

SUPREME COURT OF NIGERIA
FRIDAY 11TH DECEMBER, 2015. SC. 693/2013
CORAM:- I. T. MUHAMMAD,
M. S. MUNTAKA-COOMASSIE, O. RHODES-VIVOUR,
C. B. OGUNBIYI, C. C. NWEZE, JJSC

1. THE SHELL PETROLEUM
DEVELOPMENT COMPANY
OF NIGERIA LIMITED
2. SHELL INTERNATIONAL
PETROLEUM COMPANY LIMITED APPELLANTS
3. SHELL INTERNATIONAL
EXPLORATION AND PRODUCTION BV.
AND
1. CHIEF ISAAC OSARO AGBARA
2. CHIEF VICTOR OBARI & 8 ORS RESPONDENTS
(for themselves and on behalf of the Ancient
"Omne Eh Ejuma" Stool-in- Council, Chiefs,
Elders, Men, Women and Children of Ejama-
Ebubu in Tai Eleme Local Government Area
of Rivers State.)

APPEALS - Reply brief - Purpose - Where respondent's brief raises issue on points of law not covered in appellant's brief - Appellant should file a reply to deal with such new points (H1)

APPEALS - Reply brief - Failure to file - Although filing of reply is not mandatory - But where appellant failed to reply to issue raised by respondent - It may amount to a concession of the point raised (H2)

APPEALS - Commencement - It is initiated by filing a Notice of Appeal - Which is the foundation of a proper and valid appeal (H3)

APPEALS - Notice of - Filing - Proper venue - Party aggrieved by decision of any HC - Shall file his notice in registry of the trial court not that of CA - Save after compilation and transmission of record (H4)

APPEALS - Civil appeals - Filing fees - The fees are generally set
3707

out by Rules of Court - And paid to registrar of the court from which appeal emanates (H5)

APPEALS - Notice of - Multiple filing - Appellant may file several notices but must rely on one - Hence appellants' amended notice filed within time was properly filed (H6)

APPEALS - Notice of - Inadequate filing fees - Payment of inadequate filing fees can only make a process irregular - And not capable of affecting jurisdiction of the court (H7)

APPEALS - Notice of - Filing fees - Miscalculation of - Mistake made by the court registry officials in assessing the fees - Cannot be visited on appellant (H8)

APPEALS - Court - Discretion - Exercise of - Must always be judicial and judicious - Hence discretion based on principle that inadequate filing fees is fatal to appeal - Is a wrong exercise of discretion (H9)

COURTS - Legislation - Interpretation - Justice - Court does not read provisions of enactment in a way to deny litigant access to justice - As court is guided by its rule in conduct of its business (H10)

APPEALS - Filing fees - Inadequacy of - Remedy - Where there is insufficient filing fee on document placed before the registry - Court should direct that such shortfall be remedied (H11)

LEGAL PRACTITIONERS - Mistake - Court does not punish litigant because of error committed by his counsel - Save it can be shown that the litigant was party to the commission of the error (H12)

ACTIONS - Striking out - Effect - Once a matter is struck out by a court - The court lacks jurisdiction to make any subsequent order on it (H13)

FACTS

Before the Federal High sitting in Asaba Delta State, plaintiffs/respondents commenced this action against defendants/appellants

claiming damages in excess of N17 billion arising from alleged oil spills in the course of appellants' operations. At the end of the trial, the court entered judgment in favour of respondents and awarded the sum in excess of N17 billion as damages against appellants. Dissatisfied, appellants appealed to the Court of Appeal. Appellants filed two Notices of Appeal within the three months prescribed period. After assessment by the Registry of the trial court, appellants paid a total sum of N800.00 in respect of their Notice of Appeal filed on 08/09/2010. Thereafter, appellants brought an application before the Court of Appeal seeking for leave to amend their Notice of Appeal dated 08/09/2010.

In its ruling, the Court granted leave to appellants to amend the said Notice of Appeal and that the amended Notice of Appeal was to be filed within 7 days. In view of this, appellants filed their amended Notice of Appeal as directed. Appellants claimed to have paid N1,000 for filing of the amended Notice of Appeal. Appellants also paid an additional N4,500.00 in respect of the original Notice of Appeal. Respondents brought a notice of preliminary objection challenging the competence of appellants' appeal on the sole ground that the filing fee paid by appellants was less than the sum of N5,000.00. The Court in its ruling sustained the preliminary objection and struck out the appeal as being incompetent, on the basis of the alleged deficiency in the filing fee. Not satisfied, appellants in a further quest for justice have approached the Supreme Court on appeal.

ISSUES FOR DETERMINATION

"Whether the jurisdiction of the lower court to hear the appellants' appeal was ousted by the inadequacy of filing fees assessed by the Registry of the trial court with regard to the appellants' Notice of Appeal dated 8th September, 2010"

"Whether the court below was right when it struck out the appellants' appeal on ground of incompetent.

HELD (Unanimously allowing the appeal per MUHAMMAD JSC)

APPEALS - Reply brief - Purpose

1. Suffice it to say however, that it is the general practice since the introduction of brief writing that there may be need for an appellant

to file a reply brief when an issue of law or argument is raised in the respondent's brief not necessarily being a mere repetition of what the appellant's brief contained. In other words, where a respondent's brief raises issues on points of law not covered in the appellant's brief, an appellant should file a reply to deal with such new points/
B matters. Filing of a reply brief even by the appellant, where desirable, should not be used to either extend the scope of the arguments in the appellant's brief or to raise issues that did not arise as new issues or matters in the respondent's brief. (p. 3720 E)

C
APPEALS - Reply brief - Failure to file

2. It is to be noted generally, that although filing of a reply brief is not mandatory as held in *Popoola v. Adeyemo* (1992) 9 SCNj 79 at p.108, appellant's failure to reply to an issue or point of law raised in the respondent's brief and where he merely relies on or adopts
D his brief at the hearing of the appeal without an oral reply that may amount to a concession of the issue or point of law raised. (p. 3720 H)

APPEALS - Commencement

E 3. My Lords, it is elementary to state that an appeal in our adversarial system is initiated by filing a Notice of Appeal. The Notice of Appeal is the foundation of a proper and valid appeal. (p. 3735 A)

APPEALS - Notice of - Filing - Proper venue

F 4. By the above provisions therefore, any party who is aggrieved by the decision of any High Court, including the Federal High Court, the High Court of the Federal Capital Territory and now the National Industrial Court and or, tribunal, shall (by way of necessity not by choice) file his Notice of Appeal in the registry of that trial/first instance court or tribunal. Thus, a notice of appeal in respect of decisions
G of such trial courts or tribunals filed at the registry of the Court of Appeal is a non starter and the Court of Appeal will discountenance same as it cannot deem it properly filed. That of course, is its right and proper venue.

H However, a notice of appeal filed at the registry of the Court of Appeal after the record of appeal has been compiled and transmitted to the Court of Appeal and served on all parties and appeal has been entered is properly filed because it will amount to duplicity

of efforts, resolves and a waste of time if such notice of appeal is to be filed in the registry of the court below. Equally, for appeals emanating from the decisions of the Court of Appeal to the Supreme Court, notice of appeal in respect thereof should be filed at the Court of Appeal (Order 2 Rule 4 of the 2007 Supreme Court Rules). It is to be noted however, that there are several Judicial Divisions of the Court of Appeal and a notice of appeal must be filed at the relevant registry of the appropriate judicial Division from which the appeal emanates within the prescribed time limit. An appeal is deemed to have been brought upon filing of the notice of appeal in the registry of the Court of Appeal.
(p. 3735 G)

APPEALS - Civil appeals - Filing fees

5. Filing fees in civil appeals are generally set out by the Rules of Court and paid to the registrar of the appropriate court from which the appeal emanates. The filing fees for appeals to the Court of Appeal are provided by Order 12 Rule 1 of the Court of Appeal Rules of 2007.

Third Schedule of the said Rules, prescribes, amongst others, the following:

“- On filing of Appeal against a final judgment or decision N5,000. 00

–On filing Notice of Appeal against an interlocutory order or decision N5,000. 00

–On filing Notice of Appeal where leave is granted.N5, 000. 00

–On filing Amended or Additional Grounds of Appeal (various fees ranging from N1,000.00 - N2,000.00 depending on the period of filing)...

The above rule is saying, in other words, to my humble understanding, that filing fees payable in respect of any appeal which is as of right must be paid to the registry of the High Court, whether Federal or State. Equally, where time is extended within which to file Notice of Appeal, the filing fees should be paid to the registry of that same High Court, Federal or State within the time extended. However, where leave is granted to an applicant to file his notice of appeal, and or, where the appeal has already been entered at the appeal court, that applicant shall file his Notice of Appeal at the Registry of the

appeal court. Equally, where there is an amendment to the Notice of Appeal, filing fees in respect of the amended Notice of Appeal should be paid to the registry of that appeal court. In relation to the appeal on hand, it is to be noted that the Federal High Court is not an appellate court and except for matters specified in Order 54 (appeal
B to the court from Professional Bodies), no appeal lies to the court. The Rules do not provide either, fees for processing appeals to the court of appeal. A Lacuna should not be allowed to peep into the conduct of affairs of that court. (pp. 3736 D/3751 F)

C APPEALS - Notice of - Multiple filing

6. I think I should remind your lordships that in a plethora of cases, this court has permitted an appellant to select and rely on one Notice of Appeal where he filed several Notices of Appeal. The one he has chosen or selected or relied upon must be the extant Notice
D of Appeal. All others, whether they are 101 or more, must be taken to be abandoned whether there is a formal application to strike out such abandoned notices of appeal or not. Neither the appellants, nor any of the parties can be heard again on any such ‘dead’ notice(s) of appeal. In the appeal before the court below, the appellants selected
E and relied on the Notice of Appeal filed by them on the 8th of October, 2013. That was why they sought and obtained leave to amend it. Motion to amend was moved and same was granted by the court below, without objection, on the 3rd day of December, 2012 (p.2760
F of Vol. 7 of the Records of Appeal). The appellants were granted seven days within which to file amended notice of appeal. Appellants filed their amended notice of appeal on the 5th day of December, 2012 (two days after the ruling). It must therefore, be taken, for all intents and purposes, that the amended Notice of Appeal (filed within time and paid for as per Order 12 Rule 1 of the Court of Appeal Rules,
G 2007) was properly filed, and I so hold. (p. 3737 F)

APPEALS - Notice of - Inadequate filing fees

7. That notwithstanding, the law has for long been settled by authorities that payment of inadequate filing fees can only make a process irregular and not capable of affecting the jurisdiction of the court.
H Thus, the initial payment of N500.00 made in respect of the Notice of Appeal filed at the trial court is capable of sustaining the Notice

of Appeal in suspense and the court shall not act upon it unless it has been regularized. There was a motion before the court below to regularize the shortfall in the payment of the requisite filing fees. It was however, withdrawn and struck out and the appeal too, was struck out being incompetent. But was the appeal or Notice of Appeal filed by the appellants incompetent? I do not think so. B
(p. 3746 B)

APPEALS - Notice of - Filing fees - Miscalculation of

8. Firstly, the appellants paid the fee assessed by the trial court's registry/cash office in the sum of N500.00 (five hundred naira only). C
If there was no compliance with the Rules in respect of payment of filing full fees at the time of filing, it was not a mistake committed by the appellants. The appellants did all that they were required to do at that point in time. The mistake, if any, was that of the court officials D who did the assessment.

So, the sin committed by the officials of the court registry, cannot, justifiably, be visited on the appellants in this appeal.
(pp. 3746 E)

E

Court - Discretion - Exercise of

9. Secondly, a motion to regularize the payment of the shortfall was withdrawn by the learned SAN, Mr. Layonu, for the appellants and it was struck out by the court below. This perhaps influenced the mind of the court below to strike out the appeal. It is true that such a decision is always placed within the discretionary powers of a court. F
Exercise of discretion, however, must always be judicial and judicious. A discretionary decision based on a principle that inadequate/shortfall of filing fees is fatal to an appeal is certainly a wrong exercise of G discretion. (p. 3749 C)

Legislation - Interpretation - Justice

10. It is settled law that a court of law will not allow the provisions of an enactment to be read in such a way to deny access to court by citizens. Thus, it is not the intention of the law to deny any litigant access to justice. A rule of court stands to guide the court in the conduct of its business and it must not hold as a "mistress" but as a hand maid. The established practice of the courts is to lean towards H

granting a litigant access to court rather than denying him of such access. (p. 3749 E)

APPEALS - Filing fees - Inadequacy of - Remedy

- B 11. The principle of the law as settled by this court, as seen supra, in relation to settlement of insufficient filing fees on documents placed before the registry of a court is for the court to direct that such insufficient, inadequate, shortfall be remedied. The striking out of the appeal at the stage the court below did, was certainly unnecessary and improper.
C (p. 3749 G)

LEGAL PRACTITIONERS - Mistake

- D 12. Thirdly, should the sin of counsel be visited on his client? It is to be remembered that the learned SAN for the appellants, Mr. Layonu, withdrew the motion filed to remedy the shortfall in the filing fees prescribed by the court Rules. It was argued also by the learned SAN Mr. Akoni, that the shortfall was paid and that a receipt was exhibited before the court below and that court should have taken judicial notice of that receipt of payment. Now, Counsel may mess-up; they
E may be under misapprehension of a nature, they may goof. They are human beings subject to err. It is a well laid down principle of the law that a court of law, because of the counsel's error of judgment, carelessness, misapprehension, commission or omission, will not
F punish a litigant or visit that innocent litigant with the sin committed by his counsel unless it can be shown that the litigant himself was a party to the commission of the sin. (p. 3750 A)

ACTIONS - Striking out - Effect

- G 13. It is naive too, for Mr. Akoni, to expect the court below to take judicial notice of the cash receipt in respect of the payment for the shortfall in the filing fees which was exhibited to a struck out motion, although the court below made mention of it. The correct position of the law regarding a struck out matter is that the court lacks jurisdiction to make any subsequent order on it. (p. 3750 E)

- H
NOTABLE POINTS OF INTEREST
MUHAMMAD JSC

1. “Incompetency” and “jurisdiction” – Meaning of

Black says incompetency, is a relative term which may be employed as meaning disqualification, inability or incapacity and it can refer to lack of legal qualifications or fitness to discharge the required duty and to show want of physical or intellectual or moral fitness. Jurisdiction, on the other hand, is the authority by which courts and judicial officers take cognizance of and decide cases. It is the legal right by which judges exercise their authority. Black says further, it exists when court has cognizance of class of cases involved, proper parties are present and point to be decided is within powers of court. (p. 3731 E)

2. Jurisdiction – Conditions

In Madukolu v. Nkemdilim (1962) 2 SCNLR 341, this court laid down in clear terms, factors determining the jurisdiction of a court: D

- a) that the subject matter of the case is within its jurisdiction;
- b) that there is no feature in the case which prevents the court from exercising its jurisdiction;
- c) that the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. (p. 3731 G)

3. Appellate courts – Supervisory roles

My Lords, that in my view, is the correct position of the law. I may even add that by the principle of hierarchy of courts, the Supreme Court supervises all other courts in this country. The Court of Appeal, thus, is not only an appellate court, but has supervisory role as well on all other courts in the federation apart from this court. Where it is mandated to make rules in respect of any matter, I do not think that such rules can easily be thrown away by waive of hand. They should be complied with. (p. 3753 C)

REPRESENTATION

O. Akoni, SAN, with B. B. Lawai; A. O. Utake; U. Achiniwu (Miss), for the appellants; H

L. E. Nwosu, SAN and J. U. K. Igwe, SAN, with P. Abulumen; A. N. Ayaogu; S. Onyemenam; Z. A. Nwosu and E. Abiri, (Miss), for the respondents.

CASES REFERRED TO

- Onyekwuluje v. Animashaun (1996) 3 SCNJ
Godwin v. The Apostolic Church (1998) 12 SCNJ 213
Akibu v. Oduntan (2000) 13 NWLR (Pt. 685) 446
B Alakija v. Abdulai (1998) 6 NWLR (Pt. 552) 1
Nwali v. State (1991) 3 NWLR (Pt. 182) 663
Popoola v. Adeyemo (1992) 9 SCNJ 79
Emodi v. Kwentu (1996) 2 SCNJ 134
C Madukolu v. Nkendilim (1962) 2 SCNL 341
Maskala v. Silli (2002) 13 NWLR (Pt. 784) 216
Onyemaizu v. Ojeako (2010) 4 NWLR (Pt. 1185) 504
Akpaji v. Udemba (2009) 2 NWLR (Pt. 183) 189
Onwuchekwa v. NOIC (2002) 5 NWLR (Pt. 760) 371
UTC Nig. Ltd. v. Pamotei (1989) 2 NWLR (Pt. 103) 244
D Chime v. Chime (2001) 3 NWLR (Pt. 701) 527

STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria 1999, ss. 236, 243(1), 248
E Court of Appeal Rules 2007, O. 12 r. 1
Supreme Court Rules, O. 2 r. 4

BOOK REFERRED TO

- F Civil Procedure in Nigeria, 2nd ed. p. 802

LEAD JUDGMENT BY MUHAMMAD JSC

- This is an interlocutory appeal against the Ruling of Port-Harcourt division of the Court of Appeal (court below) of 23rd October, 2013, wherein the court below struck out appellants' appeal against
G the judgment of the Federal High Court (trial court) Holden at Asaba, delivered on the 14th of June, 2010. Facts relevant to this appeal as contained in the records of appeal are that the respondents, herein, as plaintiffs, instituted an action against the appellants, herein, as defendants. The plaintiffs claimed damages in excess of N17 billion Naira against the defendants arising from alleged oil spills in the course
H of defendants' operations. The trial court entered judgment in favour of the plaintiffs and awarded a sum in excess of N17 billion Naira

as damages against the defendants. Dissatisfied with the decision of the trial court the defendants filed an appeal to the court below. Two Notices of Appeal, according to the appellants were filed by them: first Notice of Appeal was dated and filed on 14/06/2010 (it is copied at pages 1607 - 1614 of Vol. 4 of the Records of Appeal). The second Notice of Appeal was dated and filed on 8/9/2010 (copied at pages 1905 - 1912 of Vol. 5 of the Records of Appeal). The two Notices of Appeal, according to the appellants, were both filed within the three months period for appealing against the ruling of the court below as of right.

After assessment by the Registry of the trial court, the appellants paid a total sum of N800.00 in respect of the Notice of Appeal filed on 08/09/2010. On the 26th day of November, 2012, the appellants as applicants at the court below, filed a Motion on Notice for leave to amend their Notice of Appeal dated 8th day of September, 2010 (see page 2735 of Vol. 7 of the Records of Appeal). A ruling was delivered on 3/12/2012 by the court below, granting leave to the appellants/applicants to amend their Notice of Appeal dated 8/9/2010 and that the amended Notice of Appeal was to be filed within 7 days. The appellants, pursuant to the ruling of the court below reflected above, filed their amended Notice of Appeal on the 5th day of December, 2012. The appellant claimed to have paid N1,000 for filing of an Amended Notice of Appeal as stipulated under the 3rd schedule of the Court of Appeal Rules (pages 2761 - 2768, Vol.7 of the Records of Appeal). Further, the appellants paid an additional amount of N4,500.00 in respect of the original Notice of Appeal although amended with leave of court. An official receipt for the said additional sum was exhibited before the lower court (page 2861, Vol.7 of the Records of Appeal).

Learned counsel for the respondents, Mr. Nwosu, SAN, filed a Preliminary Objection on 11/04/2013 (page 2849 - 2851, Vol. 7 of the Records of Appeal) challenging the competence of the appellants' appeal on the sole ground that the filing fee paid by the appellants was less than the sum of N5,000.00.

On the 23rd day of October, 2013, the court below heard arguments on the Preliminary Objection and gave a bench ruling. It sustained the Preliminary Objection and struck out, accordingly, the appellants' appeal before it as being incompetent due to the alleged

inadequate filing fees paid in respect of the appellants' Notice of Appeal (pages 2915 - 2917, Vol. 7 of the Records of Appeal).

Dissatisfied with the ruling of the court below, the appellants filed their Notice of Appeal to this court.

B After settlement of briefs of argument, including a reply brief
filed by the appellants, the learned senior counsel to the respondents
embedded a Notice of Preliminary Objection with its argument in
paragraphs 2.0 and 2.01 of the respondents' brief of argument. He
also filed what he termed "respondents' reply on points of law to
C appellants' reply."

On the hearing date of this appeal, 13th day of October, 2015,
each of the learned Senior counsel for the respective parties adopted
his brief of argument. Learned senior counsel for the appellants urged
this court to overrule the respondents' Preliminary Objection and
allow his appeal. Learned senior counsel for the respondents urged
D the court to uphold his Preliminary Objection and dismiss the appeal,
or, dismiss the appeal still, where the court alternatively determines
the appeal on its merits.

My Lords should be reminded that, where for the sake of
convenience, the court deems it fit to hear a Preliminary Objection
E to an appeal along with the appeal, the usual practice, always, is to
determine the preliminary objection first so as to know what line of
action next, the court shall adopt. See: Onyekwuluje v. Animashaun
& Anor (1996) 3 SCNJ; Godwin v. The Apostolic Church (1998) 12
F SCNJ 213. I will thus, treat the respondents' Preliminary Objection
hereunder.

As stated earlier, the respondents embedded their Notice of
Preliminary Objection and its arguments in their brief of arguments
dated and filed on 13/4/2015. They also filed on the same date a
separate Notice of Preliminary Objection. The grounds upon which
G the Preliminary Objection was raised are as follows:

i. "The three grounds of appeal do not relate to the factual
basis upon which the Ruling of the lower court appealed against was
based. In grounds 1 and 3 which complained that the lower court
was wrong to have struck out the appeal of the appellants for failure
H to pay the prescribed fees in respect of the Notice of Appeal filed on
8/9/2010 does not arise from the Ruling of the lower court appealed
from. The Ruling of the lower court was based on the incompetent

Notice of Appeal filed on 14/6/2010. See page 2916 (last line) to page 2917 of Vol.7 of the Records. Ground 2 of the Notice of Appeal also relates to complaints that did not arise from the Ruling of the lower court.

ii. The appellants sole issue formulated at para.3.2 at page 6 of the appellants' brief and the argument proffered thereto also relate to complaint that the lower court struck out the appeal of the appellants for failure to pay the prescribed filing fees in respect of the Notice of Appeal dated 8/9/2010."

In his submission on the Preliminary Objection, the learned SAN for the respondents argued that the three grounds of appeal having not related to or arisen from any issue decided by the lower court, they are incompetent and ought to be struck out. He cited the case of Akibu v. Oduntan (2000) 13 NWLR (Pt.685) 446 at 462 F - G. The appellants' sole issue, he argued further, distilled from the incompetent grounds of appeal, is also incompetent and liable to be struck out. He cited Alakija v. Abdulai (1998) 6 NWLR (Pt.552) 1 at page 17 A-B. The appeal, he thus argued, is incompetent and liable to be dismissed.

In his response to the Preliminary Objection, the learned senior counsel for the appellants submitted in his reply brief that the instant appeal arose from the lower court's Ruling which terminated the appellants' appeal at the court below in CA/PH/396/2012. Learned SAN stated further that the respondents' objection is clearly factually incorrect and misconceived. The grounds of appeal simply and pointedly challenge the lower court's premature termination of the appellants' appeal without reference to any specific Notice of Appeal. The grounds of appeal adequately highlight the appellants' grievance against the decision of the lower court.

Learned senior counsel for the respondents made several submissions on points of law in his reply to the appellants reply brief. This court, at the hearing stage, asked the learned senior counsel for the respondents whether he was entitled to file a reply to appellants' reply to his preliminary objection. The learned SAN for the respondents, replied that he had a right to reply to a point of law raised by the opposite side irrespective of his position in the appeal whether as appellant or respondent. I may refer to some of the points responded to, by him, anon, if the need arises. Suffice it to say however, that it is

the general practice since the introduction of brief writing that there may be need for an appellant to file a reply brief when an issue of law or argument is raised in the respondent's brief not necessarily being a mere repetition of what the appellant's brief contained. In other words, where a respondent's brief raises issues on points of law not covered in the appellant's brief, an appellant should file a reply to deal with such new points/matters. See: *Nwali v. State* (1991) 3 NWLR (PT.182) 663 at p. 671. Filing of a reply brief even by the appellant, where desirable, should not be used to either extend the scope of the arguments in the appellant's brief or to raise issues that did not arise as new issues or matters in the respondent's brief. It is to be noted generally, that although filing of a reply brief is not mandatory as held in *Popoola v. Adeyemo* (1992) 9 SCNJ 79 at p.108, appellant's failure to reply to an issue or point of law raised in the respondent's brief and where he merely relies on or adopts his brief at the hearing of the appeal without an oral reply that may amount to a concession of the issue or point of law raised. See: *Okonji v. Njokanma* (1992) 12 SCNJ 259 at 277.

I think a respondent may be placed on an equal footing, where he introduces an objection to the hearing of an appeal. His objection and submissions thereon may be regarded as the basis of his first brief. Where the appellant responds to the objection and new points or issues are raised therein, the respondent may equally be entitled but limited to reply to such new points or matters of law as misled by the appellant/respondent to the Preliminary Objection. The points of law replied by the respondents in their Preliminary Objection, are, in my humble view, properly raised. *Emodi v. Kwento* (1996) 2 SCNJ 134; *Okonji v. Njokanma* (supra). This, in my view, is also in compliance with the law of fair hearing.

The crux of the objection by the respondents is that "the three grounds of appeal" in this appeal do not relate to the factual basis upon which the Ruling of the court below was based on the incompetent Notice of Appeal filed on 14/6/2010. Secondly, the sole issue for the determination of the appeal which is distilled from the incompetent grounds of appeal is also incompetent.

Learned SAN for the respondents cited and relied on the case of *Alakija v. Abdulai* (supra).

My lords, I find it interesting (although boring) to start by

setting out the proceedings, including the Ruling of the court below, conducted on the 23rd day of October, 2013:

‘Dr. A. I. Layonu, SAN with O. Awonuga and Isa Seidu for appellants. L. E. Nwosu, SAN with E. E. Asido, Mary Ann Nnamani and A. Nworgu for respondents/preliminary objectors.

Dr. Layonu, SAN: We as appellants have pending applications. There are also pending motions by the respondents on preliminary objection. B

Nwosu, SAN: We filed preliminary objection and we are prepared to move it now.

Dr. Layonu, SAN: We ask for adjournment. I am here this morning at the instance of Mr. Akoni, SAN who is counsel to appellants. He is presently stuck in London. C

COURT: Adjournment sought is hereby refused. We have had so many adjournments previously at the instance of Mr. Akoni, SAN in this matter. We cannot continue to over indulge him. D

(Sgd.)

Ejembi Eko

Justice, Court of Appeal

Presiding

23/10/2013

Dr. Layonu, SAN: We have pending applications filed on 15/4/2013 (to amend) 15/4/2013 (to pay shortfall of filing fee), 17/9/2013 (for stay of further proceedings) E

I will allow Nwosu, SAN to take his preliminary first, then I respond. F

Nwosu, SAN: Our motion filed on 11/4/2013 prays that the appeal being incompetent be struck out. The ground for the application is inadequate filing fee. G

To give credence to our application the appellants on 15/4/2013 filed a motion praying that they be allowed to pay shortfall of the filing fee. They originally paid N500.00. They wanted the court to allow them pay the balance of N4,500.00. By this conduct appellants admit our preliminary objection vide their exhibit AEA 2. H The Notice of Appeal was filed on 14/6/2010 - See p. 1758 of Vol. 4 of the Record. They paid only N500. 00.

There is no appeal before this court. The appeal is incompetent. We urge that the appeal be struck out.

Dr. Layonu. SAN: The preliminary objection did not mention the Notice of Appeal in question. That is a question of fact. We filed no counter-affidavit because it did not come by way of motion on Notice.

B In March this year an application was granted to appellant to amend the Notice of Appeal. We have since amended and served on (sic) amended Notice of Appeal. The original Notice of Appeal is no longer a life process. It is gone forever. The only extant Notice of Appeal is the amended Notice of Appeal.

C Once an amendment has been granted it relates back to the time of filing. The life Notice of Appeal now is the further amended Notice of Appeal filed on 21/1/2013. We paid N1,100.00 for filing that process, as assessed by the registry of this court. See part II Third Schedule p. 157 Rules of this court. The fee is N1,000. 00. Preliminary Objection be dismissed. There are dead parties see pp.2239, 2285
D and 2292. 3rd, 4th, and 7th respondents are dead. See Order 15 Rule 3. See: Unity Bank Plc. v. Denclan (2012) 18 NWLR (Pt. 1332) 293 at 327 B - F A litigant should not suffer for fault of his counsel. Preliminary Objection be dismissed.

E Nwosu, SAN: Order 7 Rule 11. Says appeal is brought when the Notice of Appeal was filed at the court below. If no Notice is brought there is no appeal.

Dr. Layonu says some parties are dead. He sued dead parties. That vitiates the appeal. This appeal deserves to be struck out, on
F authorities of even this court.

Court: Dr. Layonu move your motion for us to make composite Ruling.

Dr. Layonu, SAN: We move motion filed on 17/9/2013 first. It prays for stay of further proceedings in this appeal pending the outcome of Supreme Court decision in this matter particularly
G SC.162/2013: NAOC V NKWEKE.

I now say that we ask for adjournment instead of stay of proceedings, see: Barnes v. Black Horse (2012) EWHC 1950 QB delivered on 14/6/2012. Where there are numerous appeals on one issue at Supreme Court it is desirable that there is an adjournment pending determination by the Supreme Court.
H

At this juncture, I prefer that our application for Order to pay shortfall on filing fee be adjourned until the Ruling in the two

applications.

Nwosu, SAN: He cannot orally pray for alternative prayer outside the Relief on the motion on notice.

We are not parties to the suit at the Supreme Court. We oppose the adjournment sought in alternative. If there is no appeal there is nothing to stay proceedings in. B

Court: Dr. Layonu, SAN please move your motion filed on 15/4/2013 for leave to pay shortfall of N4,500.00 filing fee.

Dr. Layonu, SAN: I hereby withdraw the motion.

Nwosu, SAN: No objection. C

Court: Motion filed on 15/4/2013 for leave to pay shortfall of filing fee is hereby struck out having been withdrawn. (Sgd.)

Ejembi Eko

Justice, Court of Appeal D

Presiding

23/10/2013

Dr. Layonu, SAN: Motion filed on 16/4/2013 seeks leave to further amend the Notice of Appeal. I want to defer that motion.

Court: A date will be given for the motion filed on 16/4/2013 will be given (sic) after the Rulings in the preliminary Objection and motion for stay of further proceedings. E

(Sgd.)

Ejembi Eko

Justice, Court of Appeal F

Presiding

23110/2013

RULING

On 11/4/2013 L. E. Nwosu, SAN of counsel for the Respondents/objectors in this appeal filed Notice of Preliminary Objection urging inter alia that the appeal be struck out for being incompetent. The ground for preliminary objection is that the appellants paid N500.00 instead of N5,000. 00 filing fee for the Notice of Appeal at pages 1607 - 1614 of Vol. 4 of the Records of Appeal. H

This court is entitled to look at its own records, and we have looked at pages 1607 - 1614 of Vol.4 of the Records of Appeal. The fee paid for the said Notice of Appeal filed on 16/6/2010 was N500.00. The Appeal was filed under the 2007 Rules of this court.

Order 12 Rule 1 and Part II Third Schedule to the 2007 Rules are *impari materia* with Order 12 Rule 1 and Part II Third Schedule to the 2011 Rules of this court.

The judgment appealed was delivered on 14/6/2010. That means the appellants had up to 12/9/2010 to file appeal in accordance with section 24 of the Court of Appeal Act, 2004 which allows an aggrieved litigant to appeal within 3 months or 90 days. We had stated in *Engr. O. Ibeabuchi & Ors v. Samuel Ikpokpo & Ors (CA/PH/406/2009 on 16/1/2013)* that it is the duty of the litigant to pay the prescribed filing fee to enable the courts to function to start and that unless the fees for filing Notice of Appeal against the decision of the court below was previously paid, as charged under Order 12 Rule 1 and the Third Schedule to the 2007 Rules of this court, the appeal has not been kick-started and this court lacks jurisdiction over such an appeal or process, since as at the close of 90 days prescribed for filing the Notice of Appeal the partial or inadequate payment of the filing fee would render the process both inchoate and invalid as at the close or expiration of the 90 days prescribed for filing that process.

Dr. A. I. Layonu, SAN says that the original Notice of Appeal having been amended the defect in the original process had been cured. The question then is whether an invalid process, void *ab initio*, can be amended; Lord Denning MR. had stated in *UAC v. MACFOY* that one cannot place something upon nothing and expect it to say. That takes care of Dr. Layonu SAN submission. The Notice of Appeal is the originating process. If it is invalid and void *ab initio* then the entire appeal founded on it including the amended Notice of Appeal all remain invalid and a nullity.

Having looked at page 1614 of Vol.4 of the Records of Appeal and seen that the fee endorsed as having been paid for filing the Notice of Appeal is N500.00, N4,500.00 short of what is mandatorily required to be paid by dint of order 12 Rule 1 and the Third Schedule to the 2007 Rules of this court, it is my firm view that the appeal is incompetent and it is hereby struck out. I said so in IBEABUCHI V. IKPOKPO (supra) and I have no cause to depart therefrom. I commend the ingenuity of Dr. Layonu, SAN in this matter. He was bright, but the facts do not support his position. Dr. Layonu, SAN argued his motion filed on 17/9/2013 praying for stay of further proceedings in the matter pending the outcome of the

numerous appeals on this issue of filing fee at the Supreme Court. He later abandoned that sole relief in the motion for an application for adjournment. L. E. Nwosu, SAN is right in the submission that he could not pray orally for alternative relief outside his motion on Notice. The effect of this is that the sole relief in the motion has been abandoned and so it deserves to be, and is hereby struck out. B

In view of all I have been labouring to say in the matter appeal No. CA/PH/396/2012, being incompetent is hereby struck out. All pending motions in the appeal are also struck out.

I agree.

(SGD)	(SGD)	(SGD)
S. J. ADAH	EJEMBI EKO	MODUPE FASANMI
JCA	JCA (PRESIDING)	JCA
23/10/2013	23/10/2013	23/10/2013. “

C

Now, I think as far as this appeal is concerned, the only valid D notice of Appeal which is extant is the one filed by the appellants on the 23rd day of October, 2013. This is fortified by both the senior learned counsel for the appellants as well as the senior learned counsel for the respondents respective introductory parts of their briefs.

Permit me to quote both, one after the other: E

Mr. Akoni, SAN

“This is an appeal against the Ruling of the Port-Harcourt division of the Court of Appealdelivered on 23rd October, 2013 whereby the court struck out the appellants appeal against the judgment of the Asaba division of the Federal High Court which F was delivered on 14th June, 2010.

The Appellants’ Notice of Appeal to this Honourable Court was filed on 23rd October, 2013 at the registry of the lower court and the Registrar of the lower court consequently compiled and G transmitted the 7 volume Record of Appeal (the Record”) to this Honourable court in line with the relevant rules of this Hon. Court. This is the appellants’ brief of argument containing arguments on the appellants grounds of appeal.”

Mr. Nwosu, SAN- H

ii) What gave rise to this further appeal was the Ruling striking out of an incompetent Notice and Grounds of appeal at the court below.

(iii) The Notice and Grounds of appeal arising therefrom

dated and filed on 23/10/13 is characteristically replete with manifest falsehood as we shall demonstrate later in this brief. (underlining for emphasis)

It is thus, pretty clear my lords that this appeal is only anchored on the Notice and Grounds of Appeal filed on 23/10/13 against the
B Ruling of the court below delivered on same date.

The said Notice and Grounds of Appeal are contained on pp.2918 of Vol.7 of the Records of Appeal. For ease of reference and clarity, the grounds of appeal are as set out below:

C “GROUND 1

The court below erred in law when it struck out the appellants’ appeal on the ground of lack of jurisdiction.

PARTICULARS OF ERROR

- i. Payment of insufficient fees does not render a case incompetent and does not affect in any way the jurisdiction of the court.
D ii. The party who inadvertently pays insufficient filing fees must take adequate steps to remedy the irregularity by filing an application for leave to pay the shortfall of the fees.

iii. By virtue of a plethora of Supreme Court authorities, the usual remedy for a party who pays insufficient filing fees for a court
E process is for the court to make an order for the balance to be paid.

GROUND 2

The Court of Appeal erred in law in refusing to adhere to the decision of the Supreme Court in the cases of Akpaii v. Udemba
F (2009) 10 NWLR (Pt. 1138) 545 and Onwugbufor & 2 Ors v. Okoye & 3 Ors (1996) 1 NWLR (Pt.424) 252.

PARTICULARS OF ERROR

I. The Supreme Court has held in a plethora of judicial decisions that the proper order for a court to make in respect of payment of insufficient fees for a process in the face of a remedial application
G is payment of the shortfall.

ii. All courts by virtue of the doctrine of stare decisis or judicial precedent are duty bound to adhere to the decision of superior courts and it is bedrock of Nigerian judicial policy.

iii. The finding of the court below flies in the face of the settled
H position of the law on the bindingness of the judgments of superior courts on lower courts.

GROUND 3

The court below erred in law when it struck out the appellants' appeal owing to payment of inadequate filing fees.

PARTICULARS OF ERROR

i. Payment of insufficient fees does not render a case incompetent and does not affect in any way the jurisdiction of the court.

ii. The party who inadvertently pays insufficient filing fees must take adequate steps to remedy the irregularity by filing an application for leave to pay the outstanding fees. The appellants filed such an application dated 15th April, 2013, after paying the outstanding fees in order to regularize. However, the court below discountenanced same and struck it out.

III. By virtue of a plethora of Supreme Court authorities, the usual remedy for a party who pays insufficient filing fees for a court process is for the court to make an order for the balance to be paid."

These are the grounds of appeal challenged by the learned SAN for the respondents that they do not relate to the factual basis upon which the Ruling of the lower court appealed against was based.

On the other hand, the issue for determination of the appeal as couched by the appellants reads as follows:

"Whether the jurisdiction of the lower court to hear the appellants' appeal was ousted by the inadequacy of filing fees assessed by the Registry of the trial court with regard to the appellants' Notice of Appeal dated 8th September, 2010."

Learned SAN for the respondents argued that the appellants' sole issue which is distilled from the above incompetent grounds of appeal is also incompetent and liable to be struck out. He relied on *Alakija v. Abdulai* (supra).

Consequent upon that, he argued further, that the appeal is incompetent and liable to be dismissed.

Your noble lordships, a sober comparison and reflection over the Ruling of the court below delivered on the 23/10/13; the Notice and Grounds of Appeal filed by the appellants' on 23/10/13 against the said Ruling; the sole issue framed by the appellants for deciding the appeal and the Notice and arguments for and against the Preliminary Objection, I am left in no doubt that the grounds of appeal as per the Notice of Appeal of 23/10/13, particularly grounds Nos. 1 and 3 do properly relate to the said Ruling of 23/10/13 by the court below. The complaints by the appellants in grounds Nos. 1 and

3 of the said Notice of Appeal were primarily to show that payment of insufficient filing fees could not render an appeal incompetent as held by the court below. The court below held inter alia:

“Having looked at pages 1614 of Vol.4 of the Records of Appeal and seen that the fee endorsed as having been paid for filing the Notice of Appeal is N500.00, N4,500.00 short of what is mandatorily required to be paid by dint of Order 12 Rule 1 of the Third Schedule to the 2007 Rules of this court, it is my firm view that the appeal is incompetent and it is hereby struck out..... In view of all I have been labouring to say in this matter appeal No. CA/PH/396/2012 being incompetent is hereby struck out...” (underlining for emphasis)

Thus, if grounds 1 and 3 of the said Notice of Appeal do not relate to the court below’s Ruling of the 23/10/13, I wonder what would be more appropriate!

Equally, I am of the humble view that the sole issue formulated by the appellants is properly and adequately covered by the said grounds of appeal, particularly grounds 1 and 3.

On ground of appeal No. 2 of the Notice of Appeal of 23/10/13, I tried to locate it within the context of the said Ruling. I find it difficult to make a headway! Perhaps, I may have to agree with the learned senior counsel for the respondents in his submission in the reply on points of law on the Preliminary Objection that appellants’ contention in their reply brief that having made mention of the cases of Akpaji v. Udemba (supra) and Onwugbufor v. Okoye (supra) a total of 18 times in their brief of argument it cannot be said that they abandoned ground 2 of the appellants’ Notice of Appeal is also misconceived. Learned senior counsel for the respondents went on to argue as follows:

“We further submit in the first place that there is nowhere in the appellants’ brief where the appellants showed from which grounds of appeal their issues for determination was distilled from (sic). Secondly, going by the tenor and manner the issue was couched by the appellants, it can only be referable to grounds 1 and 3 of the Notices (sic) of Appeal and not to ground 2 which complained of an entirely different matter from grounds 1 and 3. Finally assuming the ground 2 is validly argued under the appellants said issue, the respondents have responded to same in respondents’ issue.” (underlining for emphasis)

I do not have to belabour this point any further, my lords. It is crystal clear that ground No. 2 of the three grounds of appeal contained in the said Notice of Appeal of 23/10/13, cannot relate to the court below's Ruling of 23/10/13. It must be deemed abandoned by the appellants and it is hereby struck out.

On the whole, the preliminary objection is largely overruled while it only succeeds on ground 2 of the grounds of appeal. As the remaining two grounds of appeal i.e. 1 and 3 are found by me to be properly related to the Ruling of the court below of 23/10/13 and have fully covered the issue formulated by the appellants, I shall now, as a result, go ahead to consider the appeal proper.

I earlier on made reference to the briefs of argument filed by the parties. Learned senior counsel for the appellants formulated the following issue for the determination of the appeal:

"Whether the jurisdiction of the lower court to hear the appellants' appeal was ousted by the inadequacy of filing fees assessed by the Registry of the trial court with regard to the appellants' Notice of Appeal dated 8th September, 2010"

The learned senior counsel for the respondents submitted on the above sole issue for determination by the appellants that the issue appears to be distilled from grounds 1 and 3 of the Notice of Appeal filed on 23/10/13. He stated that the issue is incompetent having been distilled from incompetent grounds of appeal. However, he proffered an alternative argument in the circumstances and without prejudice to the notice of preliminary objection. He then proceeded to formulate his issue for determination from same grounds 1 and 3 of appeal filed in his appeal, as follows:

"Whether the court below was right when it struck out the appellants' appeal on ground of incompetent. (Grounds 1 and 3 of the Notice of Appeal)."

While treating respondents' preliminary objection earlier, I set out the grounds of appeal as contained in the Notice of Appeal of 23/10/13. Both parties agree that the live ground of appeal are Nos. 1 and 3. Both senior counsel related their respective sole issue to these grounds of appeal. Ordinarily, I would have gone ahead to treat this appeal on appellants' sole issue. But now that the senior counsel for the respondents showed his disagreement with the appellants' sole issue and went ahead to formulate his own, makes me feel bound to

examine the two issues vis-à-vis the said grounds of appeal. But let me observe firstly, that the appellants' sole issue is on whether the court below lacked the necessary jurisdiction (ouster of jurisdiction) to entertain the appeal brought to it through Notice of Appeal of 23/10/13. The question of lack of jurisdiction was as a result of the lower court's finding of "inadequacy of filing fees" assessed by the Registry of trial court.

Respondents' issue, on the other hand, distilled from the same grounds of appeal is supported by the argument of the learned SAN for the respondents that:

"The arguments under this issue are premised on the ground that even if the appellants appeal had been premised on the Notice of Appeal filed on 14/6/2010 which was the object of the Ruling of the lower court, this appeal would also have been liable to fail as it is devoid of merit. The simple reason being that even the Notice of Appeal filed on 8/6/2010 (but corrected by the learned SAN to 8/9/2010) is also defective the appellants having failed to pay the prescribed fee of N5,000.00 thereon."

It can thus, be seen clearly, that what outs the jurisdiction according to the learned SAN for the appellants is "inadequacy of filing fees" assessed by the Registry of the trial court. What makes the appeal incompetent before the lower court, according to the learned SAN for the respondents, is "the simple reason that even the Notice of Appeal filed on 8/9/2010 is also defective the appellants having failed to pay the prescribed fee of N5,000.00 thereon."

My humble understanding is that both issues are aiming, primarily, at one and the same thing, and that is: whether payment of inadequate filing fee can affect the competence capacity of court action/appeal and ipso facto affecting equally, the authority, power or jurisdiction of a court of law. In case of the former, the defect makes the action or appeal, incompetent. In the case of the latter, the defect per se removes the power, capacity, authority or jurisdiction of the court or tribunal. In other words, the defect outs the jurisdiction of that court or tribunal.

Black says incompetency, is a relative term which may be employed as meaning disqualification, inability or incapacity and it can refer to lack of legal qualifications or fitness to discharge the required duty and to show want of physical or intellectual or moral

fitness. Jurisdiction, on the other hand, is the authority by which courts and judicial officers take cognizance of and decide cases. It is the legal right by which judges exercise their authority. Black says further, it exists when court has cognizance of class of cases involved, proper parties are present and point to be decided is within powers of court. In Madukolu v. Nkendilim (1962) 2 SCNLR 341, this court laid down in clear terms, factors determining the jurisdiction of a court:

- a) that the subject matter of the case is within its jurisdiction;
- b) that there is no feature in the case which prevents the court from exercising its jurisdiction;
- c) that the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

The point in dispute in this appeal is, as it appears to me and as is agreed to by both learned senior counsel for the respective parties i.e. payment of inadequate filing fee at the trial court's Registry. So, each of the two respective sole issues framed by the learned senior counsel for the respective parties, to my mind, is just on issue of much of a muchness. They are almost alike. Thus, in view of the new issue formulated by me as shown by the underlining before the last as above, I will now proceed, hereunder, to determine the appeal.

The learned SAN for the appellants, submitted that the respondents though, belatedly, challenged the competence of the appellants appeal at the court below based upon the ruling of the same court in CA/PH/406/2009 - Engr. Okey Ibeabuchi & Ors v. Mr. Samuel Ikpokpo & Ors on the sole ground that the appellants paid the sum of N500.00 for the filing of its Notice of Appeal of 8th September, 2010 as against the sum of N5,000.00 prescribed under Order 2 Rule 1 of the Court of Appeal Rules, 2011. The appellants submitted further, that they being aware of the Ruling of the lower court in CA/PH/406/2009 (supra), had paid the alleged outstanding sum of N4,500.00 and they exhibited an official receipt to that effect. Learned SAN for the appellants argued further, that the holding of the lower court that the shortage in payment of the required fee made the appeal incompetent, thus, striking out the appeal occasions a devastating miscarriage of justice to the appellants and the decision is manifestly erroneous. Learned SAN for the appellants supported

his above argument with more reasons amongst which are that-

I. the Court of Appeal Rules cannot validly stipulate the appropriate filing fees for a process filed at the Federal High Court;

ii. payment of inadequate/insufficient filing fees cannot and does not rob the lower court of jurisdiction to hear the appellants' appeal;

III. The appellants ought not to be punished for an alleged error by the registry of the trial court.

IV. the appellants' Notice of Appeal dated 8th September, 2010 had been amended by a subsisting Order of the lower court and as such, the said Notice of Appeal was no longer a live process before the lower court.

Learned senior counsel for the respondents, made his submissions in support of the issue he formulated. He argued that even if the appellants' appeal had been premised on the Notice of Appeal filed on 14/6/2010 which was the object of the Ruling of the lower court, this appeal would also have been liable to fail as it is devoid of merit. The simple reason being that even the Notice of Appeal filed on 8/9/2010 is also defective the appellants having failed to pay the prescribed fee of N5,000.00 thereon. Learned senior counsel then went on to make further submissions on grounds of appeal numbers 1 and 3 and their particulars. He argued that on 23/10/13, appellants deliberately withdrew their motion dated 15/4/2013 for leave to regularize and pay the shortfall of the filing fees after counsel to respondents had introduced their motion dated 11/4/2013 to strike out the appeal for non payment of the full filing fees. He pointed out that by that withdrawal, there was not in existence any application to regularize the defect in the payment of the filing fees. Learned SAN for the respondents submitted further, that by the authorities of *Onwugbutor v. Okoye* (supra) and *Akpaji v. Udemba* (supra) relied heavily upon by the appellants, the law is pretty settled that the duty imposed by law is on the plaintiff or an appellant as the case may be to pay requisite fees in the filing of their originating processes as prescribed by the relevant statute and rules of court made thereunder to enable the court's judicial function to commence. He argued further that a process which was filed without payment of the requisite fees ought to be struck out in the absence of an appropriate remedial action or application to regularize such anomaly. He relied on the two cases

cited above.

In response to the nine points raised by the appellants in their brief of argument, some of which I set out earlier, Learned senior counsel for the respondents submitted, inter alia: that the Court of Appeal Rules, Order 12 Rule 1, cannot validly stipulate the appropriate filing fees for a process filed at the Federal High Court, was not raised at the court below and is being raised as a fresh point without leave of this court and it could be discontenanced. Or, alternatively, it lacks merit. He cited the cases of *Maskala v. Silli* (2002) 13 NWLR (Pt.784) 216 at 226. E-F; *Onyemaizu v. Ojeako* (2010) 4 NWLR (Pt.1185) 504 at 525 - 526 H-E. On the cases cited by the appellants, i.e. *Ogwu v. IGP* (supra) and *Onwugbufo v. Okoye* (supra) in support of their submissions on which Rules of court control payment of filing fees, the learned SAN for the respondents argued that those cases arose from State High Courts and that such State High Court Rules made provisions for fees payable on appeal to the court below in contradistinction to appeals from the Federal High Court to the court below which by its establishment Act are subject to the Rules of the Court of Appeal. He argued that such provisions in the various state High Court Rules, to the extent of their inconsistency to S.243(1) of the Constitution, are pro tanto void. That from the provisions of section 248 of the Constitution and S.32 of the Federal High Court any right of appeal from the decisions of the Federal High Court to the Court of Appeal shall be exercised in accordance with the Rules of the Court of Appeal and not the Rules of the Federal High Court. He urged this court to hold that the Rules of the court below regulate and govern the fees payable in respect of appeals from the decisions of the Federal High Court to the court below.

On the payment of inadequate/insufficient filing fees, the learned SAN for the respondents submitted in paragraph 4.15.1 that the respondents cannot and will not contest the fact that the payment of insufficient filing fees does not affect the jurisdiction of the court as it has been settled by a plethora of decisions by this apex court. He stated that the decisions of this court were not extended to mean that a carte blanche has been handed to an erring appellant to get away with either non or short payment of prescribed filing fees. There are conditions attached. The learned SAN for the respondents made copious submissions on other points raised by the appellants in their

brief such as acquiescence by the respondents; rectification of the insufficient filing fees; appellants ought not to be punished for an alleged error by the registry of the trial court; the appellants Notice of Appeal dated 8/9/2010 having been amended was no longer a liver process before the lower court and that injustice was occasioned to the appellants. I may be referring to some of these submissions as circumstances may demand, anon. The learned SAN for the respondents urged this court to answer his issue in the affirmative against the appellants.

The learned senior counsel for the appellants found that new points of law were raised by the learned senior counsel for the respondents in his brief of argument. He replied to these new points in his reply brief. I shall take these new points along with my consideration of the main briefs filed and argued by the parties in this appeal.

My Lords, it is elementary to state that an appeal in our adversarial system is initiated by filing a Notice of Appeal. The Notice of Appeal is the foundation of a proper and valid appeal. Relying on some decisions of this court, the famous legal text writer, Nwadialo, SAN, in his book: Civil Procedure in Nigeria, (2nd ed. page 802), re-stated the settled law as follows:

“Where an appeal lies as of right, it is brought by the appellant filing in the registry of the High Court or any other court or tribunal from the decision of which the appeal is brought a notice of appeal in Form 3 of the First Schedule. The notice of appeal is the foundation of a proper appeal. Where the notice of appeal is null and void there can be no valid appeal pending before the appellate court. The notice is filed in the registry of the court below and not in that of the Court of Appeal. An appeal is deemed to have been brought upon filing of the notice of appeal in the registry of the High Court.” (underlining for emphasis)

Nwadialo, SAN; cited and relied on the cases of: Okotie v. Olughur (1995) 5 SCNj 217; IBWA V. Pavex International (2000) 4 SCNj 200 at 227; Harriman v. Harriman (1987) 3 NWLR (Pt) 244 at 256; and some court rules. Order 6 of the Court of Appeal Rules of 2007, Rule 1 (one) thereof, provides that Part 2 (two) of the Rules shall apply to appeals to the court (Court of Appeal) from any court or tribunal acting either in its original or appellate jurisdiction in civil cases and to matters related thereto. Order 6 Rule 2, sub-rule (1)

provides as follows:

“(1) All appeals shall be by way of rehearing and shall be brought by notice of appeal (hereinafter called “The notice of appeal to be filed in the registry of the court below. ...” (underlining for emphasis)

By the above provisions therefore, any party who is aggrieved by the decision of any High Court, including the Federal High Court, the High Court of the Federal Capital Territory and now the National Industrial Court and or, tribunal, shall (by way of necessity not by choice) file his Notice of Appeal in the registry of that trial/first instance court or tribunal. Thus, a notice of appeal in respect of decisions of such trial courts or tribunals filed at the registry of the Court of Appeal is a non starter and the Court of Appeal will discountenance same as it cannot deem it properly filed. That of course, is its right and proper venue.

However, a notice of appeal filed at the registry of the Court of Appeal after the record of appeal has been compiled and transmitted to the Court of Appeal and served on all parties and appeal has been entered is properly filed because it will amount to duplicity of efforts, resolves and a waste of time if such notice of appeal is to be filed in the registry of the court below. Equally, for appeals emanating from the decisions of the Court of Appeal to the Supreme Court, notice of appeal in respect thereof should be filed at the Court of Appeal (Order 2 Rule 4 of the 2007 Supreme Court Rules). It is to be noted however, that there are several Judicial Divisions of the Court of Appeal and a notice of appeal must be filed at the relevant registry of the appropriate judicial Division from which the appeal emanates within the prescribed time limit. An appeal is deemed to have been brought upon filing of the notice of appeal in the registry of the Court of Appeal. Filing fees in civil appeals are generally set out by the Rules of Court and paid to the registrar of the appropriate court from which the appeal emanates. The filing fees for appeals to the Court of Appeal are provided by Order 12 Rule 1 of the Court of Appeal Rules of 2007.

It states, inter alia:

“1. Save as hereinafter provided, the fees prescribed in the Third Schedule hereto shall be charged in respect of the matters which they are respectively assigned and shall be paid to the Registrar of

the court below or of the court as the case may be... “
(underlining for emphasis)

Third Schedule of the said Rules, prescribes, amongst others, the following:

B “- **On filing of Appeal against a final judgment or decision N5,000. 00**

-**On filing Notice of Appeal against an interlocutory order or decision N5,000. 00**

C**N5, 000. 00**

-**On filing Amended or Additional Grounds of Appeal (various fees ranging from N1,000.00 - N2,000.00 depending on the period of filing)...**”

D Before considering the actual Notice of Appeal filed by the appellants from the decision of the Federal High Court, it is pertinent to state that two Notices of appeal were filed by the appellants against the decision of the Federal High Court of 14th June, 2010. Both the appellants and the respondents indicated in their briefs of arguments that two Notices of Appeal were initially filed: Learned SAN for the appellants stated in paragraph 2.3 of his reply brief that:

E “Following the judgment of the Trial Court on 14th June, 2010, the appellants filed two Notices of Appeal within the three months period for appealing against the judgment as of right. The first Notice was filed on the same 14th June, 2010 (copied at pages F 1607 - 1614, Vol.4 of the Record) while the second Notice was filed on 8th September, 2010 (copied at pages 1905 - 1912 Vol.5 of the Record).”

Learned senior counsel for the respondents stated in paragraph 1.20 of his brief of argument as follows:

G “Before the lower court the appellants filed two separate Notices of Appeal. The first one was dated and filed on 14/6/2010, while the second one was filed and dated 8/9/2010. See pages 1607 - 1614 of Volume 4 of the Record and page (sic) 2742 - 2749 of Volume 7 of the Records respectively. The appellants themselves compiled the records of appeal and purportedly paid the sum of H N500.00 for each Notice of Appeal as prescribed by the Rules of the Court of Appeal which governed the filing of such processes.”

I think I should remind your lordships that in a plethora of

cases, this court has permitted an appellant to select and rely on one Notice of Appeal where he filed several Notices of Appeal. The one he has chosen or selected or relied upon must be the extant Notice of Appeal. All others, whether they are 101 or more, must be taken to be abandoned whether there is a formal application to strike out such abandoned notices of appeal or not. Neither the appellants, nor any of the parties can be heard again on any such 'dead' notice(s) of appeal. In the appeal before the court below, the appellants selected and relied on the Notice of Appeal filed by them on the 8th of October, 2013. That was why they sought and obtained leave to amend it. Motion to amend was moved and same was granted by the court below, without objection, on the 3rd day of December, 2012 (p.2760 of Vol. 7 of the Records of Appeal). The appellants were granted seven days within which to file amended notice of appeal. Appellants filed their amended notice of appeal on the 5th day of December, 2012 (two days after the ruling). It must therefore, be taken, for all intents and purposes, that the amended Notice of Appeal (filed within time and paid for as per Order 12 Rule 1 of the Court of Appeal Rules, 2007) was properly filed, and I so hold.

The contention of the learned senior counsel for the respondents (paragraph 4.33 of his brief of argument) that the appellants' notice of appeal filed on 8/9/2010 being an incompetent originating process remains incompetent notwithstanding that it was subsequently amended. On the legal effect of an amendment of an incompetent originating process as having no curative effect on the originating process, the learned SAN for the respondents cited and relied on the case of Ministry of Works and Transport, Adamawa State v Yakubu (2013) 6 NWLR (Pt.1351) 481 at p.496 C - E.

But, one may ask: what makes the Notice of Appeal filed by the appellants on 8/9/2010, incompetent? The learned SAN for the respondents (paragraph 4.33 of his brief of argument) argued as follows:

"Although the incompetent nature of the notice of appeal of the appellants in this case did not arise from the signing of the originating process by a law firm, we humbly submit that failure to pay the prescribed fee for filing of the notice of appeal as in this case also renders the notice of appeal incompetent See: Onwugbufo v. Okoye (supra). Consequently, the only way to remedy the defective notice of

appeal is through “an appropriate remedial action or application to regularize such anomaly” See Onwugbufor v. Okoye (supra), and not by amendment of the originating summons. We finally submit on this point that the anomaly and incompetence that plagued the original notice of appeal was not cured by the subsequent amendment. And we humbly so urged.” (underlining for emphasis)

The defect in the said notice of appeal and its suggested remedy have now been identified.

However, in the case of Onwugbufor & 2 Ors v. Okoye & 3 Ors (1996) 1 NWLR (Pt.424) 252, cited and relied upon by both senior counsel for the respective parties, the salient facts in that case show that appellants as plaintiffs at the trial court filed an application for the amendment of their statement of claim to include, inter alia, an additional claim for forfeiture of the respondents’ tenancy over the land in dispute. The application was granted and amendment sought was allowed. The plaintiffs were to file same within 7 days and also pay the appropriate court fees for forfeiture claimed on paragraph 14(d). That was on the 21st of April, 1983. On the 25th April, the plaintiffs duly filed their amended statement of claim which EX FACIE showed that no summons fees as ordered by the court in respect of the new claim for forfeiture were paid by the appellants. On appeal to the Supreme Court on same issue, the court, per Iguh, JSC (rtd.) commented, inter alia:

“Quite apart from the fact that court orders must be obeyed as directed, it cannot be over-emphasised that for a valid and effective commencement of a claim, an intending plaintiff shall strictly comply with the provisions of relevant statutes and the rules made thereunder and Governing the claims made such as the High Court Law and Rules of Anambra State. It is the responsibility of the plaintiff inter alia to pay the requisite fees in respect of each and every relief claimed as prescribed by the rules to enable the court’s judicial functions to commence. A court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been WAIVED or REMITTED by the court or such fees are payable by a Government Ministry or non- Ministerial Government Department or Local Government pursuant to the provisions of the said High Court Rules of Anambra State. If the default in payment is that of the plaintiff the claim in respect of which such prescribed fees

have not been paid cannot be said to be properly before the court and should be struck out in the absence of an appropriate remedial action or application to regularise such anomaly.

In the present case, NO PAYMENT whatever was made by the appellants in respect of their new claim for forfeiture. Payment of the prescribed fees being a condition precedent to the filing of a valid claim before the court it seems to me clear that the claim for forfeiture in the present suit is incompetent. improperly before the court and ought to be struck out.” (underlining for emphasis) B

From the above quoted portion of the decision in Onwugbufor v. Okoye (supra), as cited and relied upon by the learned SAN for the respondents, four points are clear to me. They are as follows: C

- 1) Court Rules must be obeyed
- 2) where a statute prescribes payment of fees for initiating an action, that fees, as a matter of law, must be paid before the commencement of action. D
- 3) where the plaintiff who is required to effect payment of the prescribed fees, refuses, fails or neglects to make such payment as required, his action/claim shall be struck out by the court.
- 4) where there is a remedy to regularise the claim/action, the court should allow an application for the remedy to take effect. E

It has been seen earlier that the only defect identified with the Notice of Appeal of 8/9/2010, is that insufficient/inadequate filing fees was paid at the point of filing. There is dire need to find out what really happened. I recapitulate the events, in steps, as follows: F

1) Judgment was delivered by the trial court on the 14th of June, 2010

2) 1st notice of appeal was filed on the same 14th of June, 2010 (abandoned) G

3) Another (2nd) notice of appeal was filed on the 8th of September, 2010

4) Appellants filed motion which was granted by the court below on 3rd of December, 2012 for the amendment of the notice of appeal filed on 8/9/2010. H

5) Amended Notice of Appeal was filed on 5/12/12

6) On the 11/4/2013, learned counsel for the respondents filed a Notice of Preliminary Objection. He again filed a Motion on Notice on same date.

The Notice of Preliminary Objection and the Motion on Notice sought for the striking out of the appeal as it was incompetent on the ground of shortfall of the filing fees.

7) On the 15/4/2013 appellants filed a motion on notice for leave to pay shortfall of filing fees which was withdrawn and strike
B out on 3/10/2013.

8) The Motion on Notice was moved by the learned SAN for the respondents. It was responded to by the learned SAN for the appellants/respondents.

9) The court below delivered on the bench ruling. It made a
C finding that the appeal was filed under the 2007 Rules of the Court of Appeal, Order 12 Rule 1, Part II, Third Schedule thereof which required the appellants to pay N5,000.00 (Five Thousand Naira) instead of N500.00 (Five Hundred Naira). It also made a finding that the partial or inadequate payment of the filing fees rendered the
D process both inchoate and invalid.

10) Based on the findings as in step (8) above, the court below held that the appeal was incompetent and struck it out.

The appeal at the court below was filed pursuant to the provisions of the Court of Appeal Rules 2007, (The court below made a
E finding to that effect). The filing fees for a Notice of Appeal in respect of final judgment or decision is N5,000.00 (Five Thousand Naira only). Learned SAN for the appellants stated that the appellants filed a Notice of Appeal to the lower court dated 8th September, 2010. The
F said Notice of Appeal was assessed for filing at the registry of the trial court and consequently, the appellants paid a total sum of N800.00 for filing of the said Notice of Appeal at the registry of the trial court. On filing the amended Notice of Appeal on 5/12/12, at the court below, the appellants paid the sum of N1,000.00 (One Thousand Naira only) which is the filing fee stipulated under the 3rd Schedule
G of the Court of Appeal Rules for filing an amended Notice of Appeal.

The said Notice of Appeal filed by the appellants on 8/9/2010 is contained on pages 1905 - 1912 of Vol.5 of the Records of Appeal. Endorsed on page 1912 (last page of the Notice of Appeal), the following was made by the cashier's office of the Federal High Court, Asaba, Delta State:

H "N/Appeal – N500,00
S/M - N200.00

Folio - N100.00
 N800.00

In his further submissions in his brief of argument, learned SAN for the appellants stated that the court below delivered a ruling in Appeal No. CA/PH/406/2009: Engr. Okey Ibeabuchi & Ors v. Mr. Samuel Ikpokpo & Ors on 16th January, 2013 to the effect that the appropriate filing fee for a Notice of Appeal under the Court of Appeal Rules is N5,000.00 and any Notice of Appeal filed without payment of the sum of N5,000.00 is incompetent and liable to be struck out. He said he paid the outstanding filing fees of N4,500.00 in respect of the original Notice of Appeal, even though amended with leave of court. He said he notified the lower court accordingly by exhibiting before the lower court an official receipt for the said sum. B
C

Now, a Motion on Notice to regularise the payment in respect of the Notice of Appeal, was filed at the court below on the 15th of April, 2013. There were four reliefs mainly for leave, to the appellants to pay the remainder of the prescribed filing fees in respect of the appellants/applicants' appeal against the judgment of the Federal High Court in suit No. FHC/ASB/CS/57/2010 delivered on 14th June, 2010 by Hon. Justice I. N. Buba and etc. The Motion was supported by six grounds and a seven paragraph affidavit. From the grounds and the affidavit in support (grounds 2 and 3 and paragraphs 3(i) -(vi), the basis for the application was stated. Exh. AEA 1 is a certified true copy of the receipt of payment and endorsement by the registry of the court below. Exh. AEA 1 shows a total of N4,600.00 for payment of "Notice of Appeal Shortfall and Applications". This, on the face of it, presupposes that payment of the shortfall in respect of the Notice of Appeal (of 8/9/2010) has been made by the appellants. D
E
F

However, looking carefully at the submissions made by the learned SAN for the respondents on this same issue (as contained in paragraphs 4.17 - 4.17.4 on pages 23 - 26 of respondents' brief of argument. The learned SAN for the respondents stated, among other things: G

"The appellants under paras 4.25 - 4.37 at pages 13 - 17 of their brief contended to the effect that in spite of the decisions of this court, especially Onwugbufor v. Okoye (1996) 1 NWLR (Pt.424) 252, the lower court appeared to regard the issue of inadequate filing fees as an incurable defect which cannot be regularized by any H

appropriate remedial action.

We humbly submit that this contention of the appellants is also misconceived. In further reply to this contention, we rely on our earlier submissions above at paras 3.3 to 3.12. Furthermore, the cases of *ACB Ltd. v. Henshaw* (1990) 1 NWLR (Pt. 129) at page 646 and *Onwugbufor v. Okoye* (Supra) relied on by the appellants clearly showed the need of an appellant who has failed to pay the prescribed fees to obtain an order of court to regularize the payment of the shortfall. As we had shown above, the appellants duly filed a motion dated 15/4/2013 to regularize the shortfall. But for some inexplicable reasons they decided to withdraw the said motion and same was accordingly struck out on 23/10/2010 before the preliminary objection of the respondents was taken and granted. The only circumstances the appellants could have sustained their contention in this regard would have been if the lower court had considered the merit of their motion filed on 15/4/2013 and refused to grant same. Curiously, the same appellants who deprived the lower court of considering the merit of their application filed on 15/4/2013 are the same parties impugning the lower court for having not allowed them to regularize their Notice of Appeal.

The further contention of the appellants under para 4.28 at page 14 of their brief to the effect that they, suo motu as it were, took appropriate remedial action of paying the alleged shortfall at the registry of the trial court is also misconceived. The receipt of the purported shortfall they alleged they paid shows that it is in respect of another suit and not this suit. In any event, we submit that whatever remedial action that ought to be taken in the circumstances must be by an order of court which is seised of the matter, in this case the order of the Court of Appeal. This position is supported by the case of *A.C.B. Ltd. v. Henshaw* (supra) and *Onwugbufor v. Okoye* (supra) relied on by the appellants.

Furthermore, as at the time the appellants constituted themselves into a court, and went ahead to suo motu and purportedly regularized the shortfall at the trial court, the appeal had been entered in the lower court, which was the only court at the material time seised of the matter.

The appellants' further contention at paras 4.32 to 4.37 at pages 15 - 17 of their brief to the effect that by the provisions of Order

20 Rule 3 and Order 12 Rule 3 of the Court of Appeal Rules which provide for waiver of noncompliance with the Rules and exemption from payment of fees by poor people, it was wrong for the lower court to designate inadequate payment of filing fees as an incurable defect is also misconceived and irrelevant. The appellants did not apply for a waiver of the Rules upon any ground including the ground that they are poor. B

We further submit that all that the lower court did in line with the decision of this Hon. Court in *Onwugbufor v. Okoye* (supra) at p.292 paras A - D is that in the absence of an appropriate remedial action or application by the appellants to regularize the shortfall in the fees paid in respect of the notice of appeal to the lower court (the motion to that effect filed on 5/4/2013 having been withdrawn and struck out) was to take out the said Notice of Appeal as incompetent. This was the situation at the lower court and not the false premise the appeal is founded upon as contained in particular (ii) of ground 3 of the Notice of Appeal to this court where it was alleged that court below allegedly discountenanced the motion filed on 15/4/2013 and struck it out.” C D

I already reproduced what transpired at the court below on the 23/10/2013. Both learned SANs for the respective parties said that they had pending matters such as motions and preliminary objection. Dr. Layonu SAN (who was in the court that morning at the instance of Mr. Akoni, (SAN), for the appellants stated, inter alia: E

“We have pending applications filed on 15/4/2013 (to amend), 15/4/2013 (to pay shortfall of filing fee), 17/9/2013 (for stay of further proceedings). F

I will allow Nwosu, SAN to take his Preliminary first, then I respond. “ G

The respondents’ Preliminary Objection was taken. The court below then asked Mr. Layonu, SAN, to move his pending motions. He started moving the motion filed on 17/9/2013 for stay of further proceedings pending outcome of an appeal at the Supreme Court, but ended up asking for adjournment instead of the stay. On the other application, Mr. Layonu, SAN, said: H

“At this juncture, I prefer that our application for order to pay shortfall on filing fee be adjourned until the Ruling in the two applications.”

Mr. Nwosu, SAN, opposed the adjournment. The court below then asked Mr. Layonu:

“Dr. Layonu, SAN please move your motion filed on 15/4/2013 for leave to pay shortfall of N4,500 filing fee.”

Dr. Layonu, SAN then answered:

B “I hereby withdraw the motion.”

Mr. Nwosu, SAN did not object. The court below accordingly struck out the Motion for leave to pay shortfall for filing fee.

The learned SAN for the respondents argued that in view
C of the above striking order, there was absence of an appropriate remedial action or application to regularise the anomaly. Learned SAN for the appellants responded in his reply brief that the Court of Appeal Rules cannot determine the filing fees for a process filed at the trial court. Thus, filing fees paid by the appellants at the lower (trial) court was sufficient and proper having been paid upon assessment
D by the officials of the registry of the trial court. That means, he further submitted, the appellants were under no obligation to file a motion for leave to pay any shortfall and the appellants withdrawal of such motion has become quite irrelevant in the present circumstances. He argued that it was incorrect to state that no remedial action was
E taken. He referred to page 2861 of Volume 7 of the Records of Appeal which confirms that the appellants had EX ABUNDANTIA CAUTELA paid N4,600.00, despite the reasoning in *Akpaji v Udemba* (2009) 2 NWLR (Pt.183) at 189 that a defect in the payment of filing fees
F cannot be cured by any remedial step, pointing out however, that the decision in *Akpaji* case (*supra*) has been set aside by this court in SC/80/2013 *Ibeabuchi & Ors v. Ikpokpo & Ors*.

Yes! It is true that the learned senior counsel for the appellants, Mr. Layonu withdrew motion filed by appellants on 15/4/2013, seeking leave to pay the shortfall of the filing fees and the court below struck it out. It is also true that page 2861 of Vol. 7 of the Records of
G Appeal contained a receipt of payment in the sum of N4,600.00 in respect of “Notice of Appeal Shortfall and Applications” FHC/PH/CS/231/2011, issued by the Registry of the Federal High Court, Port Harcourt. This receipt had been exhibited and marked “Exhibit AEA
H 1 (paragraph 3 (iii)) of the affidavit in support of the motion filed on 15/4/2013 which was withdrawn and struck out.

Mr. Nwosu, SAN, for the respondents, submitted that the

receipt of the purported shortfall they alleged they paid shows that it is in respect of another suit and not this suit and whatever remedial action that ought to be taken in the circumstances must be by an order of court which is seised of the matter, i.e. the order of the Court of Appeal. Learned SAN for the appellants in his reply referred this court to same page 2861 of Vol. 7 of the Records of Appeal which shows that the said receipt was duly issued in respect of the suit at the trial court albeit with an obvious mistake in the suit number FHC/PH/CS/231/2001. The payment of the alleged shortfall sufficiently amounts to a remedial action in a situation of insufficient fees with or without an order of court. In this regard, he further said, the shortfall was paid within time on 12th April, 2013. My Lords, I think it is enough for the rhetoric now. It is time we face the real issue.

On the 23rd of October, 2013, when the court below delivered its judgment on the bench ruling, the case of Chukwuma Ogwe v. IGP & 2 Ors which was delivered on 13th of February, 2015, did not come into existence. That notwithstanding, the law has for long been settled by authorities that payment of inadequate filing fees can only make a process irregular and not capable of affecting the jurisdiction of the court. See: Onwugbufor & 2 Ors v. Okoye & 3 Ors (supra); Akpaji v. Udemba (2009) 6 NWLR (Pt.1138) 545. Thus, the initial payment of N500.00 made in respect of the Notice of Appeal filed at the trial court is capable of sustaining the Notice of Appeal in suspense and the court shall not act upon it unless it has been regularized. There was a motion before the court below to regularize the shortfall in the payment of the requisite filing fees. It was however, withdrawn and struck out and the appeal too, was struck out being incompetent. But was the appeal or Notice of Appeal filed by the appellants incompetent? I do not think so. Firstly, the appellants paid the fee assessed by the trial court's registry/cash office in the sum of N500.00 (five hundred naira only). If there was no compliance with the Rules in respect of payment of filing full fees at the time of filing, it was not a mistake committed by the appellants. The appellants did all that they were required to do at that point in time. The mistake, if any, was that of the court officials who did the assessment. In the case of Akpaji v. Udemba (supra), dispute rose between two bosom friends on settlement of account on a business they were operating. Plaintiff at the trial court but appellant at this court sued the defendant/

respondents. The respondent filed a counter-claim. The appellant did not file a defence on reply. However, the registry of the trial court only assessed the respondents' statement of defence for payment of filing fees, but did not assess the counter-claim for payment of filing fees. At the conclusion of trial, the trial court dismissed the appellants claim
 B and entered judgment for the respondent on his counter-claim. The appellant appealed to the Court of Appeal. The issue of non-payment of filing fees on the counter-claim came up at the Court of Appeal for which the respondent took steps to regularize. The Court of Appeal
 C having dismissed the appellants' appeal affirmed the judgment of the trial court. It also made an order pursuant to section 16 of the Court of Appeal Act that APPROPRIATE FEES for the counter-claim be paid by the respondent.

Aggrieved by the order of the Court of Appeal directing payment of appropriate fees on the counter-claim, the appellant ap-
 D pealed to the Supreme Court. In dismissing the appeal, the majority judgment (as there was a dissent) delivered by Ogbuagu, JSC (rtd.) stated clearly as follows:

"In the case of Onwugbufor & 2 Ors v. Okoye & 3 Ors
 (1996) 1 NWLR (Pt.424) at 291 - 292; (1996) 1 SCNJ 1 at 36 cited
 E by the parties in their respective briefs, (it is also reported in (1996) 34 LRNC 1), although it was held that payment of filing fees, is a condition precedent necessary to the exercise of jurisdiction, this court - per Iguh, JSC, stated inter alia:

F 'If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court should be struck out in the absence of an appropriate remedial action or application to regularize such anomaly.... '

So, it can be seen that there is a rider so to speak. The
 G appropriate remedial action was the said Order by the court below even without the said motions of the respondents afore-stated. But in any case not only did the respondents, apply for leave of the court below, to pay the appropriate fees, it exhibited, the receipt of the payment. Afterwards, as stated by Charles, J. in Lawal v. Odegimi
 H (supra) the object of the provisions of payment of filing fees in the said Rules of the High Court, is to protect the public revenue." (underlining supplied)

On the attitude of the registrars of the trial court who failed to do the proper assessment of the filing fees, Ogbuagu, JSC continued:

“Surely and certainly, the error or inadvertencies of the said registrar, cannot, in my respectful and firm view, be said to be that of the respondent. The Registrar saw and assessed the statement of defence. If he might read the entirety of the statement of defence before assessing it (and I doubt it) and he failed correctly or properly to do so, his error or omission cannot be ascribed to be that of the respondent and/or his learned counsel. With profound humility, it will be unfair and unjust in the instant appeal, to state by anybody including this court, that **IGNORANCE OF THE LAW IS NO EXCUSE**. The records shows that the respondent who took the document to the registry for assessment and payment, is only a businessman. There is no evidence that he is a lawyer or one who knows the business or procedure in the court’s Registry as regards assessment of court processes, brought before it. I therefore, hold, that the non-payment in FULL OF THE APPROPRIATE FEES, WAS A MERE irregularity and did not vitiate the proceedings and has nothing to do with the jurisdiction of the trial court. At worst. It is VOIDABLE not VOID.”

My Lords, not quite a long ago, this court had another opportunity to straighten the position of the law, where an official of the court, through commissions or omissions, fails to do what the law mandates him to do correctly. It happened in the case of Chukwuma Ogwe & Anor v. Inspector General of Police & 2 Ors, Appeal No. SC/214/2013 delivered on the 13th day of February, 2015. In this matter, the appellants at this court as plaintiffs at the Rivers State High court of Justice, commenced suit No. PHC/1325/2006, seeking to enforce their fundamental human rights. At the end of trial, the trial court found against the appellants. The appellants proceeded on appeal to the Court of Appeal Port Harcourt division. They tendered their Notice and Grounds of Appeal to the Registry of the court and on their being assessed, the sum of N3,000.00 was to be paid to the Registry. Same was accordingly paid and appellants filed their Notice of Appeal. Parties were absent on the hearing date, 11/3/2015. The court below, suo motu, raised the issue of the adequacy of the filing fees paid by the appellants and having found the fees paid to be inadequate, it struck out the appeal.

The appellants filed their appeal to this court on the court be-

low's ruling of the 11/3/2015, challenging the issue of the inadequacy of the filing fees. My learned and noble brother, M. D. Muhammad, JSC, with whom I agreed, held inter alia:

“In any event once it is shown that the appellant has paid the filing fees as assessed by the officer whose responsibility it is to do so, whether at the trial court or the Court of Appeal as the case may be, the appeal is, on the authorities, duly filed and same cannot be legally struck out. Otherwise the appellants would be made to suffer for the fault, negligence or inadvertence of another. Where the fault of the payment of inadequate filing fees in respect of the appeal is traceable to the officer who assessed the fees, it would be unfair not to place the blame where it truly is.”

So, the sin committed by the officials of the court registry, cannot, justifiably, be visited on the appellants in this appeal.

Secondly, a motion to regularize the payment of the shortfall was withdrawn by the learned SAN, Mr. Layonu, for the appellants and it was struck out by the court below. This perhaps influenced the mind of the court below to strike out the appeal. It is true that such a decision is always placed within the discretionary powers of a court. Exercise of discretion, however, must always be judicial and judicious. A discretionary decision based on a principle that inadequate/shortfall of filing fees is fatal to an appeal is certainly a wrong exercise of discretion. It is settled law that a court of law will not allow the provisions of an enactment to be read in such a way to deny access to court by citizens. Thus, it is not the intention of the law to deny any litigant access to justice. A rule of court stands to guide the court in the conduct of its business and it must not hold as a “mistress” but as a hand maid. See: Onwuchekwa v. NOIC (2002) 5 NWLR (Pt.760) 371 at 393; Chrisdom Ind. Co. Ltd. v. AIS Ltd. (2002) 8 NWLR (Pt.768) 152 at 178 C - 0; UTC Nig. Ltd. v. Pamotei (1989) 2 NWLR (Pt.103) 244 at 296; Chime v. Chime (2001) 3 NWLR (Pt.701) 527 at 553. The established practice of the courts is to lean towards granting a litigant access to court rather than denying him of such access. The principle of the law as settled by this court, as seen supra, in relation to settlement of insufficient filing fees on documents placed before the registry of a court is for the court to direct that such insufficient, inadequate, shortfall be remedied. The striking out of the appeal at the stage the court below did, was certainly unnecessary

and improper.

Thirdly, should the sin of counsel be visited on his client? It is to be remembered that the learned SAN for the appellants, Mr. Layonu, withdrew the motion filed to remedy the shortfall in the filing fees prescribed by the court Rules. It was argued also by the learned SAN Mr. Akoni, that the shortfall was paid and that a receipt was exhibited before the court below and that court should have taken judicial notice of that receipt of payment. Now, Counsel may mess-up; they may be under misapprehension of a nature, they may goof. They are human beings subject to err. It is a well laid down principle of the law that a court of law, because of the counsel's error of judgment, carelessness, misapprehension, commission or omission, will not punish a litigant or visit that innocent litigant with the sin committed by his counsel unless it can be shown that the litigant himself was a party to the commission of the sin. See: *Amadi v. Acho* (2008) 12 NWLR (Pt.939) 386 at 405; *Famfa Oil v. A. G. Federation & Anor* (2003) 18 NWLR (Pt.852) 453; *Ede & Anor v. Mba* (2011) 18 NWLR (P1278) 236. It was certainly a mistake from Mr. Layonu's side to withdraw his motion for leave to pay the shortfall in the filing fees although one could clearly see what transpired on the 23/10/2013 when he asked for adjournment of the said motion. It is naive too, for Mr. Akoni, to expect the court below to take judicial notice of the cash receipt in respect of the payment for the shortfall in the filing fees which was exhibited to a struck out motion, although the court below made mention of it. The correct position of the law regarding a struck out matter is that the court lacks jurisdiction to make any subsequent order on it. See: *Akinbobola & Sons v. Plisson Fizko Nig. Ltd. & 2 Ors* (1991) 1 NWLR (Pt.167) 270 at 288.

The next point under consideration is whether the court below can make Rules of court for the trial court. Mr. Nwosu, SAN says, it can. Mr. Akoni, SAN, disagreed. Each supported his contentions with authorities.

Let me say right away that Court Rules are meant to guide the court in the conduct of its affairs. The filing of Notice of Appeal by intending appellant has grown along with appellate courts practice whereby the intending appellant is specifically requested by the Rules of the Appeal Court to liaise with the court which handed down the decision he would want to appeal against by putting that court on

notice of his complaint against its decision. That is why the appeal court mandates him to file his notice of appeal with the registry of that court/tribunal. In almost all the appellate courts including this court, the court Rules guiding the Practice and Procedure of that court stipulate that Notice of Appeal should be filed at the registry of
 B the court that delivered the decision which is the subject matter of the appeal. The Supreme Court Rules of 1999 (as amended) were made pursuant to the provision of Section 236 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Order 8 of
 C the Rules deals with Civil Appeals to the court. Order 9 deals with criminal appeals. In instituting an appeal to the court, each of the above orders stipulates in the main:

“All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) TO BE FILED IN THE REGISTRY OF THE COURT BELOW...” (emphasis supplied
 D by me)

The Court of Appeal Rules 2007, Order 12 Rule 1, thereof, replicates the above rule of practice and it provides as follows:

“Save as hereinafter provided, the fees prescribed in the
 E 3rd Schedule hereto shall be charged in respect of the matters which they are respectively assigned and shall be paid to the Registry of the court below or of the court as the case may be.”

The above rule is saying, in other words, to my humble understanding, that filing fees payable in respect of any appeal which
 F is as of right must be paid to the registry of the High Court, whether Federal or State. Equally, where time is extended within which to file Notice of Appeal, the filing fees should be paid to the registry of that same High Court, Federal or State within the time extended. However, where leave is granted to an applicant to file his notice of appeal, and or, where the appeal has already been entered at the
 G appeal court, that applicant shall file his Notice of Appeal at the Registry of the appeal court. Equally, where there is an amendment to the Notice of Appeal, filing fees in respect of the amended Notice of Appeal should be paid to the registry of that appeal court. In relation to the appeal on hand, it is to be noted that the Federal High Court
 H is not an appellate court and except for matters specified in Order 54 (appeal to the court from Professional Bodies), no appeal lies to the court. The Rules do not provide either, fees for processing appeals

to the court of appeal. A Lacuna should not be allowed to peep into the conduct of affairs of that court. In any event, the Constitution is very clear in Section 243(1)(b) where it provides, inter alia:

“243(1) Any right of appeal to the Court of Appeal from the decisions of the Federal High Court, National Industrial Court or a High Court conferred by this Constitution shall be -

(b) exercised in accordance with any Act of the National Assembly and Rules of court for the time being in force regulating the Process, Practice and Procedure of the Court of Appeal.”

I am thus, in agreement with Mr. Nwosu, SAN in his submission that by the very IPSISIMA VERBA of the above provisions, it is the Rules of the Court of Appeal made pursuant to Section 248 of the Constitution, 1999 (as amended) that govern any right of appeal from the decision of a Federal High Court to the Court of Appeal. I agree with Mr. Nwosu, SAN, again in his submission in respect of the Act establishing the Federal High Court, Section 32 of the Act as contained in Cap. F12, Laws of the Federation of Nigeria, 2004: which provides as follows:

“32 - Appeals to the Court of Appeal Subject to the provisions of the Constitution of the Federal Republic of Nigeria, the Court of Appeal Act and the Rules of the Court of Appeal, appeals shall lie from the decisions of the court in its original or appellate jurisdiction to the Court of Appeal. “

Thus, any right of appeal from the decision of the Federal High Court including the appeal on hand, is exercisable in accordance with the Rules of the Court of Appeal and not the Rules of the Federal High Court. Order 12 Rule 1 is the correct Rule to guide the Registry of the trial court in assessing the fees payable in respect of the appeal on hand. I do not believe that the Rules as competently made by the President of the Court of Appeal are meant to rob or deprive the Federal High Court of its power to make Rules regulating its own practice and procedure as provided by Section 254 of the Constitution (1999 as amended). M. D. Muhammad, JSC, is again quoted, per his dictum, in *Ogwe v. IGP & 2 ORS* (supra) that:

“The practice that has evolved over the years is for an appellant whose appeal is within time prescribed under section 24 of the Court of Appeal Act to file his appeal to the lower court at the registry of the court against which decision the appeal is being filed.

And this is what the appellant herein did. It is at that registry that he paid the fees the officer of court assigned for the purpose assessed and requested him to pay. Having paid the fees and left his Notice of Appeal at the Registry with the officer responsible, the appeal on the authorities is deemed properly filed.”

B My Lords, that in my view, is the correct position of the law. I may even add that by the principle of hierarchy of courts, the Supreme Court supervises all other courts in this country. The Court of Appeal, thus, is not only an appellate court, but has supervisory role as well on all other courts in the federation apart from this court. C Where it is mandated to make rules in respect of any matter, I do not think that such rules can easily be thrown away by waive of hand. They should be complied with.

I commend both learned senior counsel Mr. Akoni, SAN and Mr. Nwosu, SAN, for the industry and professional skill exhibited D in their respective briefs of argument. My other words to the senior members of the profession are that counsel, especially senior ones should respect one another, regardless of motives. They should remember, they have no other profession apart from the one in the wig and gown.

E Finally, I find merit in the appeal and same is allowed by me. The order striking out the appeal by the court below is hereby set aside. The appeal is hereby restored to the Court of Appeal list. The appellants should take steps to remedy the defect in their Notice of F Appeal filed on the 8th day of September, 2010, thereby reviving their amended Notice of Appeal of 5th December, 2015. I make no order as to costs.

MUNTAKA-COOMASSIE JSC

G I was privileged to have read the lead judgment rendered by my learned brother I. T. Muhammad JSC. I entirely agree with his lordship’s reasoning for allowing this appeal.

His lordship left no stone unturned. I beg to confess that I cannot improve upon it. I too hold that the appeal is pregnant with H merits, same is hereby allowed.

RHODES-VIVOUR JSC

I have had the advantage of reading in advance the leading judgment prepared by my learned brother, Muhammad, JSC. I am in full agreement with my lordship's reasoning and conclusion. The appeal highlights the point that the nonpayment of filing fees is different from inadequate payment, the latter being the fault of the Registry. There is indeed merit in the appeal. I endorse my lordship's directives.

B

C

OGUNBIYI JSC

I have had the privilege of reading the draft lead judgment just delivered by my learned brother Tanko Muhammad, JSC. I am in full agreement that the appeal is meritorious and should be allowed.

D

I wish to state briefly that the respondents (Plaintiffs) instituted this action by an originating process against the appellants (Defendants) at the trial court claiming damages in excess of N17 Billion Naira arising from alleged oil spills in the course of the appellants operations. The trial court entered judgment for the plaintiffs/respondents in the said sum claimed. The appellants were aggrieved and hence their appeal to the Court of Appeal which notice of appeal was assessed at the registry of the trial court and they paid the sum of N500.00 as filing fee.

E

F

The appellants sought leave of the lower court to amend the said notice of appeal, same was granted and the notice was filed after the requisite filing fee of N1,000.00k was paid.

By the ruling of the lower court in an appeal CA/PH/406/2009, Engr. Okey Ibeabuchi & Ors. V. Samuel Ikpokpo and Ors., it was ruled that the appropriate filing fees for a notice of appeal under the Court of Appeal Rules is N5,000.00k and hence any notice of appeal filed without such payment is deemed incompetent and liable to be struck out. The appellant for the purpose of salvaging his deficiency paid up the balance of the shortage. That notwithstanding, the respondent filed a preliminary objection and challenged the competence of the appellants' appeal on the sole ground that the filing fee paid by them was inadequate.

H

The lower court upheld the preliminary objection raised and

struck out the notice of appeal for being incompetent. Hence the appeal now before us on a lone issue as follows:-

“Whether the jurisdiction of the lower court to hear the appellants’ appeal was ousted by the inadequacy of filing fees assessed by the Registry of the trial court with regard to the appellants’ Notice of Appeal dated 8th September, 2010.”

The law is trite that a competent notice of appeal activates the jurisdiction of a court. Where however the notice is incompetent, the subject matter is completely outside the court’s jurisdiction. The payment of filing fee is a precondition necessary for a competent notice of appeal to sustain. By the very nature of the issue raised in this appeal, it is apparent that the complaint is in respect of an inadequate payment of a filing fee which was assessed by the Registrar of the Court. Hence, I hold the view that the phrase “inadequate/insufficient filing fees” should not and cannot in the circumstance rob the court of jurisdiction to hear the appellants’ appeal. This is because the word inadequate cannot be interpreted to mean non-payment.

The lower court in this case held that the appellants failed to pay the adequate filing fees for the notice of appeal filed; this is notwithstanding the fact that the appellants did pay the fee duly assessed by the trial court for the said Notice of Appeal. The position of the appellant is fortified by the decision of this court SC/214/2013: Chukwuma Ogwe V. IGP & 2 Ors. Delivered on 13th February, 2015 at pages 18 to 19 per Dattijo Muhammad, JSC wherein his Lordship said:-

“The practice that has evolved over the years is for an appellant whose appeal is within the time prescribed under section 24 of the Court of Appeal Act to file his appeal to the lower court at the registry of the Court against which decision the appeal is being filed. And this is what the appellant herein did. It is at that registry that he paid the fees the officer of court assigned for the purpose assessed and requested him to pay. Having paid the fees and left his notice of appeal at the Registry with the officer responsible, the appeal on the authorities is deemed properly filed.”

Consequently therefore, the appellants, having paid the requisite filing fee duly assessed and charged by the Registrar of that court, cannot now be held responsible and be penalized for inadequate payment of fees.

In my humble view, it is noteworthy to say that, the failure to remedy or pay the deficiency does not and should not raise an issue of jurisdiction but the consequential effect is a mere irregularity and which is not capable in affecting the validity of the proceedings. See the cases of Akpaji V. Udemba (2009) 2 NMLR 183; ACB Ltd. V. Henshaw (1990) 1 NWLR (Pt 129) 646 at 650; Noibi V. Fikolati & Anor (1987) 1 NMLR (Pt 52) 619 at 632. B

In the result, and while subscribing with and endorsing the lead judgment of my learned brother Tanko Muhammad, JSC, I hold the view that, inadequacy of the filing fee paid by the appellants in respect of the notice of appeal cannot and does not rob the lower court of the requisite jurisdiction to hear and determine the appellants' appeal on the merit. C

The lower court in my view greatly erred in declining jurisdiction as it did. The issue is resolved in favour of the appellants and I also allow the appeal in terms of the lead judgment of my learned brother that the appeal be restored onto the Court list for hearing on the merit. I also abide by all orders made therein the lead judgment inclusive of costs. D

E

NWEZE JSC

My Lord, Ibrahim Tanko Muhammad, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with the conclusion. F

This contribution is limited only to a rebuttal of the submission which the learned senior counsel for the appellant advanced in the reply brief on the Rules of court which are determinative of the appropriate filing fees. According to Akoni, SAN, for the appellant, the Court of Appeal Rules cannot determine the filing fees for a process filed at the trial court [that is, the Federal High Court]. He cited Chukwuma Ogwe v IGP as the authority for this proposition. G

It would appear that learned senior counsel did not have the opportunity of reading the peculiar provisions of the State High Court Rules that dictated the conclusion in that case. If he had, he would have discovered that the import of section 243 (1) (b) of the Constitution on the applicable Rules of the Federal High Court did H

not fall for determination in that case. The reasoning in the said case [Chukwuma Ogwe v IGP] must, therefore, be circumscribed to the facts that yielded it.

B As such, the case [Chukwuma Ogwe v IGP] is not an authority for his proposition on the interpretation of the effect of section 243 (1) (b) as regards the applicable Federal High Court Rules. It cannot be gainsaid that cases are decided on their peculiar facts and in the light of the applicable law, Yusuf v Obasanjo [2004] 5 SC (pt 1) 27; [2004] 5 SCM 112.

C Only recently, I had occasion to deal with the import of section 243 (1) (b) (supra). In Okey Ikechukwu v FRN [2015] 7 NWLR (pt 1457) 1, 17 -18, I opined that:

Section 243 (1) (b) of the Constitution of the Federal Republic of Nigeria (as amended) provides thus:

D 243 (1) Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this Constitution shall be -

E (b) exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal. [Italics supplied for emphasis]

F Pursuant to this subsection, rights of appeal from the High Court to the lower court are exercisable in accordance, inter alia, with the Court of Appeal Rules. Order 6 Rule 2 (1) of the Court of Appeal Rules, 2011 prescribes that every appeal shall be initiated through a Notice of Appeal.

G In my humble view, when a litigant is dissatisfied with a judgment of the Federal High Court, his decision to appeal against it is in pursuance of the right of appeal donated by the section [section 243 supra]. Thus, by the very provisions of section 243 (1) (b) (supra), such a right of appeal can only be exercised inter alia “in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.” The reference here must be deemed to be a reference to the applicable Court of Appeal Rules.

H Against this background, therefore, the formidable submissions of L. Nwosu, SAN, learned senior counsel for the respon-

dents, become irrefutable. That is why I, entirely, agree with the leading judgment's endorsement of his [Nwosu, SAN'] submission that by the very tenor of section 243 (1) (b) (supra), it is the Court of Appeal Rules, made pursuant to section 248 of the 1999 Constitution (as amended), that govern the procedure for the exercise of any right from a decision of the Federal High Court to the lower Court [and this includes the prescriptions of the said Court of Appeal Rules as to the filing fees thereat, that is, the Federal High Court].

In effect, the applicable Order 12 Rule 1 of the Court of Appeal Rules was the prevailing provision in the assessment of fees at the trial court [Federal High Court] and not the Rules of the said court [that is, Federal High Court].

If any further authority is required on this point, it would only suffice to refer to section 32 of the Federal High Court Act, Cap F12, LFN 2004. Its trenchant provisions read thus:

Subject to the provisions of the Constitution of the Federal Republic of Nigeria, the Court of Appeal Act and the Rules of the Court of Appeal appeals shall lie from the decisions of the Court in its original or appellate jurisdictions to the Court of Appeal.

Unarguably, by the choice and usage of the phrase "subject to," the Federal High Court Rules cannot diminish the import of the Court of Appeal Rules since the former are subordinated to the latter rules, *Idehen v. Idehen* [1991] 7 SCNJ (pt. 2) 196, 215-216; *Ezenwosu v. Ngonadi* [1992] 3 SCNJ 59, 72; *Olatunbosun v. NISER* [1988] 3 NWLR (pt. 80) 25, 46; *Oke v Oke* (1974) 1 All NLR (pt. 1) 443, 450.

It is for these, and the more elaborate, reasons in the leading judgment that I, too, shall order the appellants to take steps to pay the short fall in their filing fees. I abide by the consequential orders in the leading judgment.

B

C

D

E

F

G

H