

SUPREME COURT OF NIGERIA
FRIDAY 24TH APRIL, 2015. SC. 402/2010
CORAM:- J. A. FABIYI, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, J. I. OKORO, C. C. NWEZE, JJSC

JERRY IKUEPENIKAN APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Notice - Competence of - It is the foundation of every appeal - Hence any defect therein will render the whole appeal incompetent - And appellate court will lack jurisdiction to entertain it (H1)

APPEALS - Notice - Failure to sign - Notice must be signed personally by appellant in criminal appeals - Otherwise there is no competent appeal - And the court has no jurisdiction (H2)

APPEALS - Preliminary objection - Purpose - Issue in the objection must be first resolved - As its resolution obviates the need for the dissipation of time - In determination of appeal on the merit (H3)

FACTS

Accused/appellant was arraigned at the High Court of Ondo State on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 1(2) and 5(b) of the Robbery and Firearms Act. To prove its case, prosecution/respondent called five witnesses and tendered several exhibits. Appellant testified for himself and called no witness in support. Having heard from the two sides and the evidence adduced in support, the court found appellant guilty as charged. He was therefore sentenced to death.

Dissatisfied, appellant appealed to the Court of Appeal Benin Division. The court dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant appealed to the Supreme Court. However, Appellant's notice of appeal was not personally signed by him, but by his learned counsel. Upon this omission, respondent raised a preliminary objection to the competence of the notice of appeal to initiate the appeal.

HELD (Unanimously striking out the appeal per
NWEZE JSC)

APPEALS - Notice - Competence of

1. As this court held in *Uwazurike and Ors v. AG Federation* (supra), a Notice of Appeal is the foundation and substratum of every appeal. Any defect therein will render the whole appeal incompetent and the appellate court will lack the required jurisdiction to entertain it. (p. 1286 E)

APPEALS - Notice - Failure to sign

2. Do I, then, need to remind learned senior counsel for the appellant that, since the decision in *Umar Cham v Gombe Native Authority* (supra) to the most recent decision in *Dr. Okey Ikechukwu v FRN* (supra), this court has been consistent in its position that a notice of appeal in a criminal appeal must be signed by the appellant personally?

Having found that the Notice of Appeal is defective and, therefore, incompetent, I am left with no other option than to strike out the appeal in its entirety. This, simply, means that the resolution of the main issues shall abide the enlistment of a competent appeal (if and whenever such a competent process is initiated).

For now, there is no competent appeal before this court. This court, therefore, lacks the jurisdiction to entertain the agitation of the appellant. (p. 1287 F)

APPEALS - Preliminary objection - Purpose

3. In all, I find considerable merit in this preliminary objection. I, therefore, enter an order upholding it. This conclusion obviates the need to consider the arguments in the main appeal.

This must be so for a preliminary objection is a pre-emptive strike; its resolution obviates the need for the dissipation of precious judicial time in the determination of the appeal on the merit.

Indeed, that is why this court is under obligation to resolve the issue agitated in the above preliminary objection before taking any further step in the determination of this appeal.

Thus, since this preliminary objection to the competence of this appeal has succeeded, the proceedings in the appeal would be aborted and the need to consider the issues raised therein would automatically abate. (p. 1288 C)

NOTABLE POINTS OF INTEREST

NWEZE JSC

1. Irrelevant case laws not to be included in Brief of argument

It is against this background that I take the liberty of this judgment to re-iterate the point that it does not serve any useful purpose suffusing a brief of argument with cases that would not assist the court in the resolution of the main issues before it. This practice may not only be counter-productive, it may actually obfuscate the court's perception of the issues. More importantly, that tendency merely underscores a penchant for grandstanding: an unwarranted relapse into pedantry! As much as possible, it should be discouraged!

After all, the law is that "cases are decided on their facts and ratio decidendi is based on the facts of the case before the court. A ratio cannot be determined outside the facts of the case". (p. 1284 D)

2. Substantial justice overrides technicalities

True, indeed this court has not hidden its contempt for technicalities. At every opportunity it has unequivocally announced its espousal of substantial justice over technical rules.

There is actually a rich corpus of case law which exemplifies this court's endorsement of substantial justice for its efficacy in fecundating the invaluable dividends of justice in any legal system anchored on the rule of law, the life blood of democracy. (p. 1285 G)

3. Supreme Court – Not to be bordered with unnecessary appeals

One final word before signing off! Appeals, such as the instant one,

which, wearisomely and injudiciously, re-cycle the self-same issues that have received numerous magisterial pronouncements of this court should not be accommodated in our ever congested Cause Lists. They, indeed, conduce to the proverbial delays in the hearing and determination of concrete appeals on recondite questions of law, anxiously, yearning for determinative answers from this final court.

My noble Lords, it is my earnest hope and prayer that prospective appellants should not be permitted the unwarranted indulgence of irritating Your Lordships with this settled issue any longer. (p. 1288 H)

REPRESENTATION

Dr. Olumide Ayeni, with Ezenwa Ibegbunam; Ayodeji Olanipekun and Affis Alatanmi, for the Appellant
 D Adewale Atake, with Arnold Oshiadi; Inna Ali (Miss) and Solo Babajide, for the Respondent

CASES REFERRED TO

Uwazurike v. A-G Federation [2007] 8 NWLR (pt. 1035) 1
 E Ikpa v. A-G Bendel State [1981] 9 SC 7
 Madukolu v. Nkemdilim (1962) 1 All NLR 587
 Kpema v. State [1986] 1 NWLR (pt. 17) 396
 Amadi v. NNPC [2000] 10 NWLR (pt. 674) 76
 Aigbobahi v. Aifuwa [2006] 6 NWLR (pt. 976) 270
 F Akpan v. Bob [2010] 17 NWLR (pt. 1223) 421
 Williams v. Mokwe [2005] 14 NWLR (pt. 945) 249
 Ojojo v. State (1970) 1 All NLR 33
 Peba v. State [1960] 6-11 SC 76
 G Onyia v. State (2009) All FWLR (pt. 450) 625
 Obu v NNPC [2003] 4 MJSC 131
 Inakoju v. Adeleke [2007] 4 NWLR (pt. 1025) 423
 Babatunde v. P. A. S. and T. A. Ltd [2007] 13 NWLR (pt. 1050) 113
 Fawehinmi v. NBA (No.2) (2008) All FWLR (pt. 448) 205

H

STATUTES & RULES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990, ss. 1(2), 5(b)
 Constitution of the Federal Republic of Nigeria 1999, s. 36

Supreme Court Rules (as amended), O. 9 r. 3(1)

Court of Appeal Rules 2002, O. 4 r. 4(1)

Federal Court of Appeal Rules 1981, O. 4 r. 5

LEAD JUDGMENT BY NWEZE JSC

The appellant herein (as accused person) was arraigned before the High Court of Justice, Ondo State, Okitipupa judicial Division, on a two - count charge of conspiracy to commit armed robbery and armed robbery contrary to Sections 1(2) and 5(b) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990. Sequel to his not guilty plea, the Prosecution opened its case and called five witnesses in proof of its allegations against him. In the course of the trial, the said court (hereinafter referred to as “the trial court”) admitted several exhibits, namely, exhibits A- G. The accused person, who testified in his defence, did not call any other witness.

The trial court, in its judgment of January 12, 2007, following its affirmative findings in favour of the Prosecution’s witnesses and the above exhibits, found the accused person guilty as charged. In consequence, it convicted and sentenced him to death pursuant to Section 1 (2) of the said Act. His appeal to the Court of Appeal, Benin Division, was unsuccessful, hence, this further appeal to this court. However, his Notice of Appeal, dated September 16 and filed on September 28, 2010, was signed by his counsel, Dr. Olumide Ayeni.

He distilled four issues from his eleven Grounds of appeal. They were framed thus:

(1) Whether the Court of Appeal was incorrect when in the circumstances it affirmed the conviction and sentence of death imposed upon the appellant by the trial court when the defence of alibi which was set up by the appellant vide exhibit F-F12 was not investigated by the Police and was so found by the trial High Court?

(2) Whether the Court of Appeal was incorrect when in the circumstances it affirmed the conviction and sentence of death imposed upon the appellant by the Trial High Court on the ground that the Prosecution proved the case against the appellant beyond reasonable doubt?

(3) Whether the Court of Appeal was incorrect when in the

circumstances, it affirmed the conviction and sentence of death imposed upon the appellant by the Trial High Court when it failed to judicially notice that the appellant was a beneficiary of the Amnesty/pardon in terms of the Amnesty Proclamation 51 No. 195 of 25th June, 2009 issued, made, proclaimed and pronounced by the President of Nigeria, pursuant to Sections 36 (10) and 175 [of the] Constitution of the Federal Republic of Nigeria, 1999?

(4) Whether the Court of Appeal was incorrect when in the circumstances, it affirmed the conviction and sentence of death imposed upon the appellant by the trial High Court when the whole process of the prosecution of the appellant upon which the conviction was based was an utter nullity?

On his part, counsel for the respondent formulated only two issues couched in these terms in the respondent's brief of argument:

(1) Whether in the circumstances of this case where the prosecution witnesses have fixed the appellant at the scene of the crime, the Lower Court ought not to have affirmed the judgment of the trial court in spite of the fact that the alibi set up by the appellant was not investigated by the Police:

(2) Whether the Prosecution proved its case beyond reasonable doubt against the appellant?

RESPONDENT'S PRELIMINARY OBJECTION

In paragraph 6.0 [page 4 of the brief], of the said respondent's brief of argument, the respondent incorporated a Notice of Preliminary Objection. It reads thus:

"Take Notice that at or before the hearing of this appeal, the respondent shall pray the Supreme Court to strike out the appellant's Notice of Appeal dated the 16th day of September, 2010 and a fortiori dismiss the issues for determination distilled in the appellant's Brief of argument from the incompetent Grounds of Appeal."

In paragraph 6.2 of the said brief, the grounds were set out follows:

"(1) By virtue of Order 9 Rule 3 (1) of the Supreme Court Rules (as amended), the appellant's Notice of Appeal herein dated 16th September, 2010, and filed on 28th September, 2010, being a criminal appeal, must be signed by the appellant himself personally;

(2) The appellant's Notice of appeal dated 16th September, 2010, and filed on 28th September, was not signed by the appellant

personally;

(3) *The appellant's Notice of Appeal herein dated 16th September, 2010, and filed on 28th September, 2010, was signed by the appellant's solicitor, Dr. Olumide Ayeni, FCI Arb;*

(4) *Order 9 Rule 3 (1) of the Supreme Court Rules as amended does not permit the appellant's solicitor to sign the Notice of Appeal herein being a criminal appeal;*

(5) *The Supreme Court lack the jurisdiction to entertain this appeal;*

(6) *This appeal is incompetent. "*

ARGUMENTS ON THE ISSUES

Due to the far-reaching nature of the Preliminary Objection of the respondent, it would, first, be disposed of before returning to the arguments in the main appeal (if need be). When this appeal came up for hearing on February 5, 2015, Dr. Olumide Ayeni, who appeared with Ezenwa Ibegbunam; Ayodeji Olanipekun and Affis Alatanmi, for the appellant, adopted the appellant's brief of argument filed on February 8, 2014. He, equally/ adopted the reply brief filed on February 4, 2015, in response to the respondent's brief of argument. He urged the court to allow the appeal.

On his part, Adewale Atake, who appeared with Arnold Oshiadi; Inna Ali (Miss) and Solo Babajide, for the respondent adopted the respondent's brief filed on February 3, 2015.

ARGUMENTS ON THE PRELIMINARY OBJECTION

RESPONDENT/OBJECTOR'S CONTENTION

Adewale Atake, for the respondent firstly, drew attention to the Notice of Preliminary Objection incorporated in the brief, [pages 4-10]. He adopted the arguments proffered in paragraphs 7.0-7.18 of the said brief in support of the said objection. The main thrust of his submissions was that the appellant should have personally signed his Notice of Appeal dated September 16, 2010, and filed on September 28, 2010, since it is a criminal appeal. He pointed out that the said Notice of Appeal was signed by the appellant's solicitor, Dr. Olumide Ayeni and not the appellant himself.

He canvassed the view that by virtue of Order 9 Rule 3 (1) of the Supreme Court Rules (as amended), the appellant is the only legally recognised person to sign the said Notice of Appeal, citing *Uwazurike v A-G. Federation* [2007] 8 NWLR (Pt.1035) 1, 13-14

and a host of other cases.

He invited the court to distinguish the facts and decision in *Ikpaa v. A-G, Bendel State* [1981] 9 SC 7 from the facts of the instant case. He explained that, unlike in the above case, there is evidence on record that counsel had every access to the appellant here
 B for the purpose of signing the Notice of Appeal. He pointed out that this court, in *Uwazurike v A-G, Federation* (supra), also, distinguished the facts and decision in *Ikpaa's* case because of the “extenuating circumstances” in the latter case. He detailed the circumstances war-
 C ranting his contention that counsel had unfettered access to the appellant herein in paragraphs 7.9 (i) -(iii), pages 7-8 of the brief.

In his view, the appellant’s failure to sign his Notice of Appeal personally rendered it fundamentally defective, incurably incompetent, since the condition precedent to the invocation of this court’s
 D jurisdiction had not been fulfilled, *Madukolu v. Nkemdilim* (1962) 1 All NLR 587, 594. He maintained that the appellant’s Notice and Grounds of Appeal are incompetent and, as such, this court lacks the jurisdiction to entertain his appeal. He urged the court to strike out the said Notice of Appeal.

E In his view, since the appellant’s issues were formulated from the said incompetent Notice, they have become worthless, *Agbaka v Amadi* [1998] 11 NWLR (pt 572) 16, 24. He urged the court to uphold the preliminary objection and dismiss the appeal.

F APPELLANT’S RESPONSE TO THE OBJECTION

As noted earlier, the appellant filed a Reply brief on February 4, 2015, although deemed properly filed and served on February 5, 2015.

G In the said reply brief, counsel invited the court to dismiss the said preliminary objection, Citing Order 4 Rule 4 (1) of the Court of Appeal Rules, 2002, Counsel contended that where a Notice of Appeal was signed is irrelevant, *Duru v. FRN* [2013] 6 NWLR (Pt.1351) 441.

H He maintained that the Notice of Appeal in the instant case, scrupulously, complied with Form 24 to the First Schedule to the Supreme Court Rules, 1985 (as amended). He observed that the appellant is a convicted prisoner. He noted that, unlike in *Uwazurike's* case, where a joint Notice of Appeal was filed for seven appellants, the present Notice of Appeal was filed on behalf of a single person,

namely, the appellant herein, citing *Kpema v The State* [1986] 1 NWLR (Pt.17) 396, 404, 405.

He, further, canvassed the view that the Proviso to Order 9 Rule 3 (1) of the Supreme Court Rules, 1985 (as amended) together with Form 24, First Schedule, Supreme Court Rules, 1985 will cumulatively operate to validate the Notice of Appeal. He cited and relied on *Amadi v. NNPC* [2000] 10 NWLR (pt 674) 76, 98 on the interpretation of the word “shall.” He, equally, prayed in aid the decisions of this court which emphasise the importance of substantial justice over technicalities, *Aigbobahi and Ors v. Aifuwa and Ors* [2006] 6 NWLR (Pt.976) 270, 294; *Akpan v. Bob and Ors* [2010] 17 NWLR (Pt.1223) 421, 478-479. B
C

In response to the objector’s contention that the court should depart from the decision in *Ikpasa* (supra), counsel urged the court to discountenance the said submission as it is, clearly, in violation of Order 6 Rule 5 (a) of the Supreme Court Rules, 1985 (as amended). He contended that the objection is unmeritorious and should be dismissed, *Williams v. Mokwe and Anor* [2005] 14 NWLR (Pt.945) 249, 267. D

RESOLUTION OF THE PRELIMINARY OBJECTION E

As it is evident from the above submissions of the appellant’s counsel, his attempts at the refutation of the respondent/objector’s censure of the said Notice of Appeal were erected on some weak-kneed propositions. In the first place, he extracted an opinion of Uwais JSC (as he then was) in *Kpema v The State* (supra) out of the context of the facts and ratio of that case. He contended at paragraph 2.05 of the reply brief that: F

“...a similar situation involving the construction of Order 9 Rule 3 (1) (supra) confronted this court which by a full panel of seven Justices per Uwais, JSC held in Kpema v. The State variously held at page 404:

...It is obvious that the appellant, having been in prison custody, had done enough in his power to bring this appeal. In the light of the foregoing, I feel inclined to hold that the appeal is competent, I therefore so hold. The aforesaid notwithstanding, I would for the following reasons, [have] allowed this appeal even if the Notice of Appeal were found to have been filed out of time...” H

With respect, two things could have prompted this sort of lacka-

daistical approach of learned counsel. It is either that he did not sufficiently acquaint himself with the facts and the ratio decidendi in *Kpema v. The State* (supra) before canvassing it as authority for his proposition or that he solely relied on the editorial case note in the Law Report for his instruction as regards the facts of the said case. Either way, I regret to announce that his arguments cannot fly.

Now, in *Kpema v The State* (supra), the appellant, actually, signed the Notice of Appeal within time. However, the appeal before this court was filed out of time. He subsequently filed an application for extension of time within which to appeal. That was done in order to regularize the purported appeal filed, as shown above. In moving the application, the appellant's counsel indicated to the Court of Appeal that the application was brought under Order 4 rule 5 of the Federal Court of Appeal Rules, 1981 (that was the designation of that court at the time). He submitted that the Court had power to grant the extension sought under the provisions of Section 25 subsection (2) (b) of the Federal Court of Appeal Act, 1976 as amended by the Federal Court of Appeal (Amendment) Act 1982 which became operative on 15th July, 1982.

Curiously, however, he made a volte face and applied to withdraw the application. By consent of counsel, that court struck out the said application for extension of time and the appeal itself relying on Section 25 subsection (4) of the Federal Court of Appeal Act, 1976. It was that ruling that prompted the appellant's appeal to this court.

As Uwais JSC (as he then was) explained “...although the appellant signed the notice of appeal to this court... within the 30 days prescribed by Section 31 subsection (2) (b) of the Supreme Court Act, 1961, the notice was not filed in the Court of Appeal until ...37 days after the decision of the Court of Appeal. Ordinarily, therefore, the appeal before this court seems to have been filed out of time.”

In answer to his own question whether there was a competent appeal before this court, the distinguished jurist, praying in aid such decisions like *The Queen v. Akpan John Nda* 2 F.S.C 29; *Berepegha Frublde v. The State* (1969)1 All N.L.R, 255; *Egbo Ojojo v. The State* (1970)1 All NLR 33 and *Neeoyode Peba v. The State* [1960] 6-11 SC 76, volunteered the following insightful opinion “it is now settled that when a notice of appeal, in a case of conviction involving sentence of death, is given out of time, that is, not given within 30 days,

this court will strike out the case for being incompetent in view of the provisions of Section 31 sub-sections (1) and (2) (b) of the Supreme Court Act, 1960."

The section provides -

31- (1) When a person desires to appeal to the Supreme Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by the rules of court within the period prescribed by sub-section (2) of this section that is applicable to the case. B

(2) The periods prescribed for the giving of notice of appeal or application for leave to appeal are- ... C

(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against.

Continuing with his meticulous analysis, Uwais JSC (as he then was) noted that: D

"A close examination of the appellant's notice of appeal to this court shows that it was thumb-impressed by him ... 29 days from the date of the ruling of the Court of Appeal. The notice was therefore prepared within the prescribed time. The appellant's signature was attested to by, it seems, an official of the Legal Aid Council who wrote his address as 'Legal Aid Council, Box 6110, Jos.' The appellant's own address for service was Jos Prison. The notice of appeal bears the stamp of the Court of Appeal which was dated 3rd May, 1965. What these facts appear to suggest is that the appellant after signing the notice must have given it to either the prison authorities or the official of the Legal Aid Council to be delivered to the Registrar of the Court of Appeal, Jos, since he could not, in the circumstances in which he found himself that is having been kept in prison custody, take the notice to the Registrar." [Italics supplied for emphasis] E F G

The above facts and circumstances yielded His Lordship's conclusion that:

"It is obvious that the appellant, having been in prison custody, had done enough in his power to bring this appeal. In the light of the foregoing, I feel inclined to hold that the appeal is competent. I therefore so hold." H

In one word, therefore, learned senior counsel cited Kpema v. The State (supra) out of context as it is, wholly, inapplicable to the question in the instant appeal. He equally cited Duru v. FRN (supra).

However, in that case, the appellant, in fact, signed his Notice of Appeal, personally, pursuant to Order 4 Rule 4 (1) of the Court of Appeal Rules, 2002 (then applicable), see, per M. D. Muhammad, JSC at pages 16-17. Indeed, the narrow issue in the case was whether the Court of Appeal was right in its decision that from his absence from court, the appellant's appeal had, pursuant to Order 4 Rule 4 (1) (*supra*), been rendered incompetent.

Not done yet, Dr. Ayeni, for the appellant, pointed out that the appellants' appeal in *Uwazurike* (*supra*) was struck out because counsel signed a joint Notice of Appeal for them. He conveniently wished away Ogbuagu, JSC re-statement of the law that "*the statutory provision is that every Notice of Appeal shall be signed by the appellant himself and no other (including counsel)... The provision is not only unambiguous, but is mandatory,*" [italics supplied]. In all, most of the cases cited in counsel's spirited attempt to salvage the Notice of Appeal were either inapplicable or, where, applicable, were against the point which was being stridently canvassed.

It is against this background that I take the liberty of this judgment to re-iterate the point that it does not serve any useful purpose suffusing a brief of argument with cases that would not assist the court in the resolution of the main issues before it. This practice may not only be counter-productive, it may actually obfuscate the court's perception of the issues. More importantly, that tendency merely underscores a penchant for grandstanding: an unwarranted relapse into pedantry! As much as possible, it should be discouraged!

After all, the law is that "cases are decided on their facts and ratio decidendi is based on the facts of the case before the court. A ratio cannot be determined outside the facts of the case". *Onyia v. State* (2009) All FWLR (Pt.450) 625, 640; *Idoniboye Obu v NNPC* [2003] 4 MJSC 131; *Inakoju v. Adeleke* [2007] 4 NWLR (Pt.1025) 423; *Babatunde v. P. A. S. and T. A. Ltd* [2007] 13 NWLR (Pt.1050) 113; *Fawehinmi v. NBA (No.2)* (2008) All FWLR (Pt.448) 205, 310.

Next, Dr. Ayeni for the appellant, contended that "*upon a true construction of Order 9 Rule 3 (1) inclusive of its proviso, the Notice of Appeal against which objection is raised is in fact competent and which this court has complete jurisdiction to adjudicate on it,*" [paragraph 2.03 of the reply brief, italics supplied].

Again, with respect, this argument is not only tendentious but

is, actually, misleading. Contrary to the impression which the above submission intends to create, Order 9 Rule 3 (1) of the Supreme Court Rules, 1985, merely, re-enacted the provisions of Order 8 Rule 4 of Federal Supreme Court Rules, 1961. This court, first gave the 1961 Rule, to employ Dr. Ayeni's words, its "true construction" in *Umar Cham v. Gombe Native Authority* (1964) NNLR 94, 95-96^B where it interpreted the rule to mean that "*a notice of appeal in a criminal matter shall be signed by the appellant personally.*"

Subsequent rules of this court, and the rules of the Lower Court, similarly, worded like the 1961 Rule, have been, consistently, interpreted likewise, *Uwazurike and Ors v. AG Federation* (supra);^C *Ugochukwu Duru v. FRN* (supra); *Iwunze v. FRN* (supra) and most recently, *Okey Ikechukwu v. FRN* (2015) LPELR (SC).

Counsel, further, submitted that the Proviso to Order 9 Rule 3 (1) (supra) should be construed in such a manner as to salvage the Notice of Appeal. It is conceded here that the beneficent provisions in the Proviso to Order 9 Rule 3 (1) of the Supreme Court Rules (supra) were designed to attenuate the far-reaching consequences of non-compliance with the substantive provisions in Order 9 Rule 3 (1) (supra).^E

However, the said provisions in the above Proviso are not open-ended. They are, actually, hedged around with conditions which the court must be satisfied with before entertaining an appeal which does not strictly comply with the requirement that the appellant must personally sign his Notice of Appeal. Regrettably, the appellant has not evinced a strong desire to move this court into invoking the provisions in his favour.^F

Dr. Ayeni, perhaps, imagining that the requirement prescribed in Order 9 Rule 3 (1) (supra) epitomizes a technical rule, reeled out decisions of this court which de-emphasize reliance on technicalities, *Aigbobahi and Ors v Aifuwa and Ors* (supra); *Akpan v Bob and Ors* (supra); *Famfa Oil Ltd v Attorney General of the Federation and Anor* [2003] 18 NWLR (Pt.825) 453, 469. True, indeed this court has not hidden its contempt for technicalities. At every opportunity it has unequivocally announced its espousal of substantial justice over technical rules.^H

There is actually a rich corpus of case law which exemplifies this court's endorsement of substantial justice for its efficacy in fecun-

dating the invaluable dividends of justice in any legal system anchored on the rule of law, the life blood of democracy. State v. Gwonto [1983] 1 SCNLR 142; Union Bank of Nigeria Plc v. Ikem [2000] 8 NWLR (Pt.648) 223; Sha v. Kwan [2000] 8 NWLR (Pt.670) 685; Adebayo v. Okonkwo [2002] 8 NWLR (Pt.768) 1; Asims (Nig) Limited v. Lower Benue River Basin [2002] 8 NWLR (Pt.769) 349; Afro-Continental (Nigeria) Ltd. v. Co-operative Association of Professionals Inc. [2003] 5 NWLR (Pt.815) 303.

However, this is not the position here. Dr. Ayeni's submission on this point is nothing but a contorted version of the settled position that a Notice of Appeal is the most important step in the initiation of an appeal. Where it turns out to be defective, the appeal would be considered incompetent. The cases on this point are many. Only a handful will be cited here: Thor v FCMB Ltd [2002] 2 SCNJ 85; Ebokan v Ekwenibe and Sons Trading Coy Ltd [1977] 7 SCNJ 77; Uwazurike and Ors v AG, Federation (2007) LPELR-3448 (SC) 14, D-E and Ikweki v. Ebele [2005] 11 NWLR (Pt.936) 397.

Others include: Akpan v Bob [2010] 17 NWLR (Pt.1224) 421; General Electric Co. v. Akande [2010] 18 NWLR (Pt.1225) 596; Okeke Amadi v. Okeke Okoli [1977] 7 S C 57, 58; Adelekan v. ECU-Line NV [2006] 12 NWLR (Pt.993) 33; Okolo v. UBN Ltd. [2004] 3 NWLR (Pt.859) 87.

As this court held in Uwazurike and Ors v. AG Federation (supra), a Notice of Appeal is the foundation and substratum of every appeal. Any defect therein will render the whole appeal incompetent and the appellate court will lack the required jurisdiction to entertain it. Aviaagents Ltd v. Balstravst Investment (1966) 1 All E.R. 450; Olowokere v. African Newspapers [1993] 5 NWLR (Pt. 295) 583; Olarewaju v. BON Ltd [1994] 8 NWLR (Pt. 364) 622.

From the submissions in paragraph 2.07 of the reply brief, counsel would seem to suggest that the decision in Ikpassa is applicable to the facts of this case. Again, with respect, this is not so. In Ikpassa's case, the appellant had used a Civil Form in giving the Notice of appeal. Expectably, this prompted the submission of Counsel for the respondent that the use of wrong form was a fundamental error and therefore fatal in view of the mandatory provisions of Order 8 Rule 3 of the old Supreme Court Rules applicable to the Fed-

eral Court of Appeal [as the Lower Court, then, was]. The Court of Appeal, by a majority, overruled the objection; invoked Order 9 Rule 28 of the Rules of the Court and proceeded to hear and determine the appeal on its merits.

On further appeal, this court endorsed that approach as a proper case for the exercise of the judicial discretion vested in the Federal Court of Appeal [as it then was] by the invocation of Order 9 Rule 28 of the Rules of the Court. Explaining the appellants constraints and why the court's discretion should have been exercised in his favour, this court explained that:

"The appellant was already confined in a condemned cell. He was no longer a free agent nor an ordinary prisoner undergoing ordinary incarceration. He was therefore at the mercy of the Prisons Authorities. It seems to me that in a case of this kind there ought to be in the Prisons Department Officers sufficiently conversant with the court's procedure relating to the filing of a notice of appeal to render assistance to prisoners desirous of appealing against their conviction and sentence."

The circumstances in Ikpasa are, therefore, different from the position in the instant appeal. As counsel for the respondent/objector had pointed out, unlike the situation in the Ikpasa case, there is evidence on record that the appellant's counsel had unbridled access to him. As such, he had every opportunity to present him with the Notice of Appeal for his [appellant's] signature as stipulated by the rules. Dr. Ayeni neither contested this claim nor did he point to any "extenuating circumstances" that avail the appellant in the instant appeal.

Do I, then, need to remind learned senior counsel for the appellant that, since the decision in Umar Cham v Gombe Native Authority (supra) to the most recent decision in Dr. Okey Ikechukwu v FRN (supra), this court has been consistent in its position that a notice of appeal in a criminal appeal must be signed by the appellant personally? See also Ugochukwu Duru v. FRN (2013) LPELR -19930 (SC) 16-7, paragraphs B - E.

Having found that the Notice of Appeal is defective and, therefore, incompetent, I am left with no other option than to strike out the appeal in its entirety. This, simply, means that the resolution of the main issues shall abide the enlistment of

a competent appeal (if and whenever such a competent process is initiated).

For now, there is no competent appeal before this court.

Uwazurike v. Attorney-General of the Federation (supra); Hambe and Anor v. Hueze and Ors (2001) 2 SCNJ 31, 43. ***This court, therefore, lacks the jurisdiction to entertain the agitation of the appellant.*** Uwazurike v Attorney-General of the Federation (supra), citing Okoye v. Nigerian Construction and Furniture Co. Ltd. [1991] 6 NWLR (Pt.199) 501; Auto Import and Export v. Adebayo [2003] FWLR (Pt.140) 1686.

In all, I find considerable merit in this preliminary objection. I, therefore, enter an order upholding it. This conclusion obviates the need to consider the arguments in the main appeal. Onyemah and Ors v. Egbuchulam and Ors [1996] 5 NWLR (Pt.448) 255; [1996] 4 SCNJ 237; Attorney-General of the Federation v. ANPP and Ors [2003] 12 SCNJ 67, 81-82.

This must be so for a preliminary objection is a pre-emptive strike; its resolution obviates the need for the dissipation of precious judicial time in the determination of the appeal on the merit. Jim-Jaja v C.O.P. Rivers State and Ors (2012) LPELR-20621 (SC) 10, paragraph F.

Indeed, that is why this court is under obligation to resolve the issue agitated in the above preliminary objection before taking any further step in the determination of this appeal. Okoi v. Ibiag [2002] 10 NWLR (Pt.776) 455, 468; UBA Plc v. ACB [2005] 12 NWLR (Pt.939) 232; Goji v Ewete [2001] 15 NWLR (Pt.736) 273, 280.

Thus, since this preliminary objection to the competence of this appeal has succeeded, the proceedings in the appeal would be aborted and the need to consider the issues raised therein would automatically abate. L. M. Ericsson Nig Ltd v Aqua Oil Nig Ltd (2011) LPELR-8807, citing Ananeku v. Ekeruo [2002] 1 NWLR (Pt.748) 301, 30; NPA v. Eyamba (2005) 12 NWLR (Pt 939) 409; UBN v. Sogunro [2006] 16 NWLR (Pt.1006) 504, 521-2.

One final word before signing off! Appeals, such as the instant one, which, wearisomely and injudiciously, re-cycle the self-same issues that have received numerous magisterial pronouncements of this court should not be accommodated in our ever congested Cause

Lists. They, indeed, conduce to the proverbial delays in the hearing and determination of concrete appeals on recondite questions of law, anxiously, yearning for determinative answers from this final court.

My noble Lords, it is my earnest hope and prayer that prospective appellants should not be permitted the unwarranted indulgence of irritating Your Lordships with this settled issue any longer. B This court has pronounced upon the above rule requiring an appellant, in a criminal appeal, to sign his Notice of Appeal, personally, not once, but, at least, six times [Umaru Cham v. Gombe Native Authority (supra); Ikpassa v. AG, Bendel State (supra); Uwazurike v. Attorney-General of the Federation (supra); Ugochukwu Duru v FRN (supra); Iwunze v FRN (supra) and, Okey Ikechukwu v FRN (supra)]. C

A word is enough for all wise and industrious counsel who have the rare privilege of pursuing their appeals up to this rare, and infrequently attained judicial altitude! This court ought to be allowed D to devote its precious time to the resolution of, evidently, contentious issues that eventuate from the interpretation or misinterpretation of statutes and sundry issues by Lower Courts.

This objection succeeds. The Notice of Appeal filed on September 28, 2010, and signed by Dr. Ayeni, having been filed in flagrant contravention of Order 9 Rule 3 (supra), and thus being, manifestly, defective, is hereby struck out Thor v FCMB Ltd (supra); Ebokam v. Ekwenibe and Sons Trading Coy Ltd (supra); Uwazurike and Ors v AG, Federation (supra); Ikweki v. Ebele (supra); Akpan v Bob (supra); General Electric Co. v. Akande (supra); Okeke Amadi v. Okeke Okoli (supra); Adelekan v. ECU-Line NV (supra); Okolo v. UBN Ltd. (supra). F

In consequence, the appeal, in its entirety, is hereby struck out for its incompetence, Uwazurike v Attorney-General of the Federation (supra); Hambe and Anor v Hueze and Ors (supra). Being incompetent, this court lacks the jurisdiction to entertain the appellant's agitation woven around it, Uwazurike v Attorney-General of the Federation (supra), citing Okoye v. Nigerian Construction and Furniture Co. Ltd. (supra); Auto Import and Export v. Adebayo (supra). H

Objection succeeds. Notice of Appeal is hereby struck out. Appeal is, equally, struck out.

FABIYI JSC

This is an appeal against the decision of the Court of Appeal, Benin Division (the court below) delivered on 15th July, 2010. Therein, the judgment of the High Court of Ondo State, Okitipupa Judicial Division (the trial court) was sustained. The conviction and
B sentence of death passed on the appellant were confirmed.

At the trial court, the appellant was arraigned on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to Sections 1 (2) and 5 (b) of the Robbery and Firearms
C (Special Provisions) Act Cap. 398, LFN, 1990.

The trial was duly conducted by the trial court. In its considered judgment, the appellant was found guilty of the offences charged. He was convicted and sentenced to death in accordance with Section 1(2) of the Act stated above. The appellant appealed to the court
D below which dismissed same on 15th July, 2010.

In a move to appeal, the appellant's Notice of Appeal dated 16th September, 2010 was signed by the Appellant's Solicitor, Dr. Olumide Ayeni; not by the appellant himself. Same precipitated the filing of a Notice of preliminary objection by Adewale Atake, learned
E counsel to the respondent. Arguments in respect of the preliminary objection can be found on pages 5-10 of the respondent's brief of argument.

On 5th February, 2015 when this appeal was heard, learned
F counsel to the respondent quickly pointed it out that he desired to argue the preliminary objection, relying on the arguments set out in the respondent's brief of argument. He submitted that by virtue of Order 9 Rule 3(1) of the Supreme Court Rules, as amended, the Notice of Appeal signed by the Solicitor to the appellant is incompe-
G tent. He cited the decision of this court in the case of *Uwazurike v. A-G Federation* (2007) 8 NWLR (Pt.1035) 1 at 13-14 in support of his stand point.

Mr. A. Atake, learned counsel for the respondent further submitted that the failure of the appellant to sign the Notice of Appeal
H renders same as fundamentally defective, incurably incompetent and the condition precedent to confer jurisdiction on this court has not been fulfilled. In support, he cited the case of *Madukolu v. Nkemdilim* (1962) 1 ALL NLR 587 at 594. He urged that the appeal should be struck out for being incompetent.

Dr. O. Ayeni, learned counsel to the appellant filed a Reply brief to the respondent's brief and made oral submissions on this crucial point when the appeal was heard.

Dr. Ayeni maintained that upon a true construction of Order 9 Rule 3(1) inclusive of its proviso, the Notice of Appeal is competent. He felt that the proviso to Order 9 Rule 3(1) should operate to render the Notice of Appeal competent. He referred to *Amadi v. NNPC* (2000) 10 NWLR (Pt.674) 76 at 98 and *Katsina Local Government v. Makudawa* (1971) 1 NWLR 100, 107. B

Learned counsel for the appellant maintained that the court should embark upon substantial justice; not technical justice. He cited the cases *Aigbobahi & Ors. v. Aifuwa & 4 Ors.* (2006) 6 NWLR (Pt.976) 270 at 294; *Akpan v. Bob & 4 Ors.* (2010) 17 NWLR (Pt.1223) 421 at 478 - 479 and *Famfa Oil Ltd. v. A-G Federation & Anr.* (2003) 18 NWLR (Pt.852) 453 at 469. C

He finally urged that the preliminary objection should be overruled. D

The applicable Order 9 Rule 3 (1) Supreme Court Rules, 1985 (as amended) reads as follows:-

“3 (1) Subject to the provisions of sub-rule 3 of this rule, appeals shall be brought by notice (hereinafter called ‘the Notice of Appeal’) to be filed in the registry of the court below which shall set forth the grounds of Appeal and shall state clearly whether the appeal is against some decision of the court below other than conviction or sentence. A Notice of Appeal shall be in the form prescribed in the First Schedule to these Rules and shall be signed by the appellant.” E

Provided that, notwithstanding that the provisions herein have not been strictly complied with, the court may, in the interest of justice and for good and sufficient cause shown, entertain an appeal if satisfied that the intending appellant has exhibited a clear intention to appeal to the court against the decision of the court below.” F

It is clear that the Notice of Appeal was signed by appellant's counsel. It has not been shown that the appellant, who was in constant touch with his counsel, could not be reached. The rule says that a Notice of Appeal shall be signed by the appellant. This is affirmed in the decision of this court in *Uwazurike v. A-G Federation* (supra) at pages 13-14. Same remains the law. I stand by it. G

It occurs to me that an appeal must be in, properly and be competent before an appellant can raise the point touching on substantial justice. I feel that since the appeal is incompetent, the court is bereft of jurisdiction. The decision of this court in *Madukolu v. Nkemdilim* (supra) is in point.

B The submissions of the learned counsel to the respondent can well be put on their mettle. The objection appears to rest on a strong wicket.

C For the above reasons and the detailed ones set out in the judgment of my learned brother Nweze, JSC, I too feel that the preliminary objection is sustainable. I therefore sustain it and strike out the appeal.

D **OGUNBIYI JSC**

E The appellant herein was tried, convicted and sentenced to death by the High Court Ondo State, on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to Sections 1(2) and 5(b) of the Robbery and Firearms (Special Provisions) Act Cap 398 LFN, 1990. The prosecution called five witnesses, tendered and admitted a total of seven exhibits. Appellant testified on his behalf but did not call any other witness. Appellant at the end of the trial, was found guilty of the offences charged and sentenced to death penalty in accordance with Section 1(2) of the Robbery and F Firearms (Special Provisions) Act Cap 398, Laws of the Federation, 1990. On appeal to the Court of Appeal, same was unsuccessful and dismissed. The conviction and death sentence imposed on the appellant were affirmed by concurrent judgments of the two Lower Courts; G hence the appeal now in this court.

H In accordance with rules of court, briefs of arguments were filed and exchanged by parties wherein the respondent raised a preliminary objection against the hearing of the appeal on the ground that the notice of appeal filed by the appellant is incompetent. The respondent's counsel has in the circumstance called for the striking out of appellant's Notice of Appeal filed and a fortiori the dismissal of the issues for determination because they were distilled from the incompetent grounds of appeal.

It is pertinent to restate that the anchor which grounds the

objection is order 9 rule 3(1) of the Supreme Court rules as amended which in otherwords makes it mandatory that the notice of appeal in criminal appeals must be signed by the Appellant personally; that the failure to comply with the rules of court had rendered the process filed incompetent that the signature on the process by the appellant's counsel in the person of Dr. Olumide Ayeni, was not within the contemplation of the rules of court. B

Submitting to substantiate his objection, it is the argument by the respondent's counsel that Order 9 rule 3(1) of the Rules of Court provides that in criminal appeals, the appellant is the only legally recognized and permitted person to sign the Notice of Appeal. Hence the appellant's solicitor herein is not permitted to sign the said notice. C
The learned counsel Dr. Ayeni representing the appellant however holds a different view from the respondent's counsel. The appellant's counsel for purpose of salvaging the appeal would rather lean and seek leverage from the proviso to Order 9 rule 3(1) of the rules of court under reference which is hereby reproduced:- D

"3(1) subject to the provisions of sub-rule (3) of this rule, appeals shall be brought by notice (hereinafter called "the Notice of Appeal") to be filed in the Registry of the court below which shall set forth the Grounds of Appeal and shall state clearly whether the Appeal is against some decision of the court below other than conviction or sentence. A Notice of Appeal shall be in the form prescribed in the first schedule to these rules and shall be signed by the Appellant." E F

Provided that, notwithstanding that the provisions herein have not been strictly complied with, the court may, in the interest of justice and for good and sufficient cause shown, entertain an appeal if satisfied that the intending appellant has exhibited a clear intention to appeal to the court against the decision of the court below." G
(emphasis provided)

It is apparent from the foregoing section that the notice of appeal must bear out certain features which are mandatory by the use of the word shall. It must in otherwords set forth the grounds of appeal, which shall also state clearly whether the appeal is against some decision of the court below other than conviction or sentence. H
It is also mandatory that the notice of Appeal shall be in a prescribed form as stipulated in the first schedule to the Rules which same shall

be signed by none other but the appellant.

The saving grace, provided by the proviso, under which the appellant seeks coverage is where the non compliance could be interpreted and waived for purpose of doing justice in situation where good and sufficient cause has been shown. This is of course factual and a matter of evidence especially when regard is had to the judicial authorities in reference. For instance in the case of *Uwazurike V. A-G Federation*, (2007) 8 NWLR Pt.1035 1 at 13 - 14, this court per Ogbuagu, JSC held:-

"It is worse if the Notice of Appeal is signed by the learned counsel for the Appellant or Appellants. The Statutory provision is that every Notice of Appeal shall be signed by the appellant himself and no other and not jointly.

Period! The Provision is not only clear but is mandatory."

It follows therefore that the mandatory requirement and expectation that the rule be complied with cannot be overemphasized. The application of the proviso was appropriate in *Ikpasa v. A.G. Bendel State* (1981) 9 SC 7 because there was evidence placed before the court to show that the appellant's counsel did not have access to his client, the appellant. The notice of appeal in that case was also filed by prison authorities who were not lawyers. Hence, the use of the proper form in filing the Notice of appeal was not possible. There was in otherwords the necessity that the court should bend over backwards in favour of the appellant in the interest of justice and allow the notice of appeal signed by the appellant's counsel to be used in that case. Thus *Ikpasa's* case cannot be cited as of general application but an exception.

In otherwords, no evidence was shown by the appellant's counsel in the case before us that it was difficult for him to access his client, the appellant. In fact the evidence is obvious on the record that the said counsel had every access to his client for purpose of signing the Notice of Appeal herein. Thus and as rightly submitted by the learned counsel for the respondent, this court in a similar situation in the case of *Uwazurike V. A-G Federation* (2007) 8 NWLR (Pt.1035) 1 refused to follow the decision in *Ikpasa's* case (supra). At page 16 of *Uwazurike's* case for instance, Ogbuagu, JSC said:-

"In short the extenuating circumstances in Ikpasa's case are distinguishable from those of the Appellants. There is no evidence or

avermment in any of the affidavits of the Appellants that their counsel was unable to have access to them.”

The facts in this case as it was in Uwazurike’s case are overwhelming that appellants’ solicitors have always had unhindered access to the appellant; another distinguishing and also paramount feature in Ikpassa’s case was the use of the civil form for purpose of a criminal appeal. The question of a counsel signing of the notice of appeal in a criminal matter as well as the effect of signing such notice of appeal by a solicitor did not appear to be a prominent issue for consideration.

The law is trite and well settled that for a court to be competent the condition precedent to confer jurisdiction must be fulfilled. The absence of a competent notice of appeal in the circumstance has therefore rendered this court deficient or robbed of jurisdiction. See the locus classicus case of *Madukolu v. Nkemdilim* (1962) 1 All NLR 587 at 594. The purported notice of appeal in the circumstance at hand was not signed by the appellant. The act of the counsel is contrary to Order 9 Rule 3(1) of the rules of this court and rendering the purported notice incompetent.

My learned brother Nweze, JSC has dealt adequately with the appeal. With the foregoing few words of mine and also adopting the reasoning and conclusion arrived thereat in the lead judgment, I also concur that the preliminary objection succeeds and the purported appeal is hereby struck out.

KEKERE-EKUN JSC

I have had the benefit of reading in draft before now the judgment of my learned brother, NWEZE, JSC just delivered. I agree entirely with the reasoning and conclusion therein. I wish to add a few words in support of the judgment.

The appellant was charged before the High Court of Ondo State, Okitipupa Judicial Division for conspiracy to commit armed robbery and armed robbery respectively under Section 1 (2) and 5 (b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398, Laws of the Federation of Nigeria, 1990. He pleaded not guilty to both counts. On 12th January, 2007 he was found guilty on both counts and sentenced to death. He was dissatisfied with the judg-

ment and filed an appeal against it before the Court of Appeal, Benin Division (the Lower Court). That court on 15th July, 2010 dismissed the appeal and affirmed the appellant's conviction and sentence by the trial court. He is still dissatisfied and has therefore further appealed to this court vide his notice of appeal dated 16/9/2010.

B Parties duly filed and exchanged briefs of argument in support of their respective positions. The respondent has however raised a preliminary objection to the hearing of the appeal on the ground that the notice of appeal, which is the foundation of the appeal, is
C incompetent for non-compliance with Order 9 Rule 3 (1) of the Supreme Court Rules as amended, having been signed by learned counsel for the appellant and not the appellant personally. In support of this contention, ADEWALE ATAKE ESQ., learned counsel for the respondent relied on the decision of this court in: *Uwazurike vs A.G. Federation* (2007) 8 NWLR (Pt.1035) 1 @ 13 - 14. He noted that
D although this court in: *Ikpasa Vs A.G. Bendel State* (1981) 9 SC 7 allowed a defective notice of appeal, the circumstances of that case are different from the instant case. It is contended that contrary to *Ikpasa's* case where there was evidence to show that the appellant's
E counsel did not have access to his client, the record in the instant appeal shows that learned counsel for the appellant had unfettered access to his client from the time the appeal was dismissed at the Lower Court, having regard to various processes filed upon his instructions.

F Dr. Olumide Ayeni, learned counsel for the appellant filed a reply brief and made oral submissions at the hearing of the appeal on 5/2/2015. He asserted that the notice of appeal is in compliance with the requirement of the law and placed heavy reliance on decisions of this court in: *Kpema Vs The State* (1986) 1 NWLR (Pt.17) 396 and *Ikpasa Vs A.G. Bendel State* (supra).
G

The importance of an originating process, such as a notice of appeal in this case, cannot be over-emphasized. It is the pillar upon which the entire appeal rests, where it is fundamentally defective, it
H goes to the root of the entire proceedings. It affects the jurisdiction of the appellate court. A defective notice of appeal is dead or nonexistent in the eyes of the law and there will be no competent appeal for the court to entertain. See: *First Bank of Nigeria Plc. Vs. T.S.A. Ind. Ltd.* (2010) 15 NWLR (Pt.1216) 247 SC; *Olanrewaju Vs BON Ltd.*

(1994) 8 NWLR (Pt.364) 622; Nwaigwe Vs Okere (2008) 13 NWLR (Pt.1105) 445; Nigerian Army Vs Samuel (2013) LPELR-SC.75/2008; Japhet & Anor. Vs The State (2014) LPELR: SC.21/2011, SC.21A/2011; Adekanye Vs F.R.N. (2005) 15 NWLR (Pt.949) 433 @ 450 - 456.

Order 9 Rule 3 (1) of the Supreme Court Rules (as amended) B provides:

“3 (1) Subject to the provisions of sub-rule (3) of this rule, appeals shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Registry of the court below, which shall set forth the grounds of appeal and shall state clearly whether the appeal is against some decision of the court below other than conviction and sentence. A notice of appeal shall be in the form prescribed in the First Schedule to these Rules and shall be signed by the appellant: C

Provided that, notwithstanding that the provisions herein have D not been strictly complied with, the Court may, in the interest of justice and for good cause shown, entertain an appeal if satisfied that the intending appellant has exhibited a clear intention to appeal to the Court against the decision of the court below.”

The use of the word “shall” in the provision is mandatory and not directory. It follows therefore that the provisions of Order 9 Rule 3 (1) of the Supreme Court Rules (as amended) must be strictly complied with, unless it is shown that the proviso thereto is applicable. See: Uwazurike Vs A.G. Federation (supra) at 13 - 14 H - B. F The authority of Kpema Vs The State (supra) cited by Dr. Ayeni does not assist him. In that case, the appellant thumb printed the notice of appeal within the 30-day period for the filing of an appeal as prescribed by Section 31 (1) & (2) (b) of the Supreme court Act 1960. G However the notice of appeal was not filed in court until after the time for filing the appeal had lapsed. This court invoked the proviso to Order 9 Rule 3 (1) in the appellant’s favour on the ground that by thumb impressing the notice of appeal within the prescribed period, the appellant, who was in prison custody, had done enough within his power to bring the appeal. The notice of appeal in Uwazurike’s H case was not signed by the appellant’s counsel. Again, as rightly pointed out by learned counsel for the respondent, Ikpassa’s case (supra) would also not avail the appellant, as in that case the court was satisfied that the appellant, being a condemned prisoner, did not

have access to counsel, as his notice of appeal was filed on his behalf by the prison authorities.

In the instant appeal, there is nothing before the court to warrant the invocation of the proviso to Order 9 Rule 3 (1). It is evident from the record that learned counsel for the appellant had unhindered access to his client, having filed various processes on his behalf containing information that could only have been supplied by the appellant.

It is unfortunate that the error in signing the notice of appeal by learned counsel instead of the appellant is a fundamental one, which deprives the court of jurisdiction to entertain the appeal. The preliminary objection is well founded and hereby sustained. I hold that the notice of appeal dated 16/9/2010 is incompetent. It is hereby struck out.

OKORO JSC

I have had the advantage of reading in draft the lead judgment of my learned brother, Nweze, JSC with which I agree that this appeal is incompetent and ought to be struck out.

The appellant herein was arraigned on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to Sections 1(2) and 5(b) of the Robbery and Firearms (Special Provisions) Act Cap.398, Laws of Federation of Nigeria, "1990. The learned trial Judge of the Ondo State High Court, Holden at Okitipupa, heard the case and at the end found the appellant guilty and sentenced him to death. An appeal to the Court of Appeal was dismissed. The appellant has further appealed to this court.

The notice of appeal dated the 16th of September, 2010 was signed by the learned counsel for the appellant, Dr. Olumide Ayeni. There is no notice of appeal signed by the appellant. Based on the above scenario, the learned counsel for the respondent, Adewale Atake, Esq., raised a preliminary objection to the competency of the appeal.

In the main, it is the submission of the learned counsel for the respondent that by virtue of Order 9 Rule 3(1) of the Supreme Court Rules, the notice of appeal ought to have been signed by the appellant in person. He argues that the notice of appeal dated the 16th

day of September, 2010 and signed by the counsel for the appellant, is incompetent. He relies on the decision of this court in *Uwazurike V. Attorney General of the Federation* (2007) 8 NWLR (Pt.1035) 1 at 13-14. It is his contention that the failure of the appellant to sign the notice personally renders the said notice incompetent and therefore robs this court of the jurisdiction to hear the appeal. B

In response, the learned counsel for the appellant, Dr. Olumide Ayeni submitted that by the proviso to Order 9 Rule 3(1) of the rules of this court, the notice of appeal can be relied upon for the hearing of this appeal. It is his view that the court should do substantial justice rather than dwelling on technicalities. He relies on these cases: *Katsina Local Government V. Makudawa* (1971) 1 NWLR, 100 at 107, *Akpan V. Bob & Ors.* (2010) 17 NWLR (pt. 1223) 421 at 478 amongst others. He urged the court to overrule the preliminary objection. C

It is now well settled that an appellate court should first consider a preliminary objection raised during an appeal and express its opinion on whether it agrees or not because a successful preliminary objection may have the effect of disposing of the appeal. It does not matter if the objection is frivolous or not. The court has a duty to consider it and should not be ignored. The rationale behind the above position of law is that it is a cardinal principle of administration of justice to let a party know the fate of his application whether properly or improperly brought. See *First Bank of Nigeria Plc. V. T.S.A. Industries Ltd* (2010) 15 NWLR (Pt.1216) 247, *Nwanta V. Essumei* (1993) 8 NWLR (Pt.563) 650, *Tambio Leather Works Ltd V. Abbey* (1998) 12 NWLR (Pt.579) 548. D

Now, Order 9 Rule 3(1) of the Supreme Court Rules 1985 (as amended) states: E

“3(1) Subject to the provisions of sub rule 3 of this rule, appeals shall be brought by notice (hereinafter called “the Notice of Appeal”) to be filed in the registry of the court below which shall set forth the grounds of appeal and shall state clearly whether the appeal is against some decision of the court below other than conviction or sentence. A Notice of appeal shall be in the form prescribed in the First Schedule to these Rules and shall be signed by the appellant. F

Provided that, notwithstanding that the provisions herein have not been strictly complied with, the court may, in the interest of justice and for good and sufficient cause shown, entertain an appeal if G

satisfied that the intending appellant has exhibited a clear intention to appeal to the court against the decision of the court below.”

The above rule of this court is clear and unambiguous and as such must be given its ordinary grammatical meaning. The provision that the notice of appeal “shall be signed by the appellant” is mandatory because the word “shall” connotes mandatoriness and does not admit any discretion. A statute, after all should not be given a construction that will defeat its purpose. See *Savannah Bank of Nigeria Ltd & Anor. V. Ammel O. Ojilo & Anor.* (1989) 1 NWLR (Pt.97) 305, *Nwankwo V. Yar’adua* (2010) 12 NWLR (Pt.1209) 518, *Bamaiyi V. Attorney General of the Federation* (2001) 12 NWLR (Pt.727) 468, *Ifezue V. Mbadugha* (1984) 1 SCNLR 427.

There is no doubt that the notice of appeal in the instant appeal was signed by the learned counsel for the appellant. Clearly, this notice of appeal is incompetent having regard to Order 9 Rule 3(1) of the Rules of this court. This position accords with the decision of this court in *Uwazurike V. Attorney General of the Federation* (supra). Nothing has happened permitting me to depart from that decision. I am bound.

That notwithstanding, the proviso to Order 9 Rule 3(1) of the Rules of this court makes an allowance for the use of a notice of appeal not signed by the appellant personally where, in the interest of justice and for good and sufficient cause shown, the court is satisfied that the intending appellant has exhibited a clear intention to appeal to the court against the decision of the court below. The “good and sufficient cause shown” as provided for in the Rules relates to, for instance, where the appellant is in custody and it becomes impossible to have access to him. In such circumstance, the appellant must “show” to the court why the appellant could not sign the notice in person. That is when the proviso applies. In the instant appeal, no such good or sufficient cause has been shown. It follows that the proviso does not avail the appellant and does not apply in the circumstance.

From all I have said above, I hold without equivocation that the notice of appeal is incompetent. The appeal is, as a result, incompetent. The preliminary objection succeeds. Accordingly, this appeal is hereby struck out.