. The dire consequence of that constitutional sacrilege or transgression is not a moot point. The appeal is drained of competence which impinges on this court's jurisdiction to entertain it. If a court, as here, is derobed of the jurisdiction to adjudicate over a matter, any decision reached thereon, no matter the quantum of dexterity and artistry invested, in it, is trapped in the web of nullity. That is the unfortunate fate of the appellants' appeal.

This appeal brings to the fore the crying need for learned counsel and, by extension, litigants to always obtain leave of court, as a precautionary measure, in situations they are uncertain as to the status of their grounds of appeal. Had the appellants procured the leave of the lower court or this court *ex abundant cautela*, their appeal would not have been caught in the intractable den of incompetence and, it would have been duly considered on its merits.

On the whole, on account of the reasons advanced heretofore, using the positions of the law as beacons, the respondents' two preliminary objections are imbued with merit. In the circumstance, I uphold those preliminary objections. Consequently, I strike out the appellants' appeal, filed on 09/11/2010, for want of competence. The parties shall bear their respective costs of prosecuting and defending the doomed appeal.

**Consideration of the appeal**:

Ordinarily, having struck out the appeal for being incompetent, that would have been the end of my arduous judicial assignment. However, it is not. This is the penultimate court - next to the apex court on the judicial ladder. In view of this hierarchical position, the law insists that I showcase my view on the appeal for the benefit of the Supreme Court, on the likely event of appeal to it.

This is to, ultimately, obviate the need for the apex court to remit the appeal to this court if it has a contrary view on the preliminary objections thereby saving judicial time and costs for the courts and the litigants alike, see Ada v. NYSC (2004) 13 NWLR (pt. 891) 639; Tanko v. UBA Plc (2010) 17 (pt. 1221) 80; Obiuweubi v. CBN NWLR (2010) 17 NWLR (pt. 1247) 465; Stowe v. Benstowe (2012) 9 NWLR (pt. 1306) 450; Elelu-Habeeb v. A-G, Fed. (2012) 13 NWLR (pt. 1318) 423. In due obedience to this current state of the law, I will proceed to consider the merit of the appeal.

In the appellants' brief of argument, they crafted a lone issue for determination to wit:

"Whether, regarding being had to the facts and circumstances of this case, the appellants are not entitled to amendment of their originating process and pleadings, more so when hearing has not commenced in the case and the respondents are not precluded from making consequential amendment to their pleadings."

The fist respondent, in his brief of argument, distilled a mono issue for determination, namely:

"Considering the fact and circumstance of this case, whether the appellants are entitled to the substitution of the writ of summons, pleadings, statement of witnesses on oath and all other processes filed in this case with a completely new process."

The second respondent adopted the solitary issue formulated by the appellants. In the third respondent's brief of argument, he framed one issue for determination, viz:

"Whether having regarding to the circumstances of this case and the nature of the proposed amendments, the court below was sight in refusing the amendments sought."

I have collated the three sets of issues for determination adumbrated above. In my view, they are interwoven. The first and third respondents' issues can, conveniently, be subsumed under the appellants' all-embracing issue for determination. On this note, I will decide this appeal on the footing of the appellants' singular issue for determination; especially as they, the appellants, are those who are peeved by the decision of the lower court.

Arguments on the issue:

Learned counsel for the appellants submitted that the appellants were entitled to have their originating process and pleading amended at any stage of the proceedings before judgment.

He cited the cases of Alsthom v. Dr Olusola Saraki (2000) 11 SCNJ 1; Abey v. Alex (1999) 12 SCNJ 234; Alhajl Karimo Laguro vs Honsotoku (1992) 2 SCNJ (Pt.11) 2O1and Order 28 rule 1 of the Kwara State High Court (Civil Procedure) Rules, hereunder abridged to "the High Court Rules," to support his submission. He posited that it was the prerogative discretion of the appellants to determine how to prosecute their case; hence they changed their counsel in the lower court, who was of the professional view that it was necessary to amend their processes.

He reasoned that when the appellants' writ of summons and statement of claim were compared with their proposed ones, the character of their case could never be charged. He added that the addition in the reliefs and facts in the proposed processes did not change their case from land matter to negligence or any other case, particularly as the additional reliefs or facts arose out of the same land dispute. He placed reliance on the cases of Abraham E.Ipadeola v. Abiodun Oshowole (1987) 3 NWLR (pt.590 18 at 33; Irepodun-Ifelodun L.G v. Balemo (2008) All FWLR 708; Solanke v. Somefun (1974) 1 SC 141. He persisted that the appellants' claims are still declaration to title to land, trespass' injunction and damages; adding that a party can amend his entire pleading to make a new case or a new cause of action. In support of that proposition, he referred to the cases of Arabambi v. Advance Beverages Ind. Ltd (2005) 19 NWLR (Pt.959) 1; Celtel Nig vs. Econet wireless Ltd (2011) 3 NWLR (pt. 1233) 156.

He contended that the amendment would not occasion injustice to the respondents because: hearing had not commenced, the respondents could make consequential amendments and they could be compensated by costs. He relied on the cases of Anakwe v. Oladeji (2008) 2 NWLR (Pt. 1072) 506; M.T. Mamman vs. A. A. Salaudeen (2005) 18 NWLR (Pt. 958) 474 and Order 28 rule 2 of the High Court Rules. He described the lower court's finding on overreaching as perverse because it failed to show how the respondents could be overreached; noting that same did not take cognizance of the law that amendment included re-writing the whole process or subsisting a new one for the old. He referred to the case of Owodunni vs. the Registered Trustees of Celestial Church of Christ (2000) 6 SCNJ 399 or (2000) 6 SC wherein amendment was so defined.

Learned counsel took the view that the fact that the first respondent filed a counter-claim against the appellants was immaterial in the consideration of the application for amendment. He stated that the amendment sought to make the second appellant the proper sole claimant based on the documents contained on pages 10, 11 and 14 of the record of appeal. He added that the amendment was meant to amend the inadvertence and mistakes of the former counsel who made the appellants claimants and failed to attach the relevant documents that could assist the court in determining the real issues in controversy between the parties. He relied on the cases of Lasisi Kode vs. Suara Yusuf (2001) 4 NWLR (pt. 703) 392 and Osasona vs. Ajayi (2004) 5 SC pt. 188 to support his view. He insisted that a grant of the amendment would not prevent the first respondent, who filed a counter-claim, from proceeding with the second appellant or instituting a separate action against the appellants jointly or severally. He maintained that paragraphs 8, 9, 13, 18, 21 and 29 of the proposed statement of claim, the land alienation permit and survey plan on page 12 of the record all showed that the land belonged to the second appellant. Learned counsel argued that courts do not punish litigants for errors or blunders committed by their counsel while preparing, filing or conducting their cases. He sought in aid of the following cases: Long John vs. Black (1998) 5 SCNJ 69 at 88; Mingi Service Ltd. vs. Imaoye (2003) FWLR (pt. 143) 341; CBN vs. Ahmed (2001) 5 SC (pt. 11) 146 at 164; JAMB v. Nkeiruka (No. 1) (2007) All FWLR (pt. 381) 175; Edmund Akaninwo vs. Nsirim (2008) 1 SC (pt. III) 151 at 181 and Adekeye vs. Akin Olugbade (1987) 1 NSCC 865 at 870. He postulated that the lower court did not show the miscarriage of justice the respondents would suffer by the amendment. He stated that the amendment sought to bring in the proper capacity in which the action ought to have been instituted. In support of that postulation, he relied on the cases of: Divisional Chief Gbogbululu vs. Head Chief Hodo (1941) 7 WACA 164 at 165; Oguntimehin v. Gubere (1964) All NLR 169 at 174; Metal Construction vs. Megliore (1979) 6 - 9 SC 118; Amadi vs. Aplin (1972) All NLR 413 at 420. He posited that the appellant did not act male fide nor was it shown that the amendment would cause injury, surprise, injustice or embarrassment to the respondents that would not be compensated by costs. He placed reliance on the case of Nabsons Ltd vs. Mobil Oil (Nig.) Ltd (1995) 7 SCNJ 267 at 277 to support his contention. For the first respondent, learned counsel submitted that the rules of courts allowed for amendment and not substitution of processes. He relied on Order 28 rule 1 of the High Court Rules and the case of Solanke vs. Somefun (1974) NSCC vol. 9 14 at 17 where amendment was defined. He draw the court's attention to paragraph 8 of the appellants' affidavit in support of the application, contained on page 40 of the record, and insisted that what they sought was amendment by way of substitution of a new writ and statement of claim which had no provision in the High Court Rules. He termed the reliefs sought as innovation of counsel which the law frowns upon, citing the case of Mobil producing (Nig) Unltd. v. Monokpo (2004) All FWLR (pt. 195) 575 in support. He stated that the appellants tailed to show which paragraphs of their pleading they were amending and those they were not amending so that the lower court was right to refuse the application. He placed further reliance on the case of Solanke vs. Somefun (supra). He restated the point that an amendment would not be allowed where it would change the character of the case, result in injustice, surprise, embarrassment to the other party. He cited the case of M. T. Mamman vs. A. A. Salaudeen (supra) in support. He explained that the representative capacity in which the appellants wanted to amend to personal capacity would change the character of the case and cause injustice to the respondents.

Learned counsel contended that the amendment sought would overreach the respondents because it would destroy the core of the first respondent's defence that the land in dispute was never a family land as shown in paragraph 3 of his statement of defence on page 2 of the additional record. He relied on the case of Yusuf vs. Adegoke (2007) 4 SCNJ at 103. He stated that the case of Abraham E. Ipadeola vs. Abiodun Oshowole (supra) was cited out of context by the appellant and so inapplicable to their case because of differences in their facts. He relied on the cases of Adegoke vs. Adesanya (1987) 5 SCNJ 80 and Babatunde vs. Pan Atlantic (2007) 4 SCNJ 140 to support his view.

He took the contrary view that the cases of Arabambi vs. Advanced Beverage Ind. Ltd (supra) and M. T. Mamman V.A.A. Salaudeen (supra), cited by the appellants, support the respondents' case in that the amendment would necessitate calling additional evidence by the abandonment of the previous statements on oath. He added that the award of costs would not be enough to the respondents whose defence would be destroyed by the amendment. He described the case of Owodunni vs. Registered Trustees of the Celestial Church of Christ (supra) as irrelevant to the case.

He argued, *per contra*, that the situation in the case was never an issue of visiting the sin of counsel on the litigants as the lower court made no such finding. He posited that where a counsel displayed tardiness and incompetence, the litigants would be bound and liable. In support of that postulation, he referred to the case of Adesina vs. Adeniran (2006) 18 NWLR (Pt. 1011) 359 and Emmanuel vs. Gomez (2009) 11 NWLR (Pt. 1139) 1. He noted that O.W. Akanbi, Esq., a counsel in the matter up until date, appeared with the erstwhile counsel, David Alabi, Esq., So that the earlier processes filed were his (Akanbi's) products. He maintained that the application was not made to correct error(s), but to substitute new parties and processes contrary to the High Court Rules, thereby making the cases of Oguntimehin v. Gubere (supra), Metal Construction vs. Megliore (supra) and Amadi vs. Aplin (supra) inapplicable. He concluded that the case of Nabsons Ltd vs. Mobil Oil Nig (supra) was against the appellants as the substitution would cause injustice and irreparable damage to the respondents.

On behalf of the second respondent, learned counsel submitted that what order 28 rule 1 of the High Court Rules envisaged was amendment and not substitution. He quoted the appellants' prayers in the application and described them as incongruous because of the words, amendment and substitution, contained therein. He referred to the Black's Law Dictionary, 8th Edition pages 89 and 1471 for the definitions of amendment and substitution respectively. He persisted that only amendment is accommodated in the High Court Rules the provision of which are meant to be obeyed. He cited the case of Kotol Investment Ltd v. UACN P.D. Co. Plc. (2011) 16 NWLR (Pt.1273) 211 to buttress his submission. He stated that the amendment would be overreaching to the respondents, citing the case of Akaninwo vs. Nsirin (2008) All FWLR (Pt. 410) 621. He reasoned that the amendment would create another suit entirely. He maintained that the appellants' application was for substitution, not amendment, which was alien to our practice and procedure.

For the third respondent, learned counsel contended that an amendment would not be granted where it could cause injustice, overreach the other party or where it was made *mala fide*. He relied on the case of Akaninwo vs. Nsirim (supra) and Adetutu v. Aderohunmu (1984) 1 SC NLR 515 at 523. He posited that the amendment would twist the case, change the parties, claims and the defence of the third respondent and cause him injustice. He placed reliance on the cases of Foko vs. Foko (1968) NMLR 441 at 446 and Kode vs. Yusuf (2001) 2 SCNJ 49 at 72. He posited that the two documents, certificate of occupancy KW 4209 of January, 1983 and Approval of Offer of Statutory Right of Occupancy obtained on 09/12/2009, were never in existence when the suit was instituted; insisting that they were concocted and procured to allow the existing suit to be substituted for a new one in the same subject matter. He relied on the case of Akaninwo v. Nsirim (supra). He stated that an amendment takes effect retrospectively and the court will not grant an amendment which seeks to plead a fact which never existed at the time the suit was filed. He noted that the amendment would result in a new cause of action contrary to the provision of Order 28 of the High Court Rules, relying on the case of Gen. Yakubu Gowon vs. Mrs. Edith Ike-Okongwu (2003) 1 SCNJ 453 at 460.

Learned counsel argued that the provision of Order 28 of the rule 1 of the High Court Rules has exceptions which had been noted in the case of Adetutu v. Aderohunmu (supra); Egwa vs. Egwa (2007) 1 NWLR (PT. 1014) 71; Abiodun Adelaja vs. Yususf Alade (1994) 6 SCNJ 160 and Patrick Okolo vs. UBN Plc. (1999) 6 SCNJ 193 at 201. He concluded that the appellant had not shown bona fide cause for a grant of the amendment.

On point of law, against the first respondent's submission, learned counsel for the appellants maintained that the application was for amendment not substitution, relying on the prayer therein. He opined that the cases cited by the first respondent were either inapposite or against its case. He persisted that the first respondent would not be overreached since he could make consequential amendment when hearing had not commenced. For the second respondent's arguments, learned counsel for the appellant repeated his replies to those of the first respondent.

He reasoned that the cases cited by the former were inapposite and of no assistance to his case. He cited the case of Alh. Folorunsho Iyanda Akanbi v. Chief Sunday Olagunju (unreported) Appeal No. CA/IL/41/2011 delivered on 08/11/2012 and Mobil Oil (Nig) Plc v. IAL 36 Inc. (2000) 6 NWLR (pt.659) 146 at 163, on consequential amendment, to support his submissions. He insisted that a refusal of the amendment would shut the appellants out in presenting their case. He placed reliance on the case of Ehidimhen v. Musa (2000) 8 NWLR (pt.669) 540 at 568.

Regarding the third respondent's submissions, learned counsel, on points of law, contended that nothing prevented appellants from the bringing in the two documents by way of amendment; adding that they would help the court settle the issue in controversy between the parties. He posited that the cases cited by the third respondent were either inapplicable or against his case.

Resolution of the issue:

Unarguably, the issue of amendment has become ubiquitous in the daily adjudications in the our courts. It is, invariably, precipitated by the accepted fallibility of man in the process of writing documents. Etymologically, amendment traces its lexical roots the Latin verb, "*emendo-emendere*", meaning "to cure, to add to correct an error". In its wider context, amendment is: "A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, detection or correction, esp., an alteration in wording", see Black's Law Dictionary, 8th Edition, page 89. In the case of Awote v. Owodunni (1986) 5 NWLR (pt.46) 941/(1986) 2 NSCC (Vol. 17) 1359 at 1366, Oputa, JSC Opined that "...amendment involves and implies an alteration, an addition to or subtraction from...."

The provision of Order 28 rules 1 and 2 of the High Court Rules, applicable to the lower court, allows for amendment. Those rules 1 and 2 state:

"1. A party may amend his originating process and pleadings at any time before the judgment.

2. Application to amend may be made to the court and such application shall be accompanied with a copy of the proposed amendment and may be allowed upon such terms as to costs or otherwise as may be just."

The ***raison d'etre*** for amendment is for the purpose of determining in an existing suit, the real questions or question in controversy between the litigating/feuding parties. It is a time-honoured principle of law that amendment can be made at any stage of proceedings in court before judgment. Most rules of courts do not circumscribe the number of times a party can apply to a court for amendment during the pendency of proceedings. It is trite that amendments could be effected before trial courts as well as appellate courts, that is, the Court of Appeal and the Supreme Court. Sometimes, the courts make amendments suo motu. These attributes of amendment have been confirmed by the apex court in floods of decided authorities, see Alsthom vs. Saraki (supra); Abey v. Alex (supra); Solanke vs. Somefun (supra); Mamman vs. Salaudeen (supra); Koade vs. Yusuf (supra); Akaninwo v. Nsirim (supra); Okolo v. UBN Ltd. (supra); Ehidimhen vs. Musa (supra); Adelaja vs. Alade (supra); SPLCN Ltd vs. Edamkue (2009) 14 NWLR (pt. 1160) 1; Ipadeola v. Oshowole (supra)/(1987) 5 SCNJ 200/(1987) 2 NSCC (Vol. 18) 755.

There are certain principles which had been invented by the Supreme Court to guide the courts in their herculean responsibility of attending to amendments of court processes. In the case of Chief Ojah & Ors vs. Chief Eyo Ogboni & Ors (1976) 4 SC (Reprint) 87 at 92, Madarikan, JSC, stated:

"It is well settled law that an amendment of pleadings should be allowed unless -

(1) it will entail injustice to the respondent;

(2) the applicant is acting mala fide; or

(3) by his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise ..."

Similarly, amendment will be granted if it: relates to a mere misnomer; does not change the nature of the claim; does not create a new suit; will cure the defects in the proceedings; will be consistent with the testimonies of witnesses being considered on appeal or will not embarrass or surprise the opponent in the proceedings. The apex court had given its blessings to these agelong guiding principles in litany of judicial authorities, see Oguntimehin v. Gubere (supra); Amadi vs. Thomas Aplin & Co. Ltd (supra); Mamman vs. Salaudeen (supra); Kode vs. Yusuf (supra); Adetutu v. Aderohunmu (supra); Gowon v. Ike-Okongwa (supra); Okolo v. UBN (supra); Ehidimhen vs. Musa (supra); Okafor vs. Ikeayi (1979) 3-4 SC 99/(1979) NSCC (vol.12) 43.

I have matched these dissected guiding considerations against the appellants' amendment sought to made with a view to deciphering whether it (the amendment) comes within the perimeter of the law. The foremost and the knotty point in this issue is whether the amendment sought would change the character of the case. Expectedly, parties expressed discordant view on this vexed point. It will be recalled that the appellants stand is that amendment will not whilst the respondents' hold, tenaciously, to a diametrically opposed stance, that it will.

It admits of no argument that the appellants' case borders on disputation over who owns the land in dispute, *id est*, land matter. It is not in doubt that the appellants' introduced lots of facts in the proposed writ of summons and statement of claim, exhibits A and B respectively. However, it is correct that some of the facts/paragraphs in the original processes, the writ and statement of claim, filed on 14/05/2009, remained unaltered/constant. The new facts being factored into the original processes have not changed the complexion of the case from its *ab initio* land matter to another different matter altogether. Nor do those new facts alter the colour of the land matter. The case of Solanke v. Somefun (supra)/(1974) NSCC (vol. 9) 14, presents facts that are on all fours with this case. In that case, almost an entirely new statement of claim was introduced. Two extra documents were added as part of the amendment. The apex court sanctioned the amendment. In the case of Akaninwo v. Nsirim (supra), the Supreme Court approved an amendment of 10-paragraphs out of a 23-pragraph statement of defence. I am, strongly, guided by these authorities in holding the view that the fact that the appellants sought to bring copious facts does not infurate the law.

The claims in the proposed processes are still on declaration, trespass, damages and injunction over the same parcel of land in dispute. The ***res*** has not changed. The appellants have the licence of the law to abandon, increase or decrease the contents of their pleadings and the reliefs therein, see Arabambi v. Advance Beverage Ind. Ltd (supra); Okolo vs. UBN Ltd. (supra); Ojah vs. Ogboni (supra). It follows that the appellants did not insult the law by their supplication of more prayers in the proposed processes.

In the proposed processes, the second appellant sues in her personal capacity, whereas in the original processes, the appellants sued in a representative capacity. The amendment sought is not hostile to the law. That was confirmed during the heyday of the West African Court of Appeal in the case of Gbogbolulu v. Hodo (supra) at page 165 where it was held:

"As soon as any question arose as to the capacity of the respective parties it was, in our view, the duty of the court to make any formal amendment in the claim which would make clear the capacity in which the plaintiff sued and the defendant was sued and the real point of controversy between them, provided that that could be done without any hardship to either party."

The Supreme Court had, wholeheartedly, adopted that position of the law in the cases of Ojah v. Ogboni (supra); Afolabi & Ors v. Adekunle & Anor (1983) 2 SCNLR 141/(1983) NSCC (vol. 14) 398/(1983) 3 SC 98; Osasona v. Ajayi (supra)/(2004) 14 NWLR (pt. 894) 527 and SPDCN Ltd. v. Edamkue (supra). If a court has the latitude to amend the capacities of parties in a matter *suo motu*, without the prompting of the parties, then *a fortiori* when parties, like the appellants herein, make application for amendment of their capacities. An amendment of the capacity in which the appellants had instituted the action would bring it into conformity or tandem with the new facts averred in the proposed statement of claim.

By the first respondent's own showing, no hardship is inflicted on him by the alteration of the appellants and the capacity they commenced the action. This can be gleaned from the averment in paragraph 23 of the amended first respondent's statement of defence, the only statement of defence before this court located on page 21 of the additional record, in which he described the first, third, fourth and fifth appellants as busy bodies, excoriated their presence in the suit and vowed to challenge their *locus standi* therein. It means that when by the proposed amendment, the names of the first, third, fourth and fifth appellants are jettisoned from the suit; the first respondent's desire is achieved without prejudice to him.

To round off this nagging point, the respondents described the amendment sought as substitution which is outside the contemplation of the High Court Rules. To begin with, the above dissected analyses deflate that, seemingly, scintillating submission. Moreover, the appellants' use of the word, "substitution", is, to my mind, a misnomer since it is, glaringly, a stranger or an alien to the provision of Order 28 of the High Court Rules. My view is solidified by the case Solanke v. Somefun (supra). At any rate, the Supreme Court, in the case of SPDCN Ltd. v. Edamkue (supra), at page 25, thereof, held: "As a matter of fact, a substitution is held as an amendment. See the case of Alhaji (Chief) Agbabiaka v. Saidu & 11 Ors. (1998) 7 SCNJ. 305, (1998) 10 NWLR (pt.5171) 534". Altogether, a conglomeration of these x-rayed legal expositions, amply, demonstrates that the amendment sought has not eroded the character of the appellants' case nor has it created a new suit in its entirety as, vehemently, canvassed by the respondents. I, therefore, endorse, *in toto,* the contentions of the appellants on this point. The character and colour of the case remain intact, unaffected by the amendment sought.

Another point raised in the issue was whether the respondents would suffer injustice, surprise, embarrassment, prejudice or overreached by the amendment. In point of fact, the respondents so much harped on this point in their different and alluring submissions. To start with, it is, abundantly, on record that the case, before the lower court, was at its cradle, waiting to take off in terms of hearing of evidence of witnesses. At the bottom/terminus of the ruling of the lower court, on page 188 of the record, it adjourned the matter to 03/12/2010 for pre-trial conference. The ruling of the lower court was delivered on 27/10/2010, months before the pre-trial conference proceedings. It is my humble view that since hearing had not commenced in the case, the respondents would not, in the least, be subjected to any injustice, prejudice, surprise, embarrassment by a grant of the amendment. This is because, they had sufficient time to approach the lower court for any consequential amendments sequel to a grant of the appellants, application for amendment. Even then, costs would have been enough recompense to the respondents for a grant of the amendment.

The respondents made heavy of the point that the amendment would overreach them. The purport and tentacles of overreaching were expounded by Tobi, JSC, in the case of Yusuf v. Adegoke (supra), at page 103, thus:

*"An overreaching conduct is a circumventing conduct to outwit the adverse party by cunning or artifice. It is designed to defeat the object or objective of the respondent's case by going too far, in the sense of destroying the core or fulcrum of the respondent's case."*

See, also, NIWA vs. SPDCN Ltd (supra); Akininwo v. Nsirim (Supra).

The respondent weaved the argument that they would be overreached having filed their statement of defence and counter-claim by the first respondent.

In the first place, I will shut my eyes to the defences erected in the respondents' statement of defence. The reason is obvious. This is an interlocutory proceedings. The law restrains me from excavating their defences at this stage. I have just observed that the law does not foreclose the respondents' right to seek for consequential amendments in return for a grant of the appellants'.

While relishing in the comfort of this extravagant latitude, donated to the respondents by the law, they can recreate their defences and tailor them along the facts and circumstances in the amended processes, that is, the proposed writ of summons and statement of claim. That is if their contrived defences have been rendered nugatory or idle by the amendment.

Let me place on record that a counter-claim, like the one filed by the first respondent, found on pages 21-23 of the additional record, is not a defence to the appellants' action. It is an independent cross-action, made an appendage to the main suit for reason of convenience, see Gowon v. Ike-Okongwu (supra). On this score, the first respondent reserves the right to allow his counter-claim stand against the second appellant, the sole party in the amendment being sought, or to redirect it as a fresh action against the other appellants which the amendment sought to drop out of the proceedings. By the foregoing analyses, it is crystal clear that the amendment sought would not outwit the respondents nor puncture the substratum of their defences in any manner. In short, the amendment would not overreach the respondents.

Now, was the application made *mala fide*? In the case of Akaninwo v. Nsirim (supra), at pages 309-310, Tobi, JSC, captured, graphically, the purport of *mala fide* in these illuminating words:

*"Mala fide is the opposite of bona fide. It simply means bad faith as opposed to bona fide, which is good faith, Mala fide projects a sinister motive designed to mislead or deceive another. Mala fide is more than bad judgment or mere negligence. It is a conscious doing of a wrong arising from dishonest purpose or moral obliquity. Mala fide is not a mistake or error but a deliberate wrong emanating from ill-will."*

It is on record that no sooner the appellants' new counsel were briefed than they filed the application for amendment of the pending processes. To my mind, the counsel were swifty in bring the application and no dishonest intention imputed and established against them, so as to bring it within the negative features of *mala fide,*bad faith.

For completeness, I must underscore the ageless principle of law that amendment of pleadings can be made at any time, during the pendency of proceedings, before judgment. The appellants harnessed this cardinal principle of law when they made the application for amendment of their writ of summons and statement of claim. The application came at the threshold of the proceedings in the case, when hearing was yet to begin therein. It ought to have been granted in that the respondents were at liberty to get even with them by dint of consequential amendments. The lower court exercised its discretion differently from my finding herein. It is my view that it was an injudicious exercise of discretion and same replete with perversity which the law permits this court to disturb and interfere with. In all, were I to have the jurisdiction to entertain the appeal, I would have resolved the solitary issue in favour of the appellants, set aside the decision of the lower court and granted the appellants' application as prayed.

For the avoidance of doubt, my consideration of the appeal and the order made therein served only to satisfy the sancrosanct requirement of the law, *id est*, that this court, as a penultimate court should make its viewpoints known, where it is not clothed with the jurisdiction to hear an appeal, for purpose of appeal to the Supreme Court. Having fulfilled that mandatory requirement, my finding during the consideration of the respondents' twin preliminary objections, that the appellants' appeal is incompetent, owing to their failure to obtain leave of court before filing their notice of appeal which hosted the grounds that were of mixed law and fact, still hunts it. Accordingly, the appellants, appeal still remains struck out on grounds of irredeemable incompetence.

**TIJJANI ABUBAKAR J.C.A.:**

My learned brother Obande JCA granted me the privilege to read in advance, the judgment just delivered.

Appellants appeal is on grounds of mixed law and facts, this makes it necessary for Appellants to obtain leave of Court, failure to obtain leave disabled Appellants appeal, and makes same incompetent; where counsel finds himself wobbling in the mesh of uncertainty as to whether grounds are of law or fact, his best option will be to ask for leave, otherwise he will be thrown into the abyss and imponderable mysteries of litigation.

Just to provide further support to my learned brother who as usual treated this issue with meticulous precision.

Mohammed JSC drew fine lines between issues of law and issues of fact in AKINYEMI v. ODUA INVESTMENT CO. (supra) citing Karibi-whyte JSC in BOARD OF CUSTOMS V. BARAU (1982) 10 S.C. 48, and OBECHIE V. ONOCHIE (1980) 2 NWLR PART 23, where he summerised the principle as follows:

*"Question of law is capable of three different meanings first it could mean a question the court is bound to answer in accordance with the rule of law....Concisely stated a question of law in this sense is one predetermined and authoritatively answered by the laws.*

*The second meaning is as to what the law is. In this sense, an appeal on a question of law means an appeal in which the question and determination is what the true law is on a certain matter. A construction of statutory provision falls within this meaning.*

*The third meaning is in respect of those questions which normally answer questions, within the province of the Judge instead of the Jury is called question of law, even though in actual sense it is a question of fact. The questions which readily come to mind are interpretation of documents, often a question of fact, but is within the province of a Judge. Also, the determination of reason able and probable cause for a prosecution in the tort of malicious prosecution, which is one of fact, but is a matter of law to be decided by the Judge.*

*On what a question of fact is, the learned justice stated thus:*

*"Like of law, question of fact has more than one meaning"*

*The first meaning is that a question of fact is any question which is not determined by a rule of law. Secondly it is any question except a question as to what the law is.*

*Thirdly, any question that is to be answered by the jury instead of by the Judge is a question of fact."*

My learned brother analysed the three grounds of appeal before arriving at his decision. I accept his reasoning and conclusion and adopt them as mine. Appellants appeal is struck out.

I also adopt the reasoning and conclusion on the main appeal even through struck out, decision of the Court below delivered on 27/10/2010 is set aside; Appellants applicant's prayers are granted were Appellants appeal held to be competent.

I make no order as to cost.

**HUSSEIN MUKHTAR, J.C.A.:**

I have previewed the judgment of my learned brother Obande F. Ogbuinya, JCA in this appeal and I am in agreement with him that this appeal is a complete non-starter and incompetent.

An appeal predicated upon an interlocutory decision and based on points of facts or mixed law and facts cannot be filed without leave of Court. The particular instances whereby an appeal lies from the Federal High Court or a High Court to the Court of Appeal as a matter of right are those prescribed under Section 241(1) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended). This appeal falls outside the scope of that provision. It therefore requires leave pursuant to Section 242 of the Constitution.

The Appellants, in the instance appear never applied either to the court below or to this court for leave to appeal. The notice of appeal filed on grounds of mixed raw and facts cannot ignite the jurisdiction of this court as it is incompetent and should be and is hereby struck out.

I subscribe to the order made on costs in the leading judgment.