

**AHMED EZZEDINE**, Respondent/Appellant, *v.* **WADIH SAIF**, Petitioner/Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH  
JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: April 16, 1985. Decided: June 20, 1985.

1. It is the duty of an appellant, including a party whose counsel has died, to superintendent or secure the services of another counsel to superintendent the perfection of his appeal within the time allowed by statute in such cases in order to confer jurisdiction on the Supreme Court and enable it to hear the appeal.
2. A waiver operates to preclude a subsequent assertion of the right waived or any claims based thereon.
3. Rights granted by statute or policy may be waived, and once waived, a party is estopped from asserting them.
4. "Estoppel" means that a party is prevented by his own acts from claiming a right to the detriment of another party who was entitled to rely on such conduct and has acted accordingly thereon. It is a bar or an impediment which precludes allegations of denials of certain facts or state of facts, in consequence of previous allegations, denials, conduct or admissions, or in consequence of a final adjudication of the matter in a court of law.
5. "Estoppel" operates to put a party entitled to its benefit in the same position as if the things represented were true.
6. A notice of completion of appeal is the sole determinant that completes the perfection of the appeal and brings the appellee under the jurisdiction of the Supreme Court.
7. It is the duty of the appellant in appeal cases to see that all documents relating to same are transmitted to the appellate court; and where the records are incomplete, the Court, upon application, will dismiss the appeal.
8. A notice of completion of appeal should be directed to the appellee by the clerk of the trial court, and served and returned served by the ministerial officer of the court that issue the notice.
9. The language of the appeal statute is mandatory and should be strictly followed. Thus, a notice of completion of appeal which directs only that an officer or other person to notify the appellee of the appeal is not a legal compliance with the statute which requires

that more be done.

10. An abandonment is the surrender, relinquishment, disclaimer, or cession of property or of rights. It is the voluntary relinquishment of all rights, title, claim and possession with the intention of not reclaiming it.
11. The intention to forsake or relinquish a thing is an essential element of abandonment, and must be proved by visible acts.
12. A motion for enlargement of time is only applicable and contingent upon the certain prevailing circumstances in which the appellant finds himself and which prevents the perfection of an appeal by him following the death of his counsel.
13. A failure by an appellant to file a return to the service of a notice of completion of appeal is a material error constituting a ground for dismissal of the appeal.
14. After an appeal is announced, and the counsel for appellant dies or becomes physically or mentally incapacitated, or is disbarred or suspended from the practice of law before the expiration of time for filing of the bill of exceptions or appeal bond, the time for the doing of such act shall commence to run anew from the date of death, incapacitation, disbarment, or suspension of such counsel. Rev. Code 1 :51.10.
15. A bill of exceptions or appeal bond shall not be filed by a new attorney of record within the extended time allowed on account of the death of a previous counsel until he has applied for and received permission of the court. Rev. Code 1 :51.10.

The petitioner/appellee filed a bill in equity in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, seeking cancellation of a sub-lease agreement entered into between petitioner and respondent. The petitioner also sought recovery of the amount of \$4,000.00 which was due him by respondent. Judgment having been entered by the court in favor of petitioner, counsel for appellant excepted thereto and announced and appeal. However, following the filing of the bill of exceptions, counsel for appellant died. One year thereafter, appellant retained new counsel to pursue the appeal. The appellant's new counsel, not finding an approved appeal bond and a notice of completion of appeal in the trial court's file, filed two motions, one for diminution of record and a second for enlargement of time to complete the appellant's appeal. The appellee resisted the two motions and in turn filed a motion to dismiss the appeal, noting that the appellant had failed to file an approved appeal bond and to serve and file a notice of completion of appeal.

The Supreme Court granted the motion to dismiss the appeal, observing that the

appellant should have secured the services of a new counsel shortly after the death of his previous counsel, and not wait until the expiration of more than eleven months following the death of said counsel. By his failure to act promptly, the Court said, appellant had abandoned his right to have his appeal heard and had waived his right to take advantage of the statute governing enlargement of time. As such, the Court opined, appellant was estopped from further proceeding with his appeal. Having determined that it lacked jurisdiction over the case, the Court then proceeded to order the *dismissal* of the appeal.

*A. W. Octavius Obey* appeared for the appellant. *Toye C. Bernard* appeared for the appellee.

MR. JUSTICE NYEPLU delivered the opinion of the Court.

On August 31, 1983, Wadih Saif of the City of Monrovia, sued Ahmed Ezzedine to recover an amount of money due him as rental fees for the period commencing July 1, 1983 and ending June 30, A. D. 1984, but which was never paid despite several repeated demands. The respondent filed an answer wherein he denied petitioner's right to recover against him. The petitioner thereafter filed a reply, following which pleadings were rested by the parties. A regular notice of assignment for the disposition of law issues was ordered issued on September 12, 1983, and the notice of assignment was issued, served and returned served, requiring the parties and their counsels to appear on September 15, 1983, for the disposition of law issues. The court having passed on the law issues, the facts were ruled to trial without a jury. The judge gave his final judgment on November 16, 1983, which final judgment we hereunder quote *verbatim*.

#### THE COURT'S FINAL JUDGMENT

"The case having been called for trial upon application of counsel for petitioner, the said petitioner appeared on the stand and was duly qualified and testified to the facts in the case and having perused the records in the case, we conclude that the defendant/respondent is still indebted to the plaintiff in the amount of \$4,000.00 and that the said defendant is hereby ruled to pay the said amount of \$4,000.00 plus whatever accrued amount that will be assessed during the conclusion of this case. Therefore, the arrangement entered into by the petitioner and respondent the subject of this property, the said agreement is hereby cancelled and the defendant is hereby ruled to cost. And so ordered".

To this final judgment of the court, respondent Ezzedine excepted and announced an

appeal to the Honourable Supreme Court of Liberia, sitting in its March A. D. 1984 Term. The trial court granted the appeal.

At the call of the case by this Court, counsel for petitioner/ appellee informed Court that he had filed a motion to dismiss the appeal which motion we hereunder quote:

"That subsequent to the filing of the bill of exceptions, counsel for respondent/appellant, Counsellor Raymond Hoggard, passed away and the respondent/ appellant subsequently retained the services of Counsellor A. W. Octavius Obey to represent him, but had failed to perfect his appeal as provided by statute, that is to say, to file an appeal bond and a notice of completion of appeal as can be more fully seen from a copy of the certificate from the clerk of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, hereto attached and marked exhibit "C" to form a part of this motion.

That instead of perfecting the appeal, counsel for respondent/appellant elected to file a motion for diminution of records as can be more fully seen from copy of said motion hereto attached and marked exhibit "D" to form a part of this motion.

That the failure of respondent/appellant to file his appeal bond and notice of completion of appeal being in violation of the statute, petitioner/appellee respectfully prays this Honourable Court to dismiss the appeal of the respondent/appellant and rule appellant to all costs".

In resisting the motion, respondent/appellant argued that he had previously filed a motion for the diminution of records and a motion for the enlargement of time, both of which he requested the Court to consolidate. He further asked the Court to take his law citations into consideration, same being The Civil Procedure Law, Rev. Code 1 :51.5, 51.7, 51.8 and 51.10. The application for consolidation was granted and both motions were strongly argued by counsel for respondent/appellant. During his argument, appellant's counsel contended that upon being retained, he inspected the case file and thereafter discovered that essential documents such as the appeal bond and the notice of completion of appeal were not in the file. He therefore moved this Court for diminution of records. The motion, he said, was filed on November 23, A. D. 1984, quite a year after the rendition of final judgment in this case by the lower court.

From our careful inspection of the records forwarded to this Court, it is revealed that respondent's original counsel, the late Counsellor Raymond Hoggard, filed a bill of exceptions on November 23, 1983, seven days after the rendition of final judgment. Regrettably, however, whilst Counsellor Hoggard was in the process of filing and/or before

he could tender the respondent/appellant's appeal bond and notice of completion of appeal, Faith or Providence decreed and he departed this life to the great beyond. These are the facts and very peculiar circumstances surrounding the non-filing by the respondent/appellant of an approved appeal bond and a notice of completion of appeal, as prerequisites provided for by our statute in such cases.

While we express our condolences to any party affected by the death of Counsellor Hoggard, we are inclined to remark here that the respondent/appellant made no effort to protect his own interest as the late Counsellor Hoggard had demonstrated from the initial stage of this case. Indeed, following the death of Counsellor Hoggard, respondent/appellant, knowing that his counsel was dead, had the duty to retain the services of another lawyer to superintend the perfection of his appeal which, if done within the time allowed by statute, would have given this Court jurisdiction to review the entire case and examine the errors complained of in the bill of exceptions. Respondent/ appellant, having woefully neglected to retain another counsel, which would have made possible the perfection of his appeal within the statutory time, thereby waived his right of appeal and cannot therefore benefit from the provisions of and the conditions contemplated by the statute with respect to enlargement of time. The law provides that a waiver operates to preclude a subsequent assertion of the right waived or any claim based thereon, even if subsequent events prove the right waived to have been more valuable than anticipated. 28 AM JUR 2d., *Estoppel and Waiver*, § 16. Rights granted by statute or policies may be waived by a party, and if so waived, a party is *estopped* from asserting it. "*Estoppel*" means that a party is prevented, by his own acts, from claiming a right to the detriment of another party who was entitled to rely on such conduct and has acted accordingly. *Estoppel* arises when one is concluded and forbidden by law to speak against his own act or deed. An inconsistent position, attitude or course of conduct may not be adopted to the loss or injury of another. *Estoppel* is a bar or impediment which precludes allegation or denial of a certain fact or state of facts, in consequence of previous allegation, denial, conduct or admission, or in consequence of a final adjudication of the matter in a court of law. It operates to put a party entitled to its benefit in the same position as if the things represented were true. *See* BLACK'S LAW DICTIONARY 494 (5<sup>th</sup> ed.)

These are the contentions advanced by the parties before us. Before we proceed further, we want to note that whilst it is true that we did not hear the merits of the appeal, counsel for the petitioner/appellee during his argument requested this Court to take judicial notice of the records submitted to us from the lower court. In this regard, we discovered that respondent original counsel, the late Counsellor Raymond A. Hoggard, filed a bill of

exceptions on November 23, 1983, seven days after the rendition of final judgment, but there was no appeal bond filed and approved by the trial judge. We also discovered that there was no notice of completion of appeal issued, served and returned served by the sheriff on petitioner/appellee, which notice is the sole determinant that completes the perfection of the appeal and brings the appellee under the jurisdiction of this Court. In substantiation of this, we find support in the case *Ross v. Minus*. In that case, this Court held:

"It is the duty of the appellant in appeals to see that all documents relating to same are transmitted to the appel-late court. Where the records are incomplete, the Court, upon application, will dismiss the appeal." *Ross v. Minus*, 1 LLR 208 (1887).

Further, where a notice of completion of appeal is issued, the service of the notice must be done by the ministerial officer of the court that issued same. In support of this argument, this Court held in the case *Adai et al. v. Jackson et al.* that: "A notice of appeal should be directed to the appellee by the clerk of the trial court, and served and returned served by the ministerial officer of said court". 2 LLR 171, 172 (1914). The essential portion of the text states: "The general principle that a notice of appeal is essential in order to complete the appeal has been well established; but we are now to consider the manner in which the notice should be given."

The statute laws governing appeal provide that the clerk of the court from which the appeal is taken shall, after the bond is filed and payment of costs by the appellant, forthwith issue a notice to appellee informing him that the appeal is taken and to what term; and that the said appellee should appear to defend the same. It is this notice, as so worded, which completes the appeal. The language of the statute is, in our opinion, mandatory and should be strictly followed; a notice therefore, which only directs an officer or other person to notify the appellee is not a legal compliance with the said statute.

Although respondent/appellant filed an approved bill of exceptions within the statutory time, yet for some apparent reason best known only to himself, he insulated himself from all the lawyers. Thus, he seemed to have had no choice but to employ tactics which, when calculated and construed, are tantamount to an abandonment.

Abandonment is the surrender, relinquishment, disclaimer, or cession of property or of rights. It is the voluntary relinquishment of all rights, title, claim and possession, with the intention of not reclaiming it. It is also the giving up of a thing absolutely without reference to any particular person or purpose, as vacating property with the intention of not returning, so that it may be appropriated by the next comer or finder. The intention to forsake or relinquish the thing is an essential element of abandonment to be proved by visible acts. It is

the voluntary relinquishment of possession of a thing by the owner with the intention of terminating his ownership, but without vesting it in any person or persons. From this interpretation of the word abandonment, it can be readily seen that respondent/ appellant abandoned his appeal, because he waited until after eleven months before he retained Counsellor Obey. In so doing, he thereby restricted and prohibited the applicability of the statutory requirement providing for the filing of a motion for enlargement of time. A motion for enlargement of time is only applicable to and its grant contingent upon the prevailing circumstances in which respondent/appellant found himself following the death of his counsel.

Additionally, it is interesting to note that Counsellor Obey, having been retained by respondent/appellant in October, 1984, eleven months after the filing of the bill of exceptions, it was incumbent upon him to file his motion for the enlargement of time. If this had been done, it would have afforded appellant the opportunity, when granted, to file an appeal bond and a notice of completion of appeal, which alone could give this Court jurisdiction to hear appellant's appeal.

This Court, in the case *Where v. Korkor*, held that:

"Failure by an appellant to file a return of service of notice of appeal is a material error constituting ground for dismissal of the appeal. "An appellant is required to superintend the appeal and is responsible for the completion of the requisites thereof". 13 LLR 8 (1957).

It must be emphasized here that promptitude is the beauty of the law which signifies the attribution of a serious and prepared lawyer. Lawyers must at all times stand in readiness unreservedly to superintend their clients interest, and thereby conserve the protection of life and property for which courts are instituted. During the arguments before this Court, counsel for appellee/movant argued that his motion to dismiss respondent/appellant's appeal was cogent, in that, there being no notice of completion of appeal, this Court had no jurisdiction to hear the appeal. Further, in resisting the sufficiency of respondent/appellant motion for enlargement of time, counsel for appellee/movant relied on several law citations contained in his resistance to appellant's motion for enlargement of time, VIDE: Civil Procedure Law, Rev. Code 1 :51.10; Rule of the Honourable Supreme Court of Liberia, §§ IV & V, pp. 38 & 39. *See* also count one of appellee's resistance to appellant's motion for enlargement of time wherein appears the following citations: VIDE: Civil Procedure Law, Rev. Code 1 :51.10, and 1.7(2); count 2 of the resistance; VIDE: *Duncan v. Wreh*, 17 LLR 628 (1966) and *Walsh Construction Company of Liberia v. Klat*, 17 LLR 384 (1966).

Counsel for movant/appellee, further arguing his motion to dismiss and his resistance to respondent/appellant motion for enlargement of time, asserted that the respondent/appellant having neglected to superintend his own appeal, coupled with his not retaining a lawyer following the death of his original counsel, he is estopped from further prosecuting his appeal. Counsel for appellee therefore requested this Court to confirm and affirm the judgment of the court below.

Counsellor Obey, counsel for appellant, in commencing his argument, cited the Court to the following laws: Civil Procedure Law, Rev. Code 1:51.6, 51.7; 51.8 & 51.10. During his argument, the said counsel strongly contended that upon being retained, he inspected the file containing the records of the case; and that upon discovering that essential documents such as the appeal bond and the notice of completion of appeal were not in the file, he moved the Court for diminution of records, which motion he filed in November of 1984, a year after rendition of the final judgment in the case by the lower court. Before we proceed further to address the issues raised by the respondent/appellant, let us look at the statute controlling motions for enlargement of time. Civil Procedure Law, Rev. Code 1 :51.10, at 251, under the caption *Tolling of Time for Acts Required to Complete Appeal*, states:

“If, after an appeal is announced, the counsel for the appellant dies or becomes physically or mentally incapacitated or is disbarred or suspended before the expiration of time for the filing of a bill of exceptions or an appeal bond, the time for the doing of such act shall commence to run anew from the date of the death, incapacitation, disbarment, or suspension of such counsel. A bill of exceptions or appeal bond shall not be filed by a new attorney of record within the extended time allowed by this section, until he has applied for and received permission of the court.” Civil Procedure Law, Rev. Code 1: 51.10.

The Court says that the respondent/appellant, having abrogated this pertinent statutory



provision upon which he could rely, there is no justifiable reason upon which this Court can deny the motion to dismiss appellant's appeal.

The Court holds therefore, that in view of respondent/ appellant nonchalant attitude, especially, when we consider his own voluntary insulation from all the lawyers in the community following the death of his original counsel, the final judgment cancelling the sublease agreement between appellee and appellant should not be disturbed. Accordingly, the judgment of the lower court is hereby confirmed and affirmed with costs against appellant. And it is hereby so ordered.

*Motion granted; appeal dismissed.*