

Henries v. Kollie [2012] LRSC 11 (16 August 2012)

Majorie P. Henries by and thru her husband, **George E. Henries** of Weedbridge, New Jersey, U.S.A and represented by her Attorney-In-Fact, **Moses Harris** of Paynesville, Liberia, MOVANT Versus **Richard Kollie** of the City of Monrovia, Liberia, RESPONDENT

MOTION TO DISMISS

Heard: August 13, 2012 Decided: August 16, 2012

Mr. Justice Ja'neh delivered the opinion of the Court.

His Honor Judge Peter W. Gbeneweleh on October 26, A.D. 2009 entered a final judgment in an action of ejectment, concluding as follows:

it is the Final Judgment of this Court that the Verdict of the empanelled Petty Jury is hereby confirmed. The Defendant is hereby liable to the Plaintiff. The Verdict of the empanelled Jury does not award any damages to the Plaintiff and this [court] cannot award any damages that were not awarded [by] the Jury.

The Clerk of this Court is hereby ordered to prepare [a] Writ of Possession, and place same in the hands of the Sheriff to oust, eject and evict the Defendant from the subject property and place the Plaintiff in possession thereof, with the aid of the qualified surveyor in keeping with the Metes and Bounds of three (3) lots contained in her two separate title deeds.

Counsellor Richard K. Flomo, Sr., counsel for Appellant/Plaintiff excepted to the final judgment and announced an appeal therefrom to this Court sitting in its March Term, A. D. 2010. The trial court granted the appeal as a matter of law. This Court remarks that except from a final judgment rendered by the Supreme Court of Liberia, appealing from a final judgment of a tribunal, as the final judgment under review, is a right guaranteed to every person by the Liberian Constitution and the statutory laws of this country. Article 20(b), Liberian Constitution (1986); Section 51.2, ILCLR (Liberian Code of Laws Revised, title I, (Civil Procedure Law, [1973]) and numerous opinions of this Court have articulated this point. The Bong Mining Company v. Benson, 34 LLR 592, 607 (1988); The Liberian Bank for Development and Investment (LBDI) v. Holder, 29 LLR 310, 315 (1981); Fahnbulleh v. Lamco J.V. Operating Company, 32 LLR 94, 95 (1984); Gray v. The Intestate of the Late David Sampson, 40 LLR 38, 47 (2000).

But when the matter on appeal was called for hearing at this forum, our attention was called to a motion filed by appellee's counsel, dated April 1, 2010 dated April 1, 2010. The seven count motion praying this Court to dismiss the Appellee's appeal substantially states the grounds thereof, as follows:

1. That the Final Ruling in the above cause of action was rendered on the 26th day of October A.D. 2009, adjudging the Respondent liable to the Movant, ordering the said Respondent to be ejected and ousted from the Movant's property. Your Honors are most respectfully requested to take judicial notice of the case file.

2. Movant further says that the Respondent's Counsel excepted to the aforesaid Ruling and subsequently announced an appeal to the Honorable Supreme Court. The appeal was granted by the court below.

3. Movant further says that on the 6th day of November, A.D. 2009, the Respondent's Counsel filed a five (5) count Bill of Exceptions which was accordingly approved by the presiding Judge as in keeping with law.

4. That on February 9, 2010, more than three months after the Ruling was had, the Movant herein applied for and obtained a Clerk's Certificate from the court below confirming that the Respondent has failed and neglected to file an Appeal Bond and Notice of Completion of Appeal. Your Honors are most respectfully requested to take judicial notice of the case file.

5. Movant further says that although the transcribed records contained an alleged approved Appeal Bond, the said Bond was never on the case file up to the 9th of February 2010 when the Clerk's Certificate as indicated in count four above, was applied for and obtained from the court below.

6. Movant further avers and says that assuming without admitting that the Respondent filed an Appeal Bond and same was approved on the 13th of January, 2010, the said Appeal Bond was filed outside the statutory period of sixty (60) days as required by law and therefore a fit subject for dismissal.

7. Movant further avers and says that the failure by the Respondent to have filed an Appeal Bond and a Notice for the Completion of Appeal within the time prescribed by the statute is a ground for the dismissal of the Appeal for which Movant so prays.

Wherefore and in view of the foregoing facts and circumstances, Movant most respectfully prays Your Honors to dismiss Respondent's Appeal and order the court below to resume jurisdiction and enforce its judgment as in keeping with law,

with the cost against the Respondent, and also grant unto the Movant all other rights that Your Honors may deem just, legal and equitable.

Attached in support of the averments contained in the Motion to Dismiss Appellant's appeal was a Clerk's Certificate, bearing the date February 9, 2010. The certificate appears to be duly signed by Ellen Hall, Clerk of Court, Sixth Judicial Circuit, Montserrado County, Republic of Liberia, attested by both Nancy Washington and Emma Washington, File Clerk and Assistant File Clerk of said court. We shall comment on this Certificate later in this opinion.

We must remark here that the statute, section 51.4, ILCLR, (Liberian Code of Laws Revised, title I, [Civil Procedure Law], (1973), directs the following as indispensable acts for completing an appeal:

- (a) Announcement of the taking of the appeal;
- (b) Filing of the bill of exceptions;
- (c) Filing of an appeal bond;
- (d) Service and filing of notice of completion of the appeal.

But the averments constituting the basis for the motion to dismiss the appeal charged the Respondent/Appellant of not performing certain mandatory acts: that Appellant failed to file an appeal bond and also neglected to serve and file the Notice of Completion of the Appeal.

As can be seen, Appellee's allegation that the Appellant failed to file an appeal bond and also neglected to serve the notice of completion of the appeal on the appellee, if supported by the records, would, in effect, deprive the Supreme Court from exercising its appellate authority to review the case on its merits. *Monrovia City Corporation v. Brown*, 38 LLR 512, 516 (1998); *Totimeh-Hansen v. Hansen*, 31 LLR 228, 230 (1983); *Marh v. Sinoe*. 27 LLR 320, 324-5 (1978).

As to the basis for the motion, the parties, as the certified records to this Court show, are in perfect agreement that His Honor, Peter W. Gbeneweleh, on October 26, A.D. 2009, entered Final Ruling in the Action of Ejectment. There is also no incongruity that Appellant's appeal therefrom was announced and duly granted according to law. That the Respondent/Appellant filed the Bill of Exceptions on November 6, 2009, containing five (5) counts and that Judge Gbeneweleh approved said Bill of Exceptions on the same said date, (November 6, 2009), is also not in dispute.

Although Movant/Appellee has not questioned the timely filing of the Bill of Exceptions as required by law, simple arithmetic counting suggests that said Bill of Exceptions was in fact filed and approved outside the statutory time. Counting

from October 27 to November 6, 2009, would clearly amount to eleven (11) days. This is certainly not within the time allowed by statute for the filing of the Bill of Exceptions. We must remark here that the Movant/Appellee failed to raise this point in the Motion to Dismiss the Appeal.

We must note also that late filing of the Bill of Exceptions, as it obtained in the case at bar, is an incisive violation of the statute. Section 51.7, I LCLR (Liberian Code of Laws Revised) title I, Civil Procedure Law, (1973)], states, *inter alia*: "...the appellant shall present a bill of exceptions signed by him to the trial judge within ten days after rendition of the judgment..." [Emphasis supplied].

The statute also speaks to the consequence for failure to file the Bill of Exceptions within ten (10) days as fixed by statute. Section 51.16, I LCLR (Liberian Code of Laws Revised) title I, Civil Procedure Law, (1973) sets forth the following:

An appeal may be dismissed by the trial court on motion for failure of the appellant to file a bill of exceptions within the time allowed by statute.

In addition to Respondent's failure to file the Bill of Exceptions within statutory time, it is submitted by Movant/Appellee that on February 9, 2010, more than three months after rendition of the Final Ruling. Movant/Appellee obtained a Clerk's Certificate seeking to confirm and support the averments that Respondent/Appellant actually neglected and failed to file an Appeal Bond and also to serve the Notice of Completion of Appeal on the Appellee within statutory time. The Clerk's Certificate, dated February 9, 2010, and signed by the Clerk of Civil Law Court, Ellen Hall, states, in relevant part, as quoted: "This is to certify that from a careful perusal of the records of this Honorable Court, it is observed that the Defendant/Appellant in the above entitled cause of action has failed to file in this Court his Notice of Completion of Appeal in the above entitled cause of action up to and including the issuance of this Clerk's Certificate. HENCE THIS CLERK'S CERTIFICATE.

On the face of the Clerk's Certificate, we note that no reference is made to the Appeal Bond. This being the case, Movant, not surprisingly, has disputed the correctness of any the transcribed records which included copy of an approved Appeal Bond. According to Movant/Appellee, no such Approved Bond was ever filed up to February 9, 2010, the date the Clerk's Certificate was applied for by the Movant/Appellee and issued by the trial court. So Movant/Appellee has argued that assuming Respondent/Appellant had filed the Appeal Bond and obtained the judge's approval on January 13, 2010, said filing of the Appeal Bond would have still been outside the statutory period of sixty (60) days; that such late filing would render the entire appeal a fit subject for dismissal.

But Respondent/Appellant, in resisting the motion to dismiss the appeal, has vehemently denied the averments set forth in said motion, stating essentially as follows:

1. That as to counts one (1) through three (3) of Movant's Motion, Respondent submits and says same contained no traversable issue and need not be traverse.

2. That as to count four (4) of Movant's Motion Respondent denied same and says further that Movant has misinformed this Honorable Court as to the averments contained in the subject Clerk's Certificate issued on February 9, 2010; in that, there is no averments on said certificate to the effect that Respondent has failed and neglected to file an appeal Bond as claimed by Movant in count four (4) of Movant's Motion. Respondent most respectfully requests your Honors to take Judicial Notice of said Clerk Certificate.

3. That as to count five (5) of the Movant's Motion, Respondent denied same and says further that Movant is alleging an allegation against the court staff for which he has no evidence; in that, the clerk certificate did not establish this allegation. Assuming without admitting that the Appeal Bond was not on the case file up to the 9th of February 2010 as alleged by movant, the Clerk's Certificate would had reflected same. Hence, count five (5) of Movant's Motion must be overruled and dismissed.

4. That as to count six (6) of Movant's Motion, Respondent denies same and says that the appeal Bond was filed within the statutory period of sixty (60) days as provided by statute; in that, Final Judgment was rendered on October 26, 2009 and Respondent filed his Appeal Bond on December 6, 2009, about forty (40) days after the rendition of final ruling. Hence, contrary to Movant assertion that Respondent did not file his appeal Bond within the statutory period of sixty (60) days, Respondent says same is not true.

Respondent most respectfully requests Your Honors to take Judicial Notice of the filing date of the Appeal Bond.

5. That as to counts four (4) through seven (7) of Movant's Motion, Respondent says that the averments contained therein are associated with distorted facts for which same should not be countenanced by this Honorable court, since indeed and in fact, movant has elected to give misleading information to this Court of last resort which act is highly contemptuous.

6. Respondent submits and avers that appeal is a constitutional right of every citizen of Liberia including Respondent and Movant should not apply falsehood and tactic to deny the Honorable Supreme Court of Liberia from reviewing all of the evidence in this case. Respondent further submits that the

Movant is applying Microscopic technicality to have this Appeal denied; however, such technicality defeats the ends of transparent justice which this Honorable court should not countenance. Such microscopic technicality cannot operate against Respondent; in that, Respondent has substantially completed the appeal process including the transcribing the entire records in this case by evidence of list of records dated March 2, 2010 signed by Mr. Victor G. Gailor, Assistant Clerk, Civil Law Court.

7. Respondent submits and avers that his grantors obtained Judgment in their favor in 1988 from this very Honorable Supreme Court for the same subject property and this Honorable Court of last resort is the final arbiter of all disputes as provided by the 1986 Constitution of Liberia. Movant being quite aware that this Honorable Supreme Court has given Final Judgment to Respondent's Grantors for the self-same property, said Movant is applying microscopic technicality to defeat transparent justice for the Supreme Court is designated as the final arbiter of all disputes and this case is not an exception. Respondent further submits that the Honorable Supreme Court cannot repudiate its own Judgment in this case. Annexed hereto are photocopies of the Supreme Court two Judgments referred to for your Honors perusal and future reference.

8. Respondent submits and says when will a matter ever come to a final end since the Supreme Court is final arbiter of all disputes as envisage in the constitution of Liberia? Several times, the Supreme Court of Liberia has rendered Final Judgments in favor of the Dennis, the grantors of Respondent and this case is no exception.

9. Respondent denies all and singular the allegations as contained in Movant's Motion not specifically traverse in Respondent's Resistance.

Wherefore and in view of the foregoing, Respondent most respectfully prays this Honorable Court to deny and dismiss Movant's Motion in its entirety; and to further grant unto Respondent such relief, justice and rights may demand in the premises.

Both the motion and the Resistance thereto raise the question whether the records before us support the existence of sufficient factual and legal grounds to warrant dismissal of the appeal.

It is worth observing that Respondent/Appellant both in the resistance and during argument before this Court, insisted that the Appeal Bond was filed within the period of sixty (60) days as provided by statute; that the Appeal Bond was filed on December 6, 2009, forty (40) days after the rendition of final ruling.

This Court, over and over again, has diligently perused and painstakingly searched the entire records certified to us. Unfortunately, we have found no evidence to support Respondent/Appellant's position that there was an Appeal Bond in the certified records approved by the trial judge within the time fixed by statute. Nor was there any showing in the records before us of the Respondent/Appellant serving copy of the Appeal Bond on the Movant/Appellee as stipulated by statute. Section 51.8 I LCLR (Liberian Code of Laws Revised) title I, Civil Procedure Law, (1973), *inter alia*, provides:

Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more legally qualified sureties, to the effect that he 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 of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within sixty days after rendition of judgment. Notice of the filing shall be served on opposing counsel....' [Emphasis Supplied].

A summary of the substantive arguments set forth by both parties provide a logical basis for the following analyzes and conclusions:

(1) The trial records appear to indicate that the Appeal Bond was filed on December 6, 2009, as correctly contended by Respondent/Appellant. However, Respondent/Appellant has elected, rather cleverly we suppose, to remain silent on other key questions of facts and points of law. For instance, Respondent/Appellant has said nothing about the date the Appeal Bond was approved by the trial judge. The reason why Respondent/Appellant avoided this point is supposedly simple. Notwithstanding the filing date to be December 6, 2009, the date of approval the trial judge succinctly inscribed on the Appeal Bond is January 13, 2010. This being the irrefutable evidence before us, we have to take it that the Appeal Bond was duly approved on the seventy ninth (79th) day after the date the appeal was announced and granted by the trial court. It might as well be a plausible argument that the judge, by inscribing January 13, 2010, as the date the Appeal Bond was approved, committed human error. We however find an argument of this kind to be hopelessly flawed. Assuming that the trial judge made such a horrendous mistake, this Court cannot help but wonder why the Respondent/Appellant, in that case, took no steps to bring this 'error of dating' to the attention of the trial court over a period of 27 days, from January 13, 2010 to February 9, 2010, when the Clerk's Certificate was issued.

We note also with dismay that Respondent/Appellant has simply insisted in the resistance that the Appeal Bond was timely filed. But on the issue of service of the

Appeal Bond on the Appellee, a mandatory requirement under the statute, Respondent/Appellant has said nothing. The records are copiously void of any showing that the Appeal Bond was served on Movant/Appellee, in horrific violation of section 51.8, referred to herein above.

(2) Further, and importantly, Respondent/Appellant has urged this Court not to dismiss the appeal on account of non service of the Notice of Completion of the Appeal, which failure in fact constitutes a statutory basis for dismissing an appeal.

Respondent/Appellant, responding, has defended this stance in the brief filed with this Court stating as follows:

Respondent submits and avers that appeal is a constitutional right of every citizen of Liberia including Respondent and Movant should not apply falsehood and tactic to deny the Honorable Supreme Court from reviewing all of the evidence in this case.

Respondent further submits that the Movant is applying microscopic technicality to have this Appeal denied; however, such technicality defeats the ends of transparent justice which this Honorable Court should not countenance. Such microscopic technicality cannot operate against Respondent; in that, Respondent has substantially completed the appeal process including the transcribing the entire records in this case by evidence of list of records dated March 2, 2010 signed by Mr. Victor G. Gailor, Asst. Clerk, Civil Law Court.

The Clerk's Certificate, substantially quoted earlier in this opinion, shows that the Respondent/Appellant committed incurable failure by untimely filing of the Notice of Completion of Appeal in the Ejectment Action counting from October 26, 2009, when the Final Ruling was entered, to February 9, 2010, the date of the Clerk's Certificate was issued. This showing was truly damning. In the face of this overwhelming evidence, Respondent/Appellant has nevertheless denied that both the Appeal Bond as well as the Notice of Completion of the Appeal was filed outside the statutory period of sixty (60) days. It is further contended by Respondent/Appellant that the Clerk's Certificate in fact did not establish that Respondent failed to comply with statute. Respondent/Appellant sets the argument in the manner as quoted: 'Assuming without admitting that the Appeal Bond was not on the case file up to the 9th of February 2010 as alleged by Movant, the Clerk's Certificate would had reflected same. Hence, count five (5) of Movant's Motion must be overruled and dismissed.

This Court says that Respondent/Appellant's arguments as outlined hereinabove, are unfounded both as to the facts of this case as well as the laws controlling. The

statutory duty to serve the Notice of Completion of the Appeal is expressly and squarely placed on the person of the Appellant. Section 51.9, I LCLR (Liberian Code of Laws Revised) title I, Civil Procedure Law, (1973), provides:

After the filing of the bill of exceptions and the filing 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. The original of such notice shall be filed in the office of the clerk of the trial court.' [Our Emphasis].

As can be seen, the language of the quoted provision is clear and begs no further interpretation. The statute leaves no ambiguity in imposing the responsibility of service of the Notice of Completion of the Appeal entirely and strictly on the shoulders of the Appellant. Also, this Court has accordingly upheld this clear meaning of this statutory provision in a number of opinions. *Kashouh v. Bernard* is one such case where Madam Justice Howard-Wolokolie, delivered the opinion of this Court during the March Term, 2008. Our holding in the *Kashouh* case reaffirmed the holding of this Court in *Pentee vs. Tulay*, 40 LLR 207 (2000).

This being the law in this jurisdiction, it is very clear that the Respondent/Appellant cannot properly shift the duty of service of the Notice of Completion of the Appeal and place this responsibility on the shoulders of any court staff, certainly not on the ministerial officer.

We have noted that Respondent/Appellant, not having served the Notice of Completion of the Appeal on the Movant/Appellee, has nonetheless, urged us not to deny the motion to dismiss the appeal citing and relying on three cases: *Blanca, S. A., et al., v. Nestle Products, Ltd., et al.* 24 LLR, 203 (1975); *Levin v. Juvico Supermarket*, 23 LLR, 203 (1974); and, *Adai et al., v. Jackson*, 2 LLR 171(1914). Our review of those cases clearly shows that the facts therein are not analogous to the facts and circumstance obtaining in the instant case.

One forceful argument Respondent/Appellant has advanced and pleaded with us is for this Court to consider the constitutional right of every person to appeal. Respondent/Appellant believes that it would amount to application of pure technicality if we were to grant the motion to dismiss the appeal for the 'simple' reason of Respondent/Appellant's failure to serve on the Movant/Appellee the Notice of Completion of the Appeal. The granting of a motion to dismiss the appeal for the Respondent/Appellant's admitted failure to serve and file the Notice of Completion of the Appeal is pure technicality; therefore, according to Respondent/Appellant, the appeal should not be dismissed in view of the constitutionally guaranteed right of every party litigant to appeal.

We find it rather difficult to agree with this argument as put forth by Respondent/Appellant. Firstly, while there is no question that Article 20(b) of the Liberian Constitution guarantees the right to appeal, the constitutional right to appeal is certainly not self executing. A party must scrupulously satisfy the requirements set by law to avail himself of the opportunity to enjoy the constitutional right of appellate review of a case. This means that a person desirous of exercising the constitutional right to an appeal must express said desire by firstly announcing an appeal as the first mandatory step. The other three requirements for perfection of an appeal must also be strictly satisfied by said party. These include the timely filing of the Bill of Exceptions, the filing of an approved Appeal Bond as well as the serving of the notice of completion of the appeal on the appellee and have same filed at the trial court. So while we reaffirm that the right to appeal is sacrosanct in this jurisdiction, the Appellant deprives himself of the full enjoyment of constitutional right where he/she neglects and fails to invoke and put the appellate review machinery into full gear.

We once again reaffirm the repeatedly stated position of this Court that we will disregard technical objections raised by a party litigant which do not materially affect the case. However, we do not accept as a mere technical objection Respondent/Appellant's failure to serve on the Movant/Appellee a copy of the approved appeal bond and Respondent/Appellee's further neglect and failure to serve on the appellee the notice of completion of the appeal. In our opinion, objecting to such failures, as in the case at bar, is material which, at all times, must claim the serious consideration of this Court.

The Supreme Court reaffirmed an established position of this Court as enunciated in numerous opinions including *Vamply of Liberia vs. Manning*, 25 LLR 188 (1976) and restated *First United American Bank vs. Ali Saksouk Textile Center*, 38 LLR 327, 335 (1997). It is held that failure to timely file an approved Bill of Exceptions, to post an appeal bond, or to serve a notice of completion of appeal, are all grounds for the dismissal of the appeal.

We cannot depart from this clear path of the law. So much as we would have loved to review the case on appeal on its merits, we cannot properly exercise such appellate authority in the light of the facts narrated, the irrefutable evidence presented and the imposition placed on us by the laws controlling. The statutory steps which would have allowed us to review the case on appeal having been snubbed by Respondent/Appellant, we are constrained, gravely to our dislike, to grant Movant/Appellee's Motion to Dismiss the Appeal as directed by the law in vogue. The Motion to dismiss the appeal is therefore granted with costs of these proceedings assessed against the Respondent/Appellant.

THE CLERK of this Court is hereby ordered to forthwith transmit under the seal of this Court a mandate to the court below as to the effect of this decision. AND IT IS SO ORDERED.

Counselor Cooper W. Kruah of the Henries Law Firm, appeared for appellants while Counselor Richard K. Flomo, Sr., appeared for appellee.

Note: When this case was called for hearing, Mr. Chief Justice Lewis and Madam Justice Wolokolie were absent.