Harris v Cavalla Rubber Corporation [2012] LRSC 13 (17 August 2012)

A. Polo Harris of Pleebo City, Sokoke District, Maryland County, Republic of Liberia APPELLEE/MOVANT Versus **CavalIa Rubber Corporation**, by and thru its General Manager **John Y. Barkemeni**, Gedetarbo, Maryland County, Republic of Liberia APPELLANT/RESPONDENT

MOTION TO DISMISS APPEAL

HEARD: October 25, 2011 DECIDED: August 17, 2012

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

The movant/appellee filed an action of damages for wrong in the 4th Judicial Circuit, Maryland County against the respondent/appellant, Cavalla Rubber Corporation. The case was heard and a final judgment entered on the 10th day of December 2008, in favor of the movant/appellee. Respondent/appellant excepted to the final judgment and announced an appeal to the Supreme Court.

Our Civil Procedure Law, section 51.7 requires that one who excepts to the trial court's final ruling and announces the taking of an appeal should present a bill of exceptions signed by him to the trial Judge within ten days after the rendition of judgment. Section 51.8 requires the appealing party to secure the approval of a bond by the trial judge and file same with the clerk of the court within sixty days. The bond is to the effect that appellant will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or any other court for which the case is removed. Section 51.9 requires that after the filing of the bill of exceptions and the appeal bond, the appealing party shall make application to the clerk of court to issue a notice of completion of appeal, a copy to be served by the appealing party on the appellee. The whole appeal process laid down by our statute, beginning with the announcement of the taking of an appeal, is required to be completed within sixty days. Section 51.16 of the CPLR also provides that failure of the appealing party to complete the appeal process within the time allowed shall be grounds for dismissal of the appeal. Sauid v. Gebara 15LLR 598, 603 (1964). Section 51.16 further states that the motion for

dismissal of the appeal shall be entertained by the trial court where the bill of exceptions is not filed within the statutory time, and by the appellate court after filing of the bill of exceptions but failure to file an appeal bond or to serve notice of the completion of the appeal as required by the statue.

The movant filed a motion seeking the appearance of the parties before this Court for the purpose of dismissing the appeal for lack of jurisdiction based on the appellant/respondent's failure to proceed with its appeal within the time provided by statute, though the bill of exceptions was filed within the statutory time.

Movant alleges that the though respondent filed its bill of exceptions within the time allowed by statute, it filed its appeal bond and notice of completion of appeal on the 10th day of February, A.D. 2009, one day late and beyond the required statutory period of sixty (60) days, and that the notice for completion of appeal was served on the movant on the 26th day of February, A.D 2009, sixteen (16) days beyond the statutory period of sixty (60) days. The movant says the dismissal is warranted based on Sections 51.8 and 51.9 of our Civil Procedure Code.

Resisting the motion to dismiss the appeal, the respondent countered that the one day default in filing its appeal bond was not due to negligence neither lack of diligence on its part or in superintending its appeal; for as will appear from the record, the bill of exceptions were timely approved by the trial judge and filed. The appeal bond, the respondent said, which is in no way defective or Insufficient, was prepared and ready as of January 16, 2009, and the notice of completion of the appeal was typed and updated on the machine several times awaiting the return of the trial judge to the County. The judge had traveled out of Maryland for the Christmas Holiday, and this delay of the filing of the bond and notice of completion of appeal was due to the absence of the trial judge from the County and this ought not to be attached to it. Besides, the respondent further countered, the counsel for the movant departed the bailiwick of the 4th Judicial Circuit during the Christmas holidays and the movant himself returned on February 10, 2009, from the Ivory Coast where he conducts transactions in the sale of rubber. On the same day of February 10, 2012, movant went to see the Judge and met the counsel for respondent who had gone to have the Judge approved the appeal bond. After the

approval of the bond, counsel for the respondent said he had the bond and notice of completion of appeal served on the appellee personally and the movant signed the notice of completion of appeal in the court room of Harper City Hall. Respondent therefore denies Bailiff Roger Ponpon's returns that the notice of completion of appeal was served on February 26, 2009, which was seventeen (17) days after the sixty day period allowed by statute for perfecting an appeal and sixteen days after the notice of completion was issued by the clerk. Respondent prays the Supreme Court to take judicial notice of the notice of the completion of appeal found in the court's records.

The movant filed an answering affidavit countering that respondent's admission that it did not complied with the statute for perfection of an appeal and its reasons given can warrant no exception for failure to perfect an appeal within the required statutory period of sixty days; the respondent's excuse that its default was not due to negligence or lack of diligence should therefore be dismissed. Further, the movant said, with respondent's reference to the absence of the trial judge from Harper, Maryland County, this does not shift the burden of the appealing party from superintending the appeal, for reason that there is presently a commercial plane flight from Maryland County to Montserrado County. Therefore, the respondent should have mailed the appeal bond to the trial judge in Monrovia, or the Counsel himself should have come to Monrovia to process the approval of the bond by the trial Judge within sixty days, that is on or before February 9, 2009.

Movant further said, the respondent allegation that appellee personally signed for the notice of completion of appeal on February 10, 2012, can be referred to the records of the court's file. The notice, movant says, shows no date when it was signed; rather, it is the Sheriff, who served the notice of completion of appeal and whose returns say that the notice of completion of appeal was served on the appellee on the 26th day of February 2009. About seventeen (17) days late and beyond the period of sixty (60) days; that counsel for respondent admits that the opposing lawyer came to Monrovia for the holiday, but counsel for appellant should have come to Monrovia by plane or otherwise to serve the notice of completion of appeal on the opposing lawyer. Failure of which constitutes a gross negligence on the part of counsel for

appellant/respondent. The allegation that movant had returned from the Ivory Coast on the 10th of February where he had gone to sell rubber, movant said, was a total fabrication and misleading statement for reason that the President, Her Excellency Ellen Johnson Sirleaf had placed a temporary stay on the exportation or sale of rubber from Liberia to Ivory Coast. The stay was lifted by the President on the 27th day of March 2009, when she visited Harper, Maryland County, for the induction into office of the Superintendent, J. Gblebo Brown, and said lifting of the ban was far after the date of the 26 February 2009. Besides, the notice of completion of appeal was already filed late on February 10, 2009.

A review of the court's records shows that the trial court made its final ruling in the matter on December 10, 2008. Respondent filed its bill of exceptions to the final ruling on December 15, 2008, well within the statutory time for filing of its bill of exception; however, the record shows that the appeal bond and notice of completion of appeal which should have been filed by the 9th of February 2009, were filed on February 10, 2009, and although the approved appeal bond and notice of completion of appeal were filed on the 10th of February, 2009, the returns of the bailiff of Maryland County, Roger Ponpon, states that the notice of completion of appeal was served on the appellee on February 26, 2009. His returns as written, reads:

On the 26th day of February A.D. 2009, I bailiff Roger Ponpon served this Notice of Completion of appeal on the plaintiff/appellee, A. Polo Harris, and the defendant's counsel, Cllr. M. Fulton W. Yancy, Jr., to appear before the Honorable Supreme Court sitting in its March Term A.D.2009. And Submit.

Dated this 28th day of February 2009.
Sgd.: Roger Ponpon
Bailiff: Md/Co. RL

Interestingly, the movant does not deny the absence of the trial Judge from the bailiwick of the court, but shifts the burden on the respondent whom he says had the responsibility to have located the Judge. The movant said that the respondent should have mailed the appeal bond to the trial Judge in Monrovia or alternatively had its counsel take the commercial flight from Harper which was now operating locally to Monrovia.

How practical this argument of movant is, leaves one wondering. Even if the respondent had decided to mail the appeal bond from Maryland to Monrovia, which mailing address would he have used in Monrovia, especially as the trial Judge is the Resident Circuit Judge of Maryland and to which venue all court related documents should be addressed? Even if the respondent were to take the commercial flight as suggested by the movant, where would the judge have been located in Monrovia?

The Supreme Court in a number of opinions has ruled that a party who takes an appeal from a judgment of the trial court has the duty to superintend his appeal. This however cannot be said to be so unreasonable as to require an appealing party to chase a judge around the country to sign an appeal bond, particularly when the trial judge has left his circuit for the Christmas holidays and has not been assigned to another circuit nor has a subsequent judge been assigned to the circuit. Absence of a judge from his assigned circuit and with no judge available to carry out the duties specifically assigned by statue to a judge should not work hardship on the party requiring said service, and opinions that required an appealing party to go around the country to locate a judge to sign an appeal bond where he is not available works hardship on the appealing party who may not have the finances to go around to locate a judge.

Our courts have granted extension of time for filing of an appeal based on good cause or excusable neglect, that is, a legally sufficient reason for none compliance with the statute on appeal or a failure, which the law will excuse. Good cause or excusable neglect" will be considered where an appealing party fails to take some proper step at the proper time, not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident. The Supreme Court said that to characterize the act of appellant as negligent or delinquent in respect of an appeal, it ought to be shown that there was no impediment to his or her performing the service. Duncan v. Perry. 13 LLR 210, 214 (1958).

The movant's argument that the respondent should have mailed the appeal bond or taken a flight to Monrovia to locate the Judge to sign the bond and have the notice of completion of appeal served on the movant's counsel is untenable and impracticable since it is public knowledge that the mailing system in the

leeward counties has been non-existent since the war, and it is in recent time that the Ministry of Postal Affairs has been trying to establish postal services in the counties which is not operative up to now as far as we are concerned. Also, we are aware that there are no regular commercial flights from Harper to Monrovia. Besides, this Court would find the options put forward by the movant unreasonable since this would works unnecessary hardship on a party who may have a properly legal reasons for review of a judge's ruling but may not be able to have his case heard on appeal where he does not have the finances to take a flight to Monrovia or elsewhere to locate a Judge in order to have his bond approved or to serve his notice of completion of appeal on the opposing counsel. Appeal is a fundamental right under our Constitution which is held inviolable. The Constitution requires the passing of rules and procedures for the easy, expeditious and inexpensive filing and hearing of an appeal; Art. 20(b) Liberia Constitution. Taking a plane to locate a Judge for the approval of a bond or to file a notice of completion of an appeal on the counsel of the adverse party is not inexpensive and is not in conformity with the spirit of our Constitution.

The movant, we observed, has not denied that his counsel or the Judge left the circuit of Maryland County and came to Monrovia for the Christmas. However, this Court has held that under the principle of good cause and excusable neglect, in order for the court to extend the period of an appeal, the appellant should show that he did all he could do under the circumstances to perfect an appeal within the time prescribed by statute. In this case, respondent did not say, and there is no evidence on record that respondent took any action to show good cause why the appeal period should have been extended. For example, counsel for the respondent could have filed an application to the trial court for extension of the appeal period due to the absence of the judge from the circuit, and request the approval of the bond nunc pro tunc upon the Judges arrival and the extension for filing and service of the notice of completion of appeal. Alternatively, because the bill of exception had been filed and the sixty day period had elapsed, which divest the trial court of jurisdiction the respondent should have filed a motion for enlargement of time for failure to act as a result of good cause or excusable neglect. Section 1.7(2) our CPLR states:

Enlargement: when under this title or by a notice given there-under or by order of court an act is required or allowed to be done at or within a

specified time, the court for cause shown may, except as otherwise provided by law, at any time in its discretion: (a) order the period enlarged if application is made before the expiration of the period originally prescribed or as extended by previous order, or (b) upon motion made after the expiration of the prescribed period permit the act to be done when failure to act was the result of excusable neglect.

This case is somehow analogous to the case, Ahmar v. Gbortoe, reported in Volume 42 of the Liberia Law Report, page 117 (2004).

In this case, a petition for judicial review was brought before the 13th Judicial Circuit for Margibi County on a labor matter of wrongful dismissal. Movant Rami Ahmar, motioned the trial court to strike the returns filed by the respondent, stating as ground therefor that the Rami brothers was a corporation and he could not personally be held liable for the acts of the corporation. The trial judge granted the motion, struck the respondent's returns and dismissed the wrongful action, stating that Rami Ahmar had been wrongfully made a party defendant to the labor action. From this ruling the respondent appealed to the Supreme Court.

The movant, Ahmar, filed a motion to dismissed the appeal, alleging that the respondent appeal bond was approved, filed, and served on the sixty-first day after the ruling of the trial court and the announcement of the taking of the appeal, and the notice of completion of appeal was also filed and served on the sixty-first day in violation of the statute.

The respondent filed his resistance stating that though the bond should have been filed on the sixth day from the date of the final judgment, he was incapacitated between February 19, 2002 to the 25, 2002, when the respondent was abducted by the Liberians United for Reconciliation and democracy (LURD) rebels during the attack on Bong Mines. This situation, the respondent said, created a situation of impossibility of performance, creating a situation over which respondent had no control and could not complete the appeal within the statutory time.

Justice Felecia Coleman, delivering an opinion on behalf of the Supreme Court, said that the respondent failed to take the appropriate legal

measures necessary to avert the dismissal of the appeal. There was no evidence from the record, she said, where respondent requested for addition time to complete the appeal. The statute provides for enlargement of time by the court if notice is given and cause shown that an act could not be done due to excusable neglect but the counsel for the respondent failed to file a motion for the enlargement of time before the trial court after the alleged abduction of the respondent by LURD which allegedly made it impossible to have respondent timely perfect the appeal as required by law. The respondent having brought this information for the first time only in his resistance to the motion to dismiss the appeal before the Supreme Court, the information and excuse was belated. The Court ruled that the alleged abduction of the respondent, in the absence of any evidence or any request for enlargement of time, does not excuse the respondent for his untimely completion of the appeal.

We uphold this principle that an appellant who has been unable to perfect his appeal due to good cause should take the appropriate legal measures for enlargement of time to complete the appeal so as to avert the dismissal of the appeal. However, in this case, where obviously the failure to have a bond approved was due to the absence of a judge from the circuit, a delay in approving the bond which was prerequisite to the filing of the notice of completion of appeal should be considered by this Court as good cause for the extension of the appeal process, especially where the length of delay was only a day and not substantial, and the act of the court should not prejudice a party. This Court, in determining whether to consider the extension of the time for filing a notice of completion of appeal on the grounds of excusable neglect, should consider all relevant factors, including the danger of prejudice, the length of delay and its potential impact on judicial proceedings, the reason for the delay and whether it was within the reasonable control of the movant. The respondent could not have filed the notice of completion of appeal unless the appeal bond was approved and filed. This Court in the case Adutum v. Wallar decided January 21, 2010, October Term 2009, stated that dismissal at the appellate level constitutes a harsh sanction, and in furtherance of our Constitution, we prefer that an appellate court address the merit of an appeal whenever

possible, so that any doubt may be resolved in allowing, rather than dismissing an appeal.

This brings us to the allegation that the bailiff returns shows that the notice of completion of appeal was served on the movant, sixteen (16) days after the bond was approved by the trial Judge.

Our Civil Procedure Law Rev. Code 1:51.9 Notice of Completion of Appeal Reads:

After the filing of a bill of exceptions and the filling of the appeal bond as required by sections 51.7 and 51.8, the clerk of the trial court on application of the appellant shall issue a notice of the completion of the appeal, a copy of which shall be served by the appellant on the appellee (emphasis ours). The original of such notice shall be filed in the office of the clerk of the trial court" Ruling on the issue of service of the completion of the appeal, this Bench on June 27, 2008, March Term 2008, in the case Kashouh v. Bernard upheld the ruling in the case, Pentee v. Tulay, 40LLR 207 (2000) when we held that section 51.9 of our Civil Procedure Law gives the appellant the authority to serve on the appellee the notice of completion of the appeal and to file the original notice with the clerk thereafter, and the sheriff is without authority to serve a notice of completion of appeal.

The filing date on the notice of completion of appeal is February 10, 2009, and it carries the movant's signature though it has no date showing when the movant signed for and received a copy of the notice of completion of appeal. In Kashouh v. Bernard (ibid), we quoted a portion of the Pentee v. Tulay ruling which states:

The Legislature in its wisdom decided to remove the middle-man bureaucracy and place the responsibility directly on the appellant to locate the appellee and to ensure that the actual performance of the service of the notice on the appellee was done by the appellant, so that if there were any neglect or failure, the appellant would have no one to blame but itself. Under the old law, wherein the Sheriff was the one to effect that service, the appellant usually argued that he could not be held responsible for a ministerial function not imposed on him, but this was rejected by the Supreme Court which thought and held otherwise.

That is why, the duty to effect service of the notice of completion of the appeal is now imposed on the appellant, the returns of the Sheriff as to the service, has now been replaced by the signature of the appellee on the face of the notice of completion of the appeal. The signature of the appellee confirms appellee's knowledge of the completion of the appeal.

The respondent stated that the movant was in the courtroom on February 10, 2009, the day the bond was approved; thereafter, counsel for respondent served the movant with a copy of the bond and the notice of completion of the appeal in line with the statute requiring service before filing of the notice with the clerk of the trial court on the same day.

The bailiff's returns that the notice was served by him on the movant, on February 26, 2009, sixteen days after the filing with the clerk the notice of completion of the appeal, cannot be considered by this Court since his service is contrary to the statute and cannot constitute services as provided under our law, that the appellant shall serve the appellee with the notice of completion of appeal and file the original of the notice with the clerk of the trial court.

We have also observed from the records quoted herein that the movant did not out-rightly deny the respondent allegation that he was served in the courtroom by counsel of the respondent after the bond was signed by the Judge on February 10, 2009. Count 9 of movant's answering affidavit filed to the respondent's resistance to the motion to dismiss reads:

That as to count seven (7) of the resistance that movant/appellee, A. Polo Harris, signed the Notice of Completion of Appeal along with Counsellor M. Fulton W. Yancy, Jr., page two of the Notice for the Completion of Appeal which they both signed, shows no date when movant signed the notice; however, the Sheriff, who served the Notice of Completion of Appeal, returns shows that the Notice of Completion of Appeal was served on the Appellee on the 26th day of February 2009.

Clearly this material issue should have been out-rightly denied by the movant in his answering affidavit quoted above if respondent's allegation of service was not true, instead of his avoidance that there is no date on the document showing when he received the notice and the Sheriff's returns shows when the notice was served. The filing date of the notice being

February 10, 2009, and said notice carries the signature of the movant, this Court has no alternative but to deduce that that the notice was served before it was filed in accordance with the statute.

Reference what we have stated above, coupled with the fact that this Court has said failure of a party to deny a material fact within his knowledge warrants an inference that it is true Tolbert vs. R.L 30LLR 3, 23 (1982), we are inclined to believe the respondent's contention that the notice was served on same day, February 10, 2009, when the bond was approved, and the notice filed with the clerk thereafter.

For factual and legal reasons already stated above, we are constrained to allow the extension for the approval of the appeal bond and the service of the notice of completion one day after the required sixty day period for reason of good cause. We have considered all relevant factors, including the danger of prejudice, the length of delay and its potential impact on judicial proceedings. The motion to dismiss is therefore denied and the hearing into the main case ordered proceeded with. Cost disallowed. AND IT IS HEREBY S0 ORDERED.

THE APPELLANT WAS REPRESENTED BY COUNSELLORS M. KRON YANGBE AND NYANTI TUAN OF THE TUAN WREH LAW FIRM, AND THE APPELLEE WAS REPRESENTED BY COUNSELLORS JAMES E. PIERRE AND N. OSWALD TWEH OF THE PIERRE, TWEH & ASSOCIATES LAW FIRM.