PRAGMATIC PRINCIPLES OF BRIEF WRITING IN APPELLATE COURTS IN NIGERIA

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1.0 INTRODUCTION

In legal parlance, a "**brief**" can be defined as *"a written statement setting out the legal contentions of a party in litigation. A document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them."*[1] Furthermore, an "**appellate brief**" is defined as "*a brief submitted to an appeal court by a party to an appeal pending in a court exercising appellate jurisdiction. The brief may be filed for an individual party or on behalf of two or more parties*"[2]

Essentially, an appellate brief is a succinct statement of the party's argument in the appeal.[3]

The focus of this paper is to highlight some of the salient principles involved in the practice of brief writing in our appellate courts. We shall commence with a historical account of the practice and the rationale for its introduction. Next, we shall undertake an examination of: the types of appellate briefs; the format of a good brief; pragmatic hints on brief writing; common pitfalls to avoid and conclude with an appraisal of the practice of brief writing under our appellate courts system.

For the purpose of this write-up, we would concentrate on the following appellate courts: the Supreme Court, the Court of Appeal and the Customary Court of Appeal. The rules of these courts have incorporated the practice of brief writing.[4]

To a very large extent, the principles regulating the practice of brief writing in these courts are basically the same. There are only minor dissimilarities in terms of format and the computation of time for filing briefs.

1.1 ORIGIN OF APPELLATE BRIEF WRITING IN NIGERIA

The consensus of opinion among legal scholars is that the concept of appellate brief writing originated from the United States of America. Before the mid-fifties, oral argument dominated the field of litigation in America. Thereafter, there was an upsurge in the spate of litigation which exposed the gross inadequacies of oral arguments paramount of which was the inordinate delays in trials. This shortcoming necessitated the introduction of brief writing into the American appellate court system.

An American professor of law, **Professor Robert Martineau** graphically captured the development as follows:

> *"Appellate review developed in England primarily as an oral process------- oral arguments often lasted for several days. That tradition was carried over to this country ----------Beginning in the mid 1950's however, oral*

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1. Black's Law Dictionary, 8th Ed. P. 204
2. Black's supra
3. Ord. 18 r. 2 and Ord, 6 r. 5 of the Court of Appeal Rules, 2011 and the Supreme Court Rules, 1985 respectively.
4. See Ord. 6 r. 5, Supreme Court Rules, 1985; Ord. 18 rr 2, 3, 4, 5 & 6, Court of Appeal Rules, 2011 and Ord. 5 of the Edo State Customary Court of Appeal Rules, 2000.

arguments became shorter ---------- Appellate attorneys must now rely primarily upon their briefs. Oral argument is no longer the central focus of the appellate process through which the appellate court performs its functions of error correction and law development"[5]

Speaking in the same vein, another American jurist, **Justice D. Re. Edwards** maintained that "*the era of forensic oratory is almost a matter of the past. For example, in the Supreme Court of the United States, in the early period when cases were few, extended oral argument was permitted. Today, one is rarely privileged to speak for more than half an hour except by special leave of court*"[6]

The history of brief writing in Nigeria spans over three decades. The practice made its debut at the Supreme Court on the 1st of September, 1977 *via* the Supreme Court Rules, 1977.[7] Under the 1977 Rules, it became obligatory for every appellant within eight weeks of receipt of the record, to file in Court and serve on the respondent, a written Brief of his argument in the appeal.[8]
The respondent was also required under the Rules to file in the Court and serve on the appellant his own brief within six weeks of service on him of the appellant's Brief.[9] An appellant might also within twenty-one days of service but not less than three days before the date of hearing file and serve on the respondent, an appellant's reply brief.[10]

After being in operation for about eight years, the Supreme Court Rules, 1977 were revoked and replaced by the Supreme Court Rules 1985.[11] The 1985 Rules retained the provisions on the filing of Briefs with minor amendments relating to computation of time and other sundry matters.[12]

At the Court of Appeal, Brief writing was introduced in 1983 as an expedient measure to fast track the hearing of election petition appeals arising from the 1983 general elections. In order to expedite such appeals, the President of the Court of Appeal issued Practice Directions[13] requiring the filing of briefs. This was merely a temporary measure to meet the exigencies of the period.

Under this temporary arrangement, the appellant was required to file his brief of argument with his notice and grounds of appeal, while the respondent had two days within which to file his brief. It must be observed that by virtue of section 132 of the Electoral Act

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5. Martineau, R. J. Modern Appellate Practice: Federal and State Civil Appeals (1983) pp. 209 – 211
6. Justice Edward D. Re, Brief Writing and Oral Argument 6th Ed. 1987 p. 179.
7. L. N. No: 48 of 1977.
8. See Ord. 9 rule 3 (1) Supreme Court Rules, 1977.
9. See Ord. 9 rule 3 (2) of the 1977 Rules
10. See Ord. 9 rule 3(3) of the 1977 Rules
11. CAP. C 23, Vol. 3 Laws of the Federation of Nigeria, 2004
12. See generally, Ord. 6, Supreme Court Rules, 1985.
13. See Practice Direction, No. 1 of 1983 (S.1.40 of 1983)

of 1982[14], the appellant had a maximum period of fourteen days to appeal to either the Court of Appeal or the Supreme Court. Furthermore, under the same section of the Act, both appellate courts were required to give their decisions not later than seven days from the date on which the appeals were filed. All these drastic measures were meant to fast track appeals on election petitions. As will be recalled, the said section 132 of the Act was unanimously declared unconstitutional, null and void by the Supreme Court on the ground that it breached the doctrine of separation of powers and constituted interference by the legislature in the judicial functions of the Courts.[15]

The introduction of brief writing on a permanent basis in respect of appeals before the Court of Appeal took effect from the of 1st of September, 1984 by virtue of the Court of Appeal (Amendment) Rules, 1984.[16] The requirement however did not apply to appeals which had been listed for hearing before 31st December, 1984.[17]
In all the subsequent amendments to the Court of Appeal Rules up-till the present one, the provisions on brief writing have been preserved.[18]

1.2. PURPOSE OF BRIEF

Primarily, the purpose of an appellate brief is to persuade the appellate court to uphold or reverse the decision of the trial court. Briefs are therefore aimed at presenting the issues involved in the case from the perspective of the party on whose behalf the brief was filed. Appellate briefs from both sides can be very valuable to anyone assessing the legal issues raised in the appeal.

The brief seeks to articulate cogent arguments to enable the appellate court reach a verdict whether to affirm or reverse the decision of the lower court on the strength of the available evidence juxtaposed with the provisions of the law, be it statutory law or case-law. The brief may also articulate policy arguments and prevailing social circumstances when appropriate. For example, where the law on the subject appears recondite, vague or broad enough to allow the appellate court some discretion in decision making, the brief can advance formidable arguments putting aside legal technicalities to achieve substantial justice.

Essentially, a brief is an advocacy document, so it must be forcefully persuasive on every issue of fact and law.

The main purpose of the introduction of brief writing in our appellate system is to curtail the time that should have been wasted in the recording of lengthy oral arguments.

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14. No. 8 of 1982
15. See: Unongo v Aper Aku & 2 Ors (1983) 11 S.C. 129; Kadiya v Lar & 2 Ors (1983) 11 S.C. 209; Ibeh v Nzenwa & Ors (1983)11 S.C.295.
16. S. I. 26 of 1984
17. See paragraph 1(2) of S.I. 26 of 1984
18. See generally, Ord. 18 Court of Appeal Rules, 2011.

The brief has become a part of the argument, so that oral argument is now intended merely "*to amplify, articulate and highlight the main points in the brief, whenever necessary*."[19] So most of the time, a counsel simply relies on his brief and adopts the argument therein as his argument in the appeal. At other times, he may complement his argument in the brief with his oral argument.

To a very large extent, the introduction of brief writing has greatly reduced the burden of both the court and the counsel involved in appellate proceedings. In a paper[20] which was presented at a seminar on Practice and Procedure at the Nigerian Institute of Advanced Legal Studies, sometime in 1995, one of our most eminent legal luminaries, **Dr.Mudiaga Odje, S.A.N., O.F.R.**, of blessed memory, lamented his ordeal while arguing the landmark case of D.O. Idudun & Ors. v Daniel Okumagba[21], in which the oral arguments and submissions before the Supreme Court, lasted for a period of two weeks of four working days each, between 29th March and 8th April, 1976.

In the present dispensation, it is virtually impossible to experience such an ordeal on appeal. Brief writing has greatly reduced the stress in appellate proceedings. Highlighting the advantages of the practice**, Niki Tobi J.C.A**. (as he then was) in the case of Weide & Co. (Nig) Ltd. v Weide & Co. Hamburg[22] stated thus: "*Good briefs are pleasant to the Courts. They make the work of the Court easy and simple. On the other hand, bad briefs can be quite irksome and they tend to complicate the work of the Court. Bad briefs give the Judges sleepless nights"*

A cardinal objective of a brief is to define the issues arising in the appeal in order to narrow the scope of controversy between the parties. Like pleadings at the trial court, parties are bound by their briefs and they are not allowed to spring surprises at the hearing of the appeal by canvassing issues outside their briefs. They can only elucidate or expand arguments on issues captured in their briefs. In Nnamani v Nnaji[23], the Court of Appeal, Enugu Division stated the position that "*the law is trite that parties are bound by their briefs in the sense that they cannot freely move in and out of their briefs by way of additions, subtractions or deviations as the case may be"* Also, in Nimateks Associates v Marco Const. Co. Ltd.[24], the court maintained that "*parties are bound by the issues raised in their briefs of argument. They cannot make a case outside their briefs of argument. It is not the function of counsel to add a fresh case readymade in their briefs in oral submission in court.*" The Court of Appeal reiterated the position in more unequivocal terms in the case of Menakaya v Menakaya[25] as follows: "*A party cannot use the forum of oral argument to blindfold the adverse party or the Court to introduce fresh matters completely outside the regime of the briefs. …..Like pleadings at the trial court, parties in an appellate litigation are bound not only by the issues formulated but by the entire briefs before the Court."*

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19. Per Nnaemeka – Agu, J.S.C. in Onifade v Olayiwola (1990) 7 NWLR (Pt.161) 130 at 159
20. Dr.Mudiaga Odje: Brief Writing for the Court of Appeal and the Supreme Court.
21. (1976) 9/10 S.C. 227; (1976) 1 NMLR 200
22. (1992) 6 NWLR (Pt. 249) 627 at 641
23. (1999) 7 NWLR (Pt 610) 313 at 325
24. (1991) 2 NWLR (Pt. 174) 411 at 431
25. (1996) 9 NWLR (Pt. 472) 256 at 288.

2.0. TYPES OF BRIEFS

We must note from the onset that the practice of filing of briefs at the appellate courts is regulated by the rules of the court in question. Appellate briefs are not filed upon the whims and caprices of counsel.

The rules of the various appellate courts identify the type of briefs that can be filed by particular parties and at particular stages of the proceedings. Any brief that is filed contrary to the rules of the court is liable to be struck out as a defective brief.

In the case of Obioha v Ibero[26], **Belgore J.S.C.** emphasised the position thus: *"The rules of this Court require no brief in this matter. Except in substantive appeals, no brief of argument is required for any application except that for leave to appeal or for enlargement of time to appeal. The situations requiring brief of argument are clearly set out in Order 6 rules 1 – 10 and order 10 of the Supreme Court Rules 1985 and so the Court found no rule in support of the brief of argument filed along with this application and it was accordingly discountenanced."*

Upon a careful consideration of the rules of the appellate courts, there are basically three types of appellate briefs. They are: the **Appellant's Brief**[27], **the Respondent's Brief**[28] and the **Reply Brief**[29]. However outside the rules of court, in actual practice, there are a few other briefs which can be entertained by special leave of the court. They include the **Supplementary Brief** and the **Brief Amicus Curiae**. We shall elucidate further on these briefs in this paper.

2.1. THE APPELLANT'S BRIEF

Under the various rules of court, the brief filing process commences with the appellant filing a written brief, being a succinct statement of his argument in the appeal. The period for the filing of this brief varies from one court to the other. At the Supreme Court, the appellant's brief must be filed and served within ten weeks of the receipt of the Record of Appeal.[30] At the Court of Appeal, the period for filing is within forty-five days of the receipt of the Record[31] and at the Edo State Customary Court of Appeal, the period is within thirty days of receipt of the Record.[32]

Notwithstanding the provisions of the rules on the computation of time, in the interest of justice, the Court may shorten or enlarge the time for the filing of the appellant's brief.[33]

The main purpose of an appellant's brief is to present the issues arising in the appeal from the point of view of the appellant. If the appellant is abandoning any point taken in the

26. (1994) 1 NWLR (Pt. 322) 503 at 519
27. Order 6 Rule 5 (i) Supreme Court Rules, 1985; Order 18, Rule 2; Court of Appeal Rules, 2011; and Order 5 Rule 1 Edo State Customary Court of Appeal Rules, 2000.
28. Order 6, Rule 5(2) Supreme Court Rules, 1985; Order 18 Rule 4, Court of Appeal Rules, 2011; and Order5, Rule 3, Edo State Customary Court of Appeal Rules, 2000.
29. Order 6, Rules 5(3) Supreme Court Rules, 1985, Order 18 Rule 5, Court of Appeal Rules, 2011; and Order 5 Rule 4, Edo State Customary Court of Appeal Rules, 2000.
30.. See Ord. 6, r. 5(1), Supreme Court Rules, 1985
31. See Ord. 18, r 2, Court of Appeal Rules, 2011
32. See Ord. 5, r. 1, Customary Court of Appeal Rules, 2000
33. See Ord. 6. r.10, Supreme Court Rules, Rules 1985, Order 18, r. 11, Court of Appeal Rules, 2011 and Ord. 5 r. 10, Customary Court of Appeal Rules, 2000.

court below, this shall be so stated in the brief. Equally, if the appellant intends to apply in the course of the hearing for leave to introduce a new point not taken in the court below, this shall also be indicated in the brief.[34]

Through his brief, the appellant should not only give in advance a deep insight into his case but also an insight to convince the court on the justice of the case.[35]

In the event of the failure of the appellant to file his brief within the time stipulated under the rules, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be struck out.[36]

If the respondent neglects to apply to the court to strike out the said appeal, the Court suo motu is entitled to strike it out. In such a situation the Court would have no choice but to fall back on its power "*to decongest the list of dead cases*"[37]

The point must be made at this stage, that where the respondent is also a **cross appellant**, the **cross appellant's brief** is formulated on the same principles regulating the drafting of an appellant's brief. The cross-appellant's brief is written to convince an appellate court that the decision appealed against is wrong in part. The "purpose of a cross-appeal is to correct an error standing in the way of a respondent in the main appeal.[38]

Essentially, where the respondent has filed a notice of cross-appeal, to all intents and purposes, he becomes an appellant and he has a duty to persuade the court to reverse the relevant part of the decision of the lower court complained against.

2.2. THE RESPONDENT'S BRIEF

A respondent's brief is written to support the decision appealed against and to establish that the decision was correctly entered or made.

At the Supreme Court, the respondent is expected to file and serve on the appellant his own brief within eight weeks after service on him of the brief of the appellant.[39]

At the Court of Appeal, the respondent's brief must be filed within thirty days of the service of the brief of the appellant on him.[40] For the Edo State Customary Court of Appeal, the period is also within thirty days of the service of the appellant's brief.[41]

The respondent's brief shall answer all material points of substance contained in the appellant's brief and contain all points raised therein which the respondent wishes to concede as well as reasons why the appeal should be dismissed.[42]

Where a respondent to an appeal is of the view that the decision appealed against could be supported on other grounds, either in substitution for or in addition to the grounds

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34 See Ord. 6, r. 5(1)(b) Supreme Court Rules, 1985.

35. U.B.N. Ltd. V Odusote Bookstore Ltd. (1995) 9 NWLR (Pt. 421) 558 at 578; Fregene V.U.A.C. (Nig) Ltd. (1997) 3 NWLR (Pt. 493) 357 at 359.

36. See Ord. 6, r. 9 Supreme Court Rules, 1985; Ord. 18, r. 10, Court of Appeal Rules, 2011 and Ord. 5 r. 9(1) Customary Court Rules, 2000

37. Per. Ogundare J.S.C. in Chinme V Ude (1996) 7 NWLR (Pt. 461) 379 at 417

38. Per Oputa J.S.C. in Eloichin (Nig) Ltd. V. Mbadiwe (1986) 1All N.L.R. 1 at 29.

39. Ord. 6 r. 5(2), Supreme Court Rules, 1985

40. Ord. 18 r 4(1), Court of Appeal Rules, 2011

41. Ord. 5 r. 3 (1), Customary Court of Appeal Rules, 2000

42. Ord. 18 r. 4(2) Court of Appeal Rules 2011and Ord.5, r. 3(2) Customary Court of Appeal Rules, 2000.

relied upon by the lower court, such respondent must file a **respondent's notice** highlighting the grounds and must formulate an issue thereon in the respondent's brief of argument.[43]

A respondent's brief should address all the issues raised in the appellant's brief as failure to do so could result in such an issue being deemed to have been conceded.[44] According to **Nnaemeka-Agu J.S.C.** in the case of Okongwu V N.N.P.C.[45]:

> *"For every material point canvassed in an appellant's brief which is not countered in the respondent's is deemed to have been conceded to the appellant*."

On the consequences of the failure of the respondent to file his brief of argument, there is a slight variation in the rules of our appellate courts. At the Supreme Court, if the respondent fails to file his brief, he will not be heard in oral argument except by leave of the Court.[46] The same applies under the Customary Court of Appeal Rules of Edo State[47] However under the Court of Appeal Rules, if the respondent fails to file his brief, he will not be heard in oral argument.[48]

However, a respondent who fails to file his brief at the Court of Appeal may not be entirely shut out from the hearing. Where it considers the circumstances of the appeal to be exceptional, or where the hearing ought to be accelerated in the interest of justice, the Court can waive the provisions relating to the preparation and filing of briefs of arguments either wholly or in part.[49] It may however prove a herculean task to move the Court to waive this requirement where the default is on the part of the respondent alone.

Sometimes in the course of an appeal, the respondent may find it expedient to take up a **preliminary objection** to the appeal. The normal procedure is to first file a **notice of preliminary objection**.[50] Thereafter, the respondent can incorporate his arguments on the preliminary objection in his brief of argument. However, the Supreme Court has approved a more liberal practice in the recent case of Dakolo v Rewane-Dakolo[51] where **Rhodes-Vivour J. S. C.** delivering the lead judgment, stated the position as follows:

> *"Learned counsel for the respondents filed a respondent's brief on 9/10/09. Incorporated in the respondent's brief are arguments on a preliminary objection. This is now accepted practice, as it obviates the necessity of filing a separate notice of preliminary objection. The practice makes it possible for the judge to determine the preliminary object-*

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43. See Ord. 18 r.7 Court of Appeal Rules, 2011 and Ord. 5 r. 6, Customary Court of Appeal Rules, 2000
44. Uche V Eke (1992) 2 NWLR (Pt 224) 433 at 440
45. (1989) 4 NWLR (Pt. 115) 296 at 309
46. See Ord. 6 r. 9 Supreme Court Rules, 1985
47. See Ord. 5 r. 9 (2) Customary Court of Appeal Rules, 2000
48. See Ord. 18, r. 10, Court of Appeal Rules, 2011
49. See Ord. 18 r.11, Court of Appeal Rules, 2011
50. See Ord. 2, r.9, Supreme Court Rules, 1985; Ord. 10, r. 1 Court of Appeal Rules, 2011 and Ord. 7, r. 17 Customary Court of Appeal Rules, 2000.
51. (2011) 16 NWLR (Pt. 1272) 22 at 41

ion with the appeal, thereby saving time."

In essence, the refusal or failure of the respondent to file a separate notice of preliminary objection may not be fatal if he raises the said objection in his brief of argument. On the surface, this liberal approach might give the impression that the court is over indulging a respondent who is trying to circumvent the rules. This may seem to tilt the scales of justice in favour of the respondent to the detriment of the appellant. However, upon an in-depth consideration of the approach, I hold a contrary view. I think this liberal approach is quite harmless. The failure of the respondent to file a separate notice does not place the appellant in any particular disadvantage.

The practice of introducing the preliminary objection in the respondent's brief is a pragmatic approach to kill two birds with one stone. The appellant is not placed in any jeopardy whatsoever. He is entirely at liberty to react to the objection in his reply brief.
For as we shall see very shortly, a cardinal objective of an appellant's reply brief is to address new issues that may have arisen from the respondent's brief.[52]

Finally, the point must be made that it is improper for the respondent to file the respondent's brief before receiving the appellant's brief. In the case of Amaefule v The State,[53] **Oputa J.S.C.** queried such an approach thus:

"The respondent filed its brief before receiving the appellant's brief. This is rather a queer and awkward procedure. A respondent's brief is usually an answer to the appellant's brief. Can anyone answer to that which he has not even seen? I suppose not."

2. 3 REPLY BRIEF

As already stated, the purpose of a reply brief is to enable the appellant to articulate his arguments on some new issues arising from the respondent's brief. A reply brief should not be used to strengthen or repeat the arguments already canvassed in the appellant's brief nor should it be a reiteration of the said arguments. Where there are no new issues raised in the respondent's brief, a reply brief is otiose.[54]

At the Supreme Court, the appellant may file and serve the reply brief, within four weeks after the service of the respondent's brief on him. Except for good and sufficient cause shown, a reply brief shall be filed and served at least three days before the hearing date.[55]

At the Court of Appeal, the prescribed period for filing and service is within fourteen days of the service of the respondent's brief.[56]

For the Edo State Customary Court of Appeal, the reply brief should be filed and served within fourteen days of the service of the respondent's brief but not later than seven clear days before the date set down for the hearing of the appeal.[57]

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52. See Omnia Nig. Ltd. V Dyktrade Ltd. (2007) 15 NWLR (Pt. 1058) 576 and Ord. 18 r. 5 Court of Appeal Rules, 2011.
53. (1988) 2 NWLR (Pt 75) 156 at 174
54. See Olafisoye V. F.R.N. (2004) 4 NWLR (Pt. 864) 580
55. See Ord. 6, r. 5(3), Supreme Court Rules, 1985.
56. See Ord. 18, r. 5, Court of Appeal Rules, 2011
57. See Ord.5, r.4, Customary Court of Appeal Rules, 2000.

As the name implies, a reply brief should reply to the arguments contained in the respondent's brief. If the respondent's brief has joined issues with the appellant's brief, the appellant need not repeat the issues already joined either by emphasis or by expatiation.[58]

It follows therefore that an appellant cannot file a reply brief before he is served with the respondent's brief. Commenting on such a situation in the case of Sodipo v Ogidan,[59] **Ogunbiyi J.C.A**. stated inter-alia:

> *"I would wish to point out however that the appellant's reply brief was filed before the respondent's brief of argument. Same cannot therefore be a response to; in anticipation of that which was not in existence. Regard cannot in the circumstance be had to the reply brief."*

A reply brief becomes imperative when an issue of law or fact is raised in the respondent's brief which requires a reply by the appellant. The failure to file a reply brief can adversely affect the case of the appellant if the issues raised in the respondent's brief are weighty, substantial and relevant in law.[60]

A reply brief must not introduce new issues for determination. It cannot be independent of the main brief. The point was aptly explained by **Niki Tobi J.C.A**. in the case of Essien V C.O.P[61] thus:

> *"If a reply brief contains issue or issues for determination then it has acquired an independent character. It is no more a reply brief but something else. In the instant case, the so called reply brief as indicated above, contains two distinct and different issues not canvassed in the appellant's brief. I do not think I will make use of it."*

Where an appellant fails to file a reply brief within the time specified under the rules, he shall be deemed to have conceded all the new points or issues arising from the respondent's brief.[62] In the case of Okoye v Nig. Const and Furniture Co. Ltd.[63] where the appellants failed to file a reply to dispute the contention of the respondent on a new issue, the Supreme Court held that the appellants are deemed to have conceded that point. The Supreme Court also reached the same verdict in the cases of Odutola v Kayode[64] and Salami v Mohammed.[65]

2.4 SUPPLEMENTARY BRIEF

As the name implies, a supplementary brief is a brief filed in addition or supplementary to the main brief of the appellant or respondent. Strictly speaking, there

58. Ochemaje v State (2008) 15 NWLR (Pt. 1109) 57 at 68
59. (2008) 4 NWLR (Pt. 1077) 342 at 354
60. Mini Lodge Ltd. v Ngei (2009) 7 NWLR (Pt.1173) 254 at 263
61. (1996) 5 NWLR (Pt 449) 489 at 490
62. See Ord. 18 r. 10 of Court of Appeal Rules, 2011 and Ord. 5 r. 9 (3) Customary Court of Appeal Rules, 2000.
63. (1991) 6 NWLR (Pt. 199) 501 at 533
64. (1994) 2 NWLR (Pt.221) 81
65. (2000) 11 W.R.N. 76 at 81

are no provisions under the rules of our appellate courts for the filing of a supplementary brief. In the case of Iwuaba v Nwaosigwelem[66] **Kolawole J.C.A**. frowned at the practice of filing supplementary briefs when he stated thus:

> "*In my view, the Rules do not provide for the filing of four separate briefs, two by the appellants and two by the respondents. I do not think that the Rules provide for supplementary briefs.*
> *In my view, an amended brief ought to be designed to take care of the functions of a supplementary brief. Then if necessary, an appellant may, within fourteen days of the service on him of the respondent's brief but not later than three clear days before the date set down for the hearing of the appeal, file and serve or cause to be served on the respondent, a reply brief which shall deal with all new points arising from the respondent's brief."*

However in actual practice, the courts have recognized the necessity of filing a supplementary brief under certain exigencies. With the leave of the court, a party can file a supplementary brief.[67] In the case of Oduye v Nigeria Airways Ltd.[68], the appellant filed a supplementary brief in order to invite the Supreme Court to depart from, review and overrule its earlier decision pursuant to the provisions of Order 6 Rule 9 of the Supreme Court Rules, 1985 (un-amended).

Also in the case of State v Collins Aibangbee & Anor[69], the appellants in a murder case filed a supplementary brief.

Furthermore, in Din v Attorney-General of Federation[70], both parties were permitted to file supplementary briefs because the Supreme Court suo motu raised two fresh issues at the close of addresses by counsel and thereafter requested both counsel to address it on the issues so raised.

Notwithstanding the foregoing decisions, we must caution that where the rules of court have not made express provision for the filing of a particular court process, counsel should be wary of incurring the displeasure of the court by presumptuously filing such a process. In the case of Okpala & Anor v Ibeme & Ors[71], the Supreme Court frowned at the practice of filing a supplementary brief without leave of court on the ground that the Rules of Court did not provide for the filing of such a brief. **Nnaemeka-Agu J.S.C.** delivering the lead judgment of the Court expressed their disapproval as follows:

> *"Quite apart from the fact that there does not appear to be any authority for filing a supplementary brief ----there is no provision in the rules for filing a*

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66. (1989) 5 NWLR (Pt. 123) 623 at 629
67. See: Okpala v Ibeme (1989) 2 NWLR (Pt. 102) 208 at 220 and Okenwa v Mil. Gov. Imo State (1996)6 NWLR (Pt. 455) 394 at 414
68. (1987) 2 NWLR (Pt. 55) 126 at 154
69. (1988) 3 NWLR (Pt. 84) 548 at 570
70. (1988) 4 NWLR (Pt. 87) 147
71. (1989) 4 NWLR (Pt. 87) 147

supplementary brief ----- there is no provision in the rules for filing a supplementary brief without leave of the Court"

On the whole, I think it is better to avoid the controversies surrounding the filing of a supplementary brief. The admonition of **Kolawole J.C.A.** in Iwuaba v Nwaosigwelem (supra) is quite appropriate. According to His Lordship, the simple solution is to come by way of an application to amend the appropriate brief to incorporate the new points being canvassed. The court will naturally grant an amendment when the interest of justice so dictates.

2.5. BRIEF AMICUS CURIAE

This is a brief filed by a person who is not directly a party to the case but is accepted as a **friend of the Court**. Such a brief is filed with the leave of the court, to assist the court to reach a decision on some intricate legal issues.

Most of the time, the brief of an amicus curiae is filed upon the invitation of the Court to the counsel. Thus in the case of Attorney – General of Ogun State v Alhaja Aberuagba[72], **Bello J.S.C.** (as he then was) observed:

"As the appeal raised very important constitutional issues concerning the Federal and State's taxing powers, we invited all the Attorneys-General in the federation as amici curiae to file briefs of argument on the issues and to appear for oral argument at the hearing. The Attorney-General of the Federation and the Attorneys – General of ten states responded to the invitation ------. I should like to express my appreciation for the assistance given to the Court by learned counsel for the parties and learned amici curiae"

Similarly in the celebrated case of Garuba Abioye & 4 Ors v Sa'Adu Yakubu & 5 Ors[73], dealing with the operation of the provisions of the Land Use Act, 1978, the Honourable Chief Justice of Nigeria invited the Attorney-General of the Federation, all the Attorneys-General of the states as well as five senior advocates to wit: Chief F.R.A. Williams, Kehinde Sofola; Dr. Mudiagar Odje, P.O. Balonwu and Alhaji Abdulai Ibrahim, to submit written briefs of argument and to appear at the Supreme Court for oral arguments. All the invited amici curiae responded to the invitation.

There was however another instance where the Supreme Court issued similar invitations to the Attorneys-General of Anambra and Rivers State. This was the celebrated case of Peenok Investments Ltd. v Hotel Presidential Ltd.[74] To the chagrin of the Court, the

72. (1985) 2 NWLR (Pt. 3) 409
73. (1991) 5 NWLR (Pt. 190) 130 - 256
74. (1982) 12 S.C. 1 at 24

two Attorneys-General did not honour the invitation. Whereupon, **Irikefe J.S.C.** (as he then was) condemned their conduct thus:

> *"When this appeal came before us, we invited the Attorneys-General of both Anambra and Rivers State to come before us and address the Court as amici – curiae. Neither state honoured the invitation of Court. While the Rivers State Government maintained studied silence, the Anambra State sent a reply indicating that it's Attorney-General was out of the country on state duties while the Legal Adviser who had been dealing with the case was bereaved. The utter nonchalance exhibited by these two states over this matter cannot in my view be too strongly condemned"*

However, it is not always at the instance of the Court that a counsel can file brief amicus curiae. Such a brief can be filed upon the application of counsel. In the famous case of Savannah Bank of Nigeria Ltd & Anor v Ajilo & Anor[75], a learned Senior Advocate, **Professor A. B. Kasunmu**, applied to the Supreme Court and was granted leave to file a brief and to address the Court as amicus curiae. In his brief and in his oral submissions, Professor Kasunmu pitched his tent on the side of the respondents. Incidentally, the Supreme Court upheld the submissions of the respondents and dismissed the appeal.

3.0 FORMAT OF A GOOD BRIEF

The precise form for appellate briefs varies from one appellate court to the other, but there are more similarities than differences. The format of the brief is usually set out in the appellate court's rules. The rules generally require that appellate briefs should include the following parts:

(i) The Court in which the appeal is to be argued;
(ii) The Appeal Number;
(iii) The Parties to the appeal;
(iv) The title of the Brief (i.e. appellant's, respondent, reply brief etc);
(v) A table of contents;
(vi) Preliminary Objection, if any;
(vii) Statement of Facts;
(viii) Issues For Determination;
(ix) The Argument;
(x) Conclusion and Reasons;
(xi) List of Legal Authorities; and
(xii) Signature of Counsel and Addresses for service.;

75. (1989) 1NWLR (Pt 97) 305 at 322

Items (i) to (xii) enumerated above are what I consider as the essential parts of an appellate brief. I do not think we need any further elucidation in respect of items (i) to (v). The items speak for themselves. Concerning item (vi) which is on preliminary objections, I have made a few comments on the modus operandi for raising a preliminary objection to an appeal in the respondent's brief of argument. Before I round up the paper, I will make further comments on some errors committed by some appellate counsel in relation to the raising of such objections in their briefs.

In the event, we will consider items (vii) to (xii) under this section seriatim.

3.1 STATEMENT OF FACTS

Incidentally, the appellate courts rules do not expressly provide for a statement of facts. But every experienced appellate court lawyer has come to realise that without a brief statement of the facts culminating in the appeal, the brief would be most unintelligible. The rationale for stating the facts was aptly summarized by the American legal scholar **Professor Llewellyn** as follows:

> *"It is a question of making the facts talk. For, of course, it is the fact, not the advocate's expressed opinions, which must do the talking. The court is interested not in listening to any lawyer rant, but in seeing, or better, in discovering from and in the facts, where sense and justice lie"*[76]

The appellate brief writer should present an account of the facts that is brief, accurate, complete, compelling and persuasive. While the primary purpose of the facts is to persuade the court to rule in your favour, you must not misrepresent the facts either affirmatively or by omission. All material facts must be stated.

However, your facts should not be over inclusive. Don't waste the time of the Court with irrelevant facts and details which cannot advance your case. Moreover, do not include any facts that are outside the record. While stating the facts, you must avoid the appearance of bias or overstatement. If your account of the facts appears balanced, candid and reliable, the Court will frequently rely on your statement of the facts as the authentic version and this will further advance your case. On a practical note, all references to the facts should include a citation of the page and line in the record of appeal.

Usually, the real difficulty involved in the statement of the facts is to determine which facts to include or exclude. The cardinal rule is that of relevancy. Any fact not relevant to the issues for determination in the appeal should be excluded. It goes without saying that the facts that favour your case should be emphasized. You can do this by placing favourable facts in prominent locations and by providing details about them.

76. Llewellyn: The Modern Approach To Counselling & Advocacy, 46 Columbia Law Review, 167.

Place the most favourable facts toward the beginning and the end of your statement of facts. On the other hand, you must de-emphasise unfavourable facts. You can do this by making terse references to such facts without giving the details.

In the statement of facts you must avoid sarcasm, hyperbole or argument. Keep your narration serious and objective. The narration should avoid aspersions against the opposing party, the opposing counsel or the lower court. There should be no room for emotions or sentiments. Any show of bias will automatically compromise the integrity of the brief. The point was pungently made by **Oputa J. S. C**. in Engineering Enterprise of Niger Contractor Co. of Nigeria v Attorney-General of Kaduna State[77], that unless a counsel maintains a balanced position in his statement of facts, by scrupulously presenting the facts without undue bias:

> *"the integrity of his brief will have been seriously compromised and the effectiveness of the brief will suffer as the Court may then approach the brief with a degree of skepticism or even disbelief"*

The requirement for objectivity in the art of brief writing is one of the reasons why counsel are seriously admonished not to prepare the briefs in matters where they are personally involved. In such instances, such a counsel is not likely to give a balanced and unbiased statement of the facts. In the case of Fred Egbe v Hon. Justice Adefarasin[78], the appellant who is a legal practitioner, prepared the brief himself and made some biased comments which elicited the unfavourable comments of **Oputa J. S.C**. thus:

> *"In this case, the Appellant, a very eminent counsel undertook to conduct his case himself. He who descends into the arena of conflict cannot avoid the dust of the encounter ---- In his introduction, the Appellant in his brief alluded to certain facts, which do not form part of this case either as pleaded or as established by the evidence of the 9 witnesses who testified"*

3.2. ISSUES FOR DETERMINATION

The rules of court provide that the appellate brief shall contain what are in the appellant's view, the issues arising in the appeal.[79] This makes it mandatory for the appellant to formulate issues for determination in his brief of argument. The rules do not make it mandatory for the respondent to formulate issues for determination in the appeal. The rationale for this liberal approach in relation to the respondent was explained in the case of Hope Democratic Party v Peter Obi[80] thus: "*Although by the provision of Rule 7 of the Court of Appeal Practice Directions No. 2 of 2007, a respondent is required to file his brief of*

77. (1987) 2 NWLR (Pt. 57) 38; (1987) 5 S.C. 27 at p. 95
78. (1987) 1 NWLR (Pt. 47) at 19
79. See Ord. 6, r 5(1) (b), Supreme Court Rules, 1985; Ord. 18, r. 3 (1) Court of Appeal Rules, 2011 and Ord. 5, r. 2(1), Customary Court Rules, 2000.
80. (2012) 1 NWLR (Pt. 1282), 464 at 468.

argument, however, there is no mandatory provision that he sets out issues for determination therein. This is because the respondent is at liberty to adopt the issues articulated by the appellant."

The rules however do not preclude the respondent from articulating their own views as to in fact formulate what they consider as the real issues for determination in the appeal. The cardinal rule is that the Court is not bound to accept and determine the appeal based on the issues as formulated by the parties. The Court has the power to either adopt the issues as framed by the parties or to reframe the issues in their entirety, provided they relate to the grounds of appeal. This position has long been settled by a line of cases such as: Akpa v The State.[81], Sha v Kwan[82]; Labiyi v Anretiola[83] and Hope Democratic Party v Peter Obi[84]

The major challenge in the formulation of issues for determination is how to identify the issues arising for determination in the appeal. The focal question is "what really is an issue for determination?" In the case of Chukwudili Ugo v Amamchukwu Obiekwe,[85] the Court maintained that:

"An issue for the purpose of an appeal, must be such a proposition of law or fact, so cogent, weighty and compelling that a decision on it, in favour of a party to the appeal, will entitle him to the verdict of the Court."

Again, in the case of Standard Consolidated Dredging and Construction Co. Ltd & Anor v Katone Crest Nig. Ltd.[86], the Court defined an issue for determination as: *"Such a proposition of law or fact which if resolved one way or the other ought to affect the judgment appealed against"*

In Coker v Olusoga,[87] **Niki Tobi J.C.A.** (as he then was) posited that: "*As a matter of law, a well formulated issue acts as a mirror to the entire brief. What is not contained in the issues formulated goes to no issue and will not be considered by the court in the determination of the appeal"*

The cardinal principle in the formulating of issues for determination is that the issues must arise and be based on the grounds of appeal. They should not be framed in the abstract but in concrete terms arising from and related to the grounds of appeal filed which represent the questions in controversy in the particular appeal. See: Okpala and Anor v Ibeme and Ors[88] and Ehot v The State.[89] The issues for determination help to expatiate, expand or edify the grounds of appeal. They act as a mirror to reflect the grounds of appeal.

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81. (1995) 6 NWLR (Pt. 248) 439 at 466
82. (2000) 8 NWLR (Pt 670) 685 at 710
83. (1992) 8 NWLR (Pt. 258) 139.
84. (2012) 1 NWLR (Pt. 1282) 464 at 485
85. (1989) 1 NWLR (Pt. 99) 566 at 580
86. (1986) 5 NWLR (Pt. 44) 791 at 799
87. (1994) 2 NWLR (Pt. 329) 648 at 658
88. (1989) 2 NWLR (pt. 102) 208
89. (1993) 4 NWLR (Pt. 290) 644

See: Busari and Others v Oseni and Others[90] and Muojekwu v Ejikeme[91]
The purpose of formulating issues for determination in an appeal is to narrow down the matters arising from the grounds of appeal. See: Overseas Construction Company Ltd v Creek Enterprises Ltd.[92]; Ogbuniya v Okudo (No. 2)[93] and Anie v Ugogbe.[94]

For practical purposes, one of the guiding principles to be followed while formulating issues for determination is that a number of grounds of appeal should where appropriate, be formulated into a single congruous issue. When the grounds of appeal have been properly condensed into fewer issues then: *"the argument of an appeal by reference to and along the lines of the issues formulated is trim, neat and concise in its treatment of the questions raised in the appeal."* – **Per Obaseki J.S.C**. in K.S.U.D.R. v FANZ Const. Ltd[95]

In view of the fact that an issue can be formulated from one or more grounds of appeal, it would be wrong for a party to formulate more issues than the grounds of appeal. Where the issues outnumber the grounds of appeal, it amounts to a proliferation of issues which is strictly prohibited. See the following cases on the point: Madagwa v State[96]; Agbeatoba v Lagos State Executive Council[97]; Leeds Presidential Hotel Ltd. v Bank of the North Ltd.[98] and Ebute v U.B.N. Plc [99]

It is axiomatic that an issue for determination which is not supported by any ground of appeal is incompetent. In Baridam v State[100] **Iguh J.S.C.** bluntly made the point that: *"It is trite law that an appellate Court can only hear and decide on issues raised in the grounds of appeal filed before it and that an issue which is not covered by the grounds of appeal must be struck out as incompetent."*
Conversely, where any ground of appeal is not reflected in the issues formulated by the parties, the ground of appeal is deemed to have been abandoned See Odutola v Kayode.[101]

In the case of Schmidt v Umanah[102], **Niki Tobi, J.C.A.** (as he then was) gave a pictorial elucidation of the principle thus: *"A ground of appeal which is not ventilated by an issue is like a building which is not supported by concrete pillars. In the way the building will crash or crumble so will the ground of appeal crash or crumble. This is because they are not supported by any of the issues formulated in the appellant's brief"*

In the formulation of the issues for determination, although the rules of court do not specifically state that counsel must indicate in his brief which of the ground or grounds of

90. (1992) 4 NWLR (Pt. 237) 557
91. (2000) 5 NWLR (Pt. 657) 402 at 428
92. (1985) 3 NWLR (Pt. 13) 407
93. (1990) 4 NWLR (Pt. 146) 551
94. (1995) 6 NWLR (Pt. 402) 425 at 432
95. (1990) 4 NWLR (Pt. 142) 1 at 48 – 49
96. (1988) 5 NWLR (Pt. 92) 60
97. (1991) 4 NWLR (Pt. 188) 664
98. (1993) 1 NWLR (Pt. 269) 334
99. (2012) 2 NWLR (1284) 254 at 255
100. (1994) 1 NWLR (Pt. 320) 250
101. (1994) 2 NWLR (Pt. 324) 1 at 20
102. (1997) 1 NWLR (Pt 479) 75 at 83

appeal are covered by an issue, it is highly desirable that the issue as formulated should be tied to the ground or grounds of appeal. This practice will assist the appellate Court tremendously in *"relating the arguments on the issue to the grounds of appeal they cover, thus saving the time of the Court and enhancing quick disposal of the appeal*"; Per **Edozie, J.C.A**. in Hanseatic Int'l. Ltd v Usang[103]

However since the practice is not mandatory under our rules, the failure to specifically state the ground(s) of appeal from which the issue is formulated will not be fatal to the appeal. In Yusuf v Kode[104], **Tabai J.C.A**. (as he then was) explained the position that "*Ideally the ground or grounds of appeals from which an issue is formulated ought to be specifically stated. I do not think however that the failure so to state is such a defect that warrants striking out or discountenancing the issue and the arguments based thereon. The defect is more as to form than any substance.*" The usual practice is that where the counsel fails to specifically tie the issues to the grounds of appeal, the Court will suo motu identify the relevant ground(s) and tie them to the issues for determination. This is done in the interest of justice, in order not to visit the sin of counsel on the parties. The Supreme Court restated the position in the case of Araka v Ejeagwu[105] that*"------the practice whereby counsel would specify to which ground or grounds of appeal issues relate is to be encouraged ----- Be that as it may, it cannot be overemphasised that the approach which best satisfies the demand of justice is for an appellate Court to consider the issue argued on an appeal as long as they relate to a ground or grounds properly filed."*

In the framing of issues for determination, learned counsel must avoid any form of verbosity. An issue for determination is a concise and precise statement of the complaint of the appellant raised in the grounds of appeal. The issue raised must not be argumentative. Whatever argument is intended to prop an issue should be canvassed in the appropriate part of the brief of argument. See Ojibah v Ojibah[106] and Titilayo v State[107]

The issues for determination ought not to be vague or couched in general terms. They should not be hypothetical but must relate to the dispute at hand. The essence of issues is *"to narrow down the relevant points in controversy"* – Per **Chukwuma – Eneh J.C.A.** in Adah v N.Y.S.C.[108]

In practice, the issues for determination are framed in form of short questions encompassing one or more grounds of appeal and are meant to be a guide to the arguments and submissions to be advanced in support of the grounds of appeal. See the case of

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103 (2002) 13 NWLR (Pt. 784) 376 at 401 – 402
104. (2002) 6 NWLR (Pt. 762) 231 – 245
105 (2000) 15 NWLR (Pt. 692) 717
106. (1991) 5 NWLR (Pt. 191) 296
107. (1998) 2 NWLR (Pt. 537) 235 at 241
108. (2001) 1 NWLR (Pt. 693) 65 at 74

Angyu v Malami.[109] Usually the issues are framed with the commencing word "*whether* ----" But there is nothing sacrosanct about the use of that word. Other alternative opening words are: "*Is", "Should", "May" or "Can*". It is all a matter of the style of the brief writer. The most import consideration is to frame the issues in the form of questions to be determined in the appeal.

Finally, the brief writer must avoid the proliferation of issues for determination. More often than not, when the issues are too many, that gives a signal that the brief writer may have unwittingly framed every slip or ground of appeal as an issue. This cannot be the case. The issues must be cogent and compelling enough to warrant the intervention of the appellate Court. Frivolous and trifling issues have a way of weakening strong and cogent ones. The point was pungently made by **Ubaezonu J.C.A**. in Obot v Akpan[110] that "*appeals are never won by the quantity of issues but rather by their quality in terms of expert formulation. Large quantity of issues results in repetition of arguments and that is not the best approach to brief writing"*

3.3. THE ARGUMENT

Since the introduction of the system of brief writing in the appellate Courts, oral arguments now play a secondary role in an appeal. This is so because under the rules of the various appellate Courts, oral argument will be allowed at the hearing of the appeal only to emphasise and clarify the written argument appearing in the briefs already filed in Court.[111] The appellant shall be entitled to open and conclude the argument. But when there is a cross-appeal or a respondent's notice, the cross-appeal shall be argued together with the appeal as one case and within the time allotted for one case, and the Court may, having regard to the nature of the appeal, inform the parties which one is to open and close the argument.[112]

Furthermore, under the dispensation of brief writing, counsel must always note that it is the issues for determination that are canvassed in argument both in the brief of argument and oral submissions. It is patently and palpably wrong for counsel to canvass argument based on their grounds of appeal.

In the case of Leedo Presidential Hotel Ltd v B.O.N. Ltd.;[113] **Musdapher J.C.A** (as he then was) maintained that: "*It is a settled principle of law, laid down by this Court and the Supreme Court in a plethora of cases, that arguments and submissions are to be canvassed in the brief, on the basis of the issues as formulated and not on the grounds of appeal. It is meaningless to formulate issues arising for the determination of the appeal and then to disregard them and then to proceed to argue the appeal on the basis of the grounds of appeal."*

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109 (1992) 9 NWLR (Pt. 264) 242 at 250

110. (1998) 4 NWLR (Pt. 547) 409 at 420

111. See Ord. 6 r 8 (1) Supreme Court Rules, 1985; Ord. 18, r. 9(1) Court of Appeal Rules, 2011 and Ord. 5, r. 8(i) Customary Court of Appeal Rules, 2000.

112. See Ord. 6 r. 8 (2) Supreme Court Rules, 1985, Ord. 18, r. 9(2) Court of Appeal Rules, 2011 and Ord. 5, r. 8(2) Customary Court of Appeal Rules, 2000.

113. (1993) 1 NWLR (Pt. 269) 234 at 347

The same principle was reiterated in the following cases: Macaulay v NAL Merchant Bank[114]; Alade v Ogundokun[115]; Kim v State[116]; and Kaugama v N.E.C[117]

In the argument of the issues for determination, counsel may argue each issue seriatim or he may argue some issues together. The approach to be adopted by counsel may be determined by the peculiarities of the issues formulated. It may be advisable to take similar issues together in argument. Sometimes, the solitary approach may make the argument more pungent and piercing. Suffice to say that any issue which is not argued in the brief is deemed to have been abandoned. According to **Niki Tobi J.C.A**. in Onuguluchi v Ndu[118], *"It is one procedure to formulate an issue and it is another procedure to argue it. An issue, which is not argued, goes to no issue, as the Court will regard it as abandoned."*

Essentially, the section of the brief where the issues are argued can be regarded as the heart of the brief. This is the persuasive section of the brief, so every word should function persuasively. In drafting the argument, you must try to put yourself in the shoes of the judge. Frame your arguments to convince the court about the justice of your case. There should be a clear analysis of the applicable law, a logical application of the law to the facts and a well articulated presentation that will render your analysis easily convincing.

You must determine the order in which the issues are to be argued in your brief. The general rule is that the strongest and the most viable issues should be argued first. This will enable the Court to be convinced of the strength of your case very early in the brief. If the Court forms a good impression of your case from the onset, it is very likely; the Court will be persuaded by the entire brief. A weak start may make the Court to form the impression that the entire case is weak.

Furthermore, presenting the strongest arguments first will make the judge to read your most cogent submissions when he is most attentive, alert and receptive. However, sometimes, it may be more expedient to present certain arguments first. This is so where there are salient threshold issues to be canvassed such as jurisdictional or other pre-conditional issues which may determine the entire appeal.

In order to facilitate the easy comprehension of the sequence of the arguments in the brief, it is advisable to structure the arguments under identified headings and subheadings related to the articulation of the issues for determination in the appeal.

The presentation of argument should be forceful, concise, persuasive and convincing. For each argument, you should clearly state a major premise and when necessary legal authorities should be cited in support. Where the subject matter is regulated by statutory provisions, the relevant statute should be cited. It is after the statutory provision has been

114. (1990) 4 NWLR (Pt. 144) 282 at 321
115. (1992) 5 NWLR (Pt. 239) 42 at 48
116. (1992) 4 NWLR (Pt. 233) 17 at 50 – 51
117. (1993) 3 NWLR (Pt. 284) 681 at 696
118. (2000) 11 NWLR (Pt. 679) 519 at 554

cited before you introduce case law authorities to expatiate on the operation of the statute. Where the subject matter is regulated by common law or customary law, decided cases should be cited to strengthen the elucidation of the legal principles involved. When relying on decided cases, you must do more than just citing the cases. You must analyze the cases supporting your argument and where appropriate, refer to the facts, the ratio decidendi and sometimes the dictum of the court.

After presenting your major premise, that is the relevant law, you must advance your argument by applying the law to the facts of the case. This is your minor premise. In this regard, you must show how the law applies to your case by cogent submissions. To do so, you will need to make reference to some parts of the record of appeal relating to the evidence adduced. Sometimes the facts of your case may be on all fours with the facts of the particular case you have cited. This becomes a major advantage. At other times the facts may be different. You must be able to distill the applicable principle from the facts which tally with your own case.

If you are faced with a situation where your adversary has cited a case which seems to be strongly against your position, you may canvass arguments to show why that case should not be applicable. For instance, you may distinguish the facts of that case with that of the present one.

However, in the course of preparing the brief of argument, counsel may come across an insurmountable or unassailable point of law against his case. The obstacle may be in a statutory provision or in a case decided by a superior court.

Confronted with such insurmountable hurdle, it may be expedient for counsel to concede that obvious point in his argument. The path of integrity and intelligence may so dictate. When a counsel articulates his argument against an obvious point of law, he loses his credibility before the Court. It is not a mark of weakness or lack of intelligence for a counsel to concede an obvious point of law. Such a concession is a demonstration of intelligence, courage and integrity. The Court is most likely to commend such conduct in its judgment. In Adebisi v Odukoya[119], **Adamu J.C.A.** applauded such conduct thus:

"I must begin by commending the attitude and posture of the learned counsel for the respondent in his candid concessions to all the three issues in the appeal as canvassed and argued by the appellant in the appellant's brief. This stance of the respondent, which I believe is in the interest of justice and for the purpose of assisting this Court to arrive at a just decision in the case has been found to be of such assistance to me and has simplified my task or burden in writing this judgment I will therefore in that regard, like to recall the paramount duty of a legal practitioner towards the Court which is to assist the Court and to promote and foster the course of justice rather than misleading the Court by proffering unnecessary and prolonged arguments"

Nevertheless, a counsel may feel very strongly about the justice of his case, even in

119. (1997) 11 NWLR (Pt. 527) 83 at 90 - 91

the face of an unfavourable decision of the Supreme Court. Counsel might hold the view that the decision of the Supreme Court is either unjust or it was given per incuriam. In such a situation, if the appeal is before the Supreme Court, counsel is at liberty to proffer arguments to urge the Supreme Court to set aside its previous decision. The rules of Court make provision for such an argument. Specifically, Order 6, rule 5(4) of the Supreme Court Rules provides that: *"If the parties intend to invite the Court to depart from one of its own decisions, this shall be clearly stated in a separate paragraph of the brief, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons"*

The power of the Supreme Court to overrule itself has been established by a long line of authorities. They include: Bucknor – Maclean v Inlaks Ltd[120], Odi v Osafile[121], Bronik Motors Ltd v Wema Bank Ltd[122], and Clement v Iwuanyanwu.[123]
The rationale for the exercise of this power was explained by **Oputa J.S.C.** (as he then was) in the case of Adegoke Motors Ltd. v Adesanya & Anor[124] as follows:

"We are final not because we are infallible; rather, we are infallible because we are final. Justices of this Court are human beings, capable of erring. It will certainly be shortsighted arrogance not to accept this obvious truth ----- when therefore it appears to learned counsel that any decision of this Court has been given per incuriam, such counsel should have the boldness and courage to ask that such a decision be overruled ----- Learned counsel has not asked us to overrule either Skenconsult or Ezomo supra. If that was what was wanted, the briefs should have said so specifically and the Chief Justice of the Federation would have gladly empanelled a full Court."

To wrap up this segment, it is pertinent to note that when an appeal is called up for argument, and neither the parties nor their counsel appear to present oral arguments, then if the briefs have been filed by all the parties, the appeal will be treated as having been argued and will be considered as such.[125]
Again, when an appeal is called, and it is discovered that a brief was filed for only one of the parties and neither of the parties concerned nor their legal practitioners appear to present oral argument, the appeal shall be regarded as having been argued on that brief.[126]
In the case of Ogbu v Orum[127]**, Obaseki J.S.C**. (as he then was) applied the rule when he stated that "*where briefs have been filed, the absence of the parties or their counsel does not attract any sanction of the Court and the appeal will be treated as having been duly argued and will be considered as such for purposes of the judgment*"

120. (1980) 8 – 11 S.C.1
121. (1985) 1 NWLR (Pt. 1) 17
122. (1983) 5 S.C. 158
123. (1989) 3 NWLR (Pt. 107) 39
124. (1989) 3 NWLR (Pt. 109) 250 at 274 – 275
125. See Ord. 6, r. 8 (6), Supreme Court Rules, 1985; Ord. 18, r. 9(4) Court of Appeal Rules, 2011 and Ord. 5, r. 8(5) Customary Court of Appeal Rules, 2000.
126. See Ord. 6, r. 8 (7) Supreme Court Rules, 1985
127. (1981) 12 N.S.C.C. 81 at 85

3.4. CONCLUSION AND REASONS

Most of the rules of appellate courts require that the brief should include a conclusion. The conclusion is normally a short and perfunctory section where counsel states precisely the relief that is sought and the reasons why the relief should be granted.

The provision of Order 6, rule 5 (5) (b) of the Supreme Court Rules, 1986 states that:

"All briefs shall be concluded with a numbered summary of the reasons upon which the argument is founded"

Furthermore, Order 18, rule 3 (4) of the Court of Appeal Rules, 2011 provides that *"All briefs shall be concluded with a numbered summary of the points to be raised and the reasons upon which the argument is founded"*

From the foregoing, it is apparent that the requirements regarding the concluding part of the brief is more demanding at the Court of Appeal than at the Supreme Court. This is because whereas a brief filed at the Court of Appeal must be concluded with both a numbered summary of the points to be raised as well as the reasons upon which the argument is founded, a Supreme Court brief shall be concluded only with a numbered summary of the reasons upon which the argument is founded. Incidentally, Order 5 rule 2(3) of the Edo State Customary Court of Appeal Rules, 2000 follows the pattern of the Court of Appeal Rules in this regard. It is difficult to fathom the rationale for the disparity in the different rules in this aspect of the manner of concluding the brief.

Essentially, counsel should use the conclusion section as another opportunity to succinctly persuade the Court. Do not simply state that:

"For the foregoing reasons, this appeal should be allowed (or dismissed)."

Instead, in some few and brief sentences, reiterate the key reasons why the appeal should be allowed or dismissed.

In Adegboyega v Awe,[128] the Court of Appeal held that a brief without a conclusion is defective. Furthermore, in F.B.N. v Owie[129] **Akpabio J.C.A**. sounded a note of warning on the danger of ending a brief of argument with a defective conclusion. He stated: *"The two briefs merely ended with 'conclusion', which did not help much. The work of this Court has thereby been made more difficult. This is therefore giving notice that in future, briefs may be rejected if they are not 'concluded with a numbered summary.'"*

3.5. LIST OF LEGAL AUTHORITIES

There are provisions under the rules of Court which require the parties to incorporate in their briefs, where possible or necessary the particulars of the law reports, law books, legal journals and other relevant statutory instruments.[130] Under the Supreme Court Rules,

128. (1993) 3 NWLR (Pt. 280) 224
129. (1997) 1 NWLR (Pt 484) 744 at 752
130. See Ord. 6 r. 5 (5) (c) Supreme Court Rules, 1985; and Ord 18 r. 3(2) of the Court of Appeal Rules, 2011

Order 6, rule 7 specifically provides that at least one week before the date of hearing, a party who has filed a brief shall forward to the Registrar of the Court, a list of the law reports, textbooks and other authorities which counsel intend to cite at the hearing of the appeal. However, such a list need not be forwarded to the Registrar if the party has included the list in his brief of argument.[131] This provision underscores the significant advantage of inserting a list of legal authorities in the brief of argument.

Usually, the list of authorities comes after the concluding section of the brief. The list of authorities is restricted to only authorities cited by the counsel in the brief. For orderly presentation, the authorities should be listed in the alphabetical order. Normally, the decided cases are listed before the statutory authorities. Each authority should include the full citation of the decision or statute as the case may be. If possible, a cross-reference to each page in the brief where the authority is cited may be included. Counsel should be diligent to ascertain the accuracy of the citation of each authority.

3.6 SIGNATURE OF COUNSEL AND ADDRESSES FOR SERVICE

A well prepared brief of argument should be drafted by a legal practitioner and should contain an address or addresses for service.[132] In Okonkwo v U.B.A.Plc,[133] **Rhodes – Vivour J.S.C.** frowned at the practice of counsel arguing a brief prepared and signed by a layman. In his words: *"In this appeal, the Notice of Appeal and the appellant's brief were both signed by Mr. I. Okonkwo, a Company Director and a layman. The signature of Mr. I. Okonkwo on both documents implies that the documents were prepared by him. I must remind Mr. J.O.N. Ikeyi who appeared for the appellants that court business is very serious business. It is unheard of for counsel to argue a brief prepared by a layman. If this is allowed, cranks, professional litigants and those with only a nodding acquaintance with the law will prepare briefs for argument before this Court."*

On the issue of addresses for service, this is a sine qua non for all court processes. The purpose of inserting the address for service is to enable the bailiff effect service of the brief on the other party. The purpose of all types of service of processes is to give notice to the other party of the case against him.

It is settled law that where notice of proceedings is required to be given, failure to give such notice is a fundamental error which renders such proceedings void because the court has no jurisdiction to entertain it. See Madukolu v Nkemdilim[134] and Skenconsult (Nig) Ltd & Anor v Ukey[135]

4.0 PRAGMATIC HINTS ON BRIEF WRITING

Since the introduction of brief writing in our appellate court proceedings, oral_ argument plays an almost insignificant role in appellate proceedings. In the vast

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131 See Ord. 6 r. 7(2) Supreme Court Rules, 1985.

132. See Ord.18 r. 3 (1) of the Court of Appeal Rules, 2011; and Ord. 5 r. 2(1) of the Edo State Customary Court of Appeal Rules, 2000.

133. (2011) 16 NWLR (1274), 614 at 629

134. (1962) 1 All NLR 248

135. (1981) 1 S.C. 6

majority of appeals, oral argument makes no difference. By and large, appeals are won or lost based on the brief of argument. In view of the strategic importance of the brief, counsel must painstakingly master the art of brief writing. There are some salient steps that must be taken in order to package a viable brief of argument.

The first step the counsel must take before putting his pen to paper is to carry out in-depth research on the rules and statutes governing the appellate procedure. While studying the rules, counsel must pay particular attention to provisions stipulating timelines or deadlines, requirements as to the form and content of briefs and other mandatory stipulations. Don't assume that you already know the rules because you recently handled an appeal in the same Court. Rules change and this can alter the procedure.

Next, counsel must familiarise himself with the facts of the case. The best way to master the facts is to study the record of proceedings in the entire case. Apply for a certified copy of the record of proceedings before you get started. In the event that you need to urgently prepare your brief before you receive the record of proceedings, you should source for certified copies of all relevant court processes filed in the course of the proceedings, such as writ of summons, pleadings, motions, charges, affidavits etc, etc., together with the handwritten manuscripts of the proceedings as recorded by counsel. Collate all these materials in order to get a full picture of the proceedings culminating in the appeal. If you did not participate in the proceedings at the lower court, get in touch with the previous counsel and source for some of these relevant materials from him. You may also discuss the prospects of your appeal with the previous counsel in order to solicit his views. He might offer some useful ideas to facilitate your chances in the appeal.

After obtaining the necessary materials, you must settle down to study and master the record. The record will normally include the original processes filed, the exhibits tendered at the trial (if any) and the transcript of the proceedings. After you have mastered the record, it will be advisable for you to proceed to summarise the proceedings in such a manner as to highlight the salient aspects of the case. The idea is to come out with a condensed version of the record that contains only the materials which you require to package your brief of argument. The advantage of this summary is two – fold. First it will enable you to work efficiently without the labour of perusing the entire record over and over again. Secondly, the summary will greatly facilitate your mastery of the cold facts.

Armed with the summary, you must go ahead to prepare an outline of the structure of your brief. Here, you present the brief in a skeletal form. The outline should present your case in a logical and persuasive form. You may structure your outline under different headings and sub-headings that presents a logical argument. Use the outline to make topic headings to highlight each major point in your brief.

In the presentation of your arguments, you must recognise and identify the hierarchy of legal authorities. For example, if your point of law is hinged on a statute, you must quote the statute first and rely on it, before you quote some decided cases on the interpretation or the application of that statute. Even when you are relying on decided cases, it is advisable to rely on the most recent decisions of the most superior courts in Nigeria. Don't rely on foreign decisions where we have local authorities on the point. When relying on case law,

don't just cite a long string of cases without analyzing them. Explain why the cases you have cited should apply to the appeal rather than the cases cited by your opponent.

While writing your brief, adopt a style of writing that is easy to comprehend. A leading authority on the subject of brief writing posited that all good briefs must comply with what he described as the A.B.C. of all legal writing - **accuracy, brevity and clarity**.[136] Another eminent scholar identified the four attributes of a good brief as **simplicity, clearness, brevity** and **order.**[137] Suffice to say that the language of the brief must communicate the submissions with cohesive persuasion. The court should not have any difficulty following the trend of the argument.

In your brief of argument, you must focus attention on each sentence. As much as possible, one thought should be captured in each sentence. Use short sentences. If you use a sentence which is too long, you may lose the attention of your reader or hearer before you get to the end of the sentence.

According to **Lord Denning, Master of the Rolls** (of blessed memory) "*If you write an over-long sentence in your opinion or judgment, the reader will get bemused. He will say to himself, 'I must read that sentence again so as to get the hang of it.' That destroys its effect altogether.*"[138]

But the Master of the Rolls further advised that: "*If you find that you must have a long sentence, break it up with suitable punctuation. Sometimes a dash. At other times, a colon or semi-colon. It enables the reader to get the sense more readily*"[139]

A very crucial stage in the preparation of your brief is the **editing stage**. Even experienced legal practitioners cannot produce a perfect brief on the first draft. Never stop at your first draft. You must go through it. Not only to see whether the draft is accurate but more importantly to see if it is clear to the reader. When you are editing the draft, you must be very objective about your work. Don't assume that you have produced a master piece. Look out for possible errors. Editing is something that should be done on paper, not on a computer. Print the brief out, read it meticulously and edit with a red pencil or biro.

When editing, ask yourself the following questions:

(i) Have you articulated your arguments to resolve the issues in your favour?
(ii) Are there any grammatical or spelling errors?
(iii) Are your sentences too long?
(iv) Are your quotations and references correct?
(v) Are your citations of cases and statutes accurate?
(vi) Is your language civil and polite enough?
(vii) Does the brief pass the test of accuracy, brevity and clarity?

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136. Edward D. Re: Brief Writing and Oral Argument (4th Ed.) pp. 7 – 13
137. Mackay: Introduction to an Essay on the Art of Legal composition 3 L.Q.R. 326 at 338.
138. Denning: The Closing Chapter, p. 61
139. Denning, supra, p. 64.

When you have concluded your editing, it may be advisable to give the edited brief to an experienced and reliable colleague to proof read the brief before filing. As the saying goes, *two good heads are better than one.*

5.0. COMMON PITFALLS TO AVOID

In the course of this write up, I have mentioned some of the common errors to be avoided in the practice of brief writing in our appellate court proceedings. I have highlighted the mistake of counsel arguing the grounds of appeal instead of the issues for determination. We have condemned the proliferation of issues for determination in excess of the grounds of appeal. We have also faulted the formulation of issues outside the grounds of appeal. In this section we shall highlight some further errors that may result in a defective brief.

A common error is in relation to the raising of a **preliminary objection** to the appeal after the respondent has filed the required notice of preliminary objection. Some counsel erroneously formulate an **issue for determination to encompass the preliminary objection**. It is trite law that issues are formulated on the grounds of appeal filed. We have stated that much in this paper.

In the recent case of Trousseau Invest Ltd v Eyo,[140] the Court of appeal made some comments on the point thus: "*The rules do not provide for argument or manner of its presentation in pursuit of the preliminary objection. However, the argument on the preliminary objection is usually incorporated in the respondent's brief and relied upon with the leave of court at the hearing of the appeal. Rather than follow the time tested rule of practice, learned counsel for the 1st to 4th respondents chose to raise his ground of preliminary objection as an issue in the appeal notwithstanding the fact that it is not derivable from the grounds of appeal.*"

See also the following decisions on the point. NITEL v Jattau[141]and Adisa v Teno Eng. Ltd.[142]

Another common error is where a counsel to the respondent files what he terms a "**reply brief**" to respond to so-called new issues arising in the appeal after he has filed his respondent's brief. For the avoidance of doubt, a reply brief can only be filed by the appellant and not a respondent. If there are new issues arising in the appeal which the respondent was not aware of when he filed his brief, the option available to him is to file a motion to amend his respondent's brief to address such unforeseen issues. An amended respondent brief is designed to solve such problems, not a so-called reply brief. See Iwuaba v Nwaosigwelem[143] and Onyekwelume v Ndulue.[144]

There is also the problem of the size of the brief. Going by the definition under our

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140. (2011) 6 NWLR (Pt. 1242) 195 at 206
141 (1996) 1 NWLR (Pt. 425) 392 at 399
142. (2001) 1 NWLR (Pt. 695) 633 at 650
143. (1989) 5 NWLR (Pt. 123) 623at 629
144. (1997) 7 NWLR (512) 250 at 279

rules, an appellate brief should be a **succinct statement** of the party's argument in the appeal.[145] Unfortunately, some lawyers file very voluminous briefs much to the irritation of the Court. In the case of Universal Vulanizing (Nig) Ltd v Ijesha United Trading & Transport Co. Ltd. & 6 ors,[146] **Uche Omo J.S.C**. remarked: *"The document is most certainly not succinct. It is lengthy, otiose and not surprisingly repetitive --- It is to be hoped that this Court will not be inflicted in the future with the tiresome task of wading through such a document."*

Conversely, counsel must avoid the error of filing a brief which is too scanty. In Minister, Federal Ministry of Housing v Alhaji Mustapha Bello[147] **Okoro J.C.A**. emphasised that: "*Although a lengthy argument in a brief is not always advisable, an argument which occupies barely half a page, to me, leaves much to be desired*"
In one case, the Court observed that the brief filed by counsel was "*too brief to be called a brief*"

A common problem is the inability of some practitioners to package their brief in an orderly manner. Sometimes, they simply jumble all the arguments together without bringing them under specific issues. They leave the Court with the burden of sorting out the hodgepodge. In the case of Oguonzee v The State,[148] where this writer appeared for the respondent, **Ige, J.C.A**. frowned at such an approach by the appellant's counsel. His Lordship remarked:

"The counsel for the appellant in this case has lumped up together the argument in respect of all the issues formulated by him leaving the Court to sort out which. With due respect to the learned counsel for the appellant, I must say that his brief falls short of the standard expected in this Court. I had the mind of putting aside his arguments and consider only that of the respondent who set out his issues and arguments on them methodically and according to the rules of brief filing. But this case being a murder appeal, where the life of the appellant is at stake, the sins of his counsel should not be visited on him."

Sometimes, in a desperate bid to adduce further evidence on appeal some practitioners have attempted to exhibit some documents in their briefs of argument. This procedure is altogether wrong. In the case of Attorney-General of Enugu State v Avop Plc., **Niki Tobi J.C.A**. queried the procedure thus: "*What type of procedure is this? A procedure where a document is annexed or exhibited in a brief is not known to me. I have never seen it done by any counsel in my little experience in the Court of Appeal. Certainly, a brief is not where a document or exhibit is made available to the court. That is the function of affidavit or witness in court"*[149]

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145. See Ord. 18 r. 2. and Ord. 6 r. 5 of the Court of Appeal and Supreme Court Rules, respectively.
146. (1992) 9 NWLR (Pt. 266) 388 at 397
147. (2009) 12 NWLR (Pt. 1155) , 345 at 358
148. (1997) 8 NWLR (Pt. 518) 566
149. (1995) 6 NWLR (Pt. 399), 90 at 119

These are some of the pitfalls that practitioners must avoid in appellate court proceedings. The list is not exhaustive. The bottom-line is that counsel in appellate proceedings must be diligent and prudent while handling such cases.
The inexperience or ignorance of counsel can easily jeopardize the prospects of a good case. To be forewarned they say, is to be forearmed.

6.0. CONCLUSION

In the course of my brief sojourn so far as an appellate court judge, I have discovered that many lawyers are not well grounded in the art of brief writing. This is quite an unfortunate situation in view of the strategic importance of the brief of argument in appellate proceedings. More often than not, most appeals are won or lost, on the basis of the briefs filed by counsel. Often times, briefs filed by counsel are found to be poorly prepared without complying with the provisions of the rules of court and the elementary principles of brief writing.

When a brief is badly written, the burden of the court becomes more onerous. Lamenting on the adverse effect of a defective brief, **Uwais C.J.N**. in Shell Petroleum Dev. Co. (Nig) Ltd. v F.R.I.R.,[150] stated that "*Rather than assist the Court to easily follow the argument in support of the questions for determination, they helped in making the arguments complex. Had it been the circumstances were ordinary, we would have no difficulty in striking out the briefs for offending the rules"*

Counsel are advised to study the rules of Court meticulously before preparing their briefs of argument. They should master the record to be completely abreast with the facts. Counsel should source for good precedent briefs from more seasoned legal practitioners. Many learned counsel have produced and filed excellent appellate briefs in many celebrated cases. All that a serious counsel can do is to read some of such excellent briefs and use them as precedents. However, they must be careful not to adopt such briefs wholesale but they should intelligently modify and adapt same to suit their case.

On the whole, I have traced the origin of brief writing in our appellate court system in Nigeria and the rationale for its introduction. I have identified the different types of briefs applicable in the system. The key features of a viable appellate brief have been highlighted. Some practical suggestions on the art of brief writing have been given. Lastly, I alerted on a few common errors to be avoided by practitioners in the exercise.

The subject of brief writing in our appellate courts is too vast to be comprehensively covered by a single presentation such as this. There are more elaborate works on the subject. I wish I could be more elaborate than this. But as the subject is on brief writing, I have tried my utmost best to make this presentation brief. I do not know whether I have succeeded.

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150 (1996)8 NWLR (Pt. 466) 256 at 274

However, in the words of my mentor, Lord Denning, Master of the Rolls, "*Something has, however, been attempted. Something done. You will find it in the previous pages. If I had time, I would have told you more*" [151]

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151. Denning: The Discipline of Law, 315