ARMAH KAMARA and **HENRY KOLLIE,** Appellants, *v.* **BINDI KINDI, et** al., Linear Heirs of the late FAHN KINDI, Appellees.

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

Heard: April 18, 1985. Decided: June 21, 1985.

1. Although it is the service of the notice of completion of appeal upon the appellee that brings the appellee under the jurisdiction of the Supreme Court, where failure to make such service is traceable to acts of an officer of the trial court, which are in the nature of criminal acts and are designed to defeat the ends of justice, to the detriment and prejudice of party-litigants, a motion to dismiss the appeal based on the failure to serve the notice of completion of appeal will be denied.
2. 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 said court.
3. Judges and other officers of court are not nominals, but are bound by law to execute the respective duties for which they are called to serve.
4. The admission of secondary evidence when the best cannot be produced is a well established principle in the Liberian jurisdiction.
5. Where an appellant's failure to have the notice of completion of appeal served on the appellee was caused by an error of the clerk of the trial court under circumstances over which the appellant had no control, a judgment dismissing the appeal will be reversed on re-argument.
6. When any of the records of the judgment of the trial court has been omitted from the papers submitted on appeal, and such records have been lost through the negligence of the clerk of the trial court, the case will be remanded by the Supreme Court for a new trial and the clerk of the trial court will be appropriately disciplined.
7. Where it appears that officers of the trial court have acted in a manner suggesting suspicion, corruption or fraud, the case will be remanded for an investigation and a new trial ordered.

In a petition for declaratory judgment filed in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, judgment was rendered in favor of the petitioners/appellees.

Exceptions were noted by the respondents/appellants and an appeal announced to the Supreme Court.

When the case was called for hearing by the Supreme Court, the Court was notified that appellees had filed a motion to dismiss the appeal, stating as reasons that the appellants had failed to announce an appeal from the judgment and that the notice of completion of appeal had been served 122 days after the rendition of the judgment. The records of the trial court were devoid of parts showing the exceptions taken to the judgment and the announcement of an appeal. Moreover, there were no records that the appeal bond and the notice of completion of appeal had been filed as prescribed by the Civil Procedure Law.

In resisting the motion to dismiss the appeal, the appellants contended that they had excepted to the judgment, announced an appeal therefrom and filed an approved bill of exceptions, an approved appeal bond, and a notice of completion of appeal with the clerk of the trial court within the time prescribed by law. They accused the clerk of mutilating the records so that the appellants announcement of the appeal could not be seen. They also accused the clerk of mutilating the notice of the completion of the appeal, of fraud, and of connivance with the appellees/petitioners to defeat the appeal and the ends of justice. They noted that the clerk who had issued the certificate stating that no appeal bond had been filed was the same person who had filed and dated the bond approved by the judge.

The Supreme Court, after examining the records, agreed with the appellants. The Court observed that indeed relevant parts of the records showing the announcement of the appeal had been mutilated by the clerk of the trial court, and that although the said clerk had filed the appellant's approved appeal bond, he had fraudulently issued a certificate stating that no appeal bond had been filed. The Court noted that upon receipt of the approved appeal bond, it became mandatorily incumbent upon the clerk to issue the notice of completion of appeal and to order the same served on the appellee. The Court was therefore constrained to reach the following conclusions: That the clerk had deliberately withheld issuance of the notice of completion of appeal; that the clerk was not negligent, but blatantly derelict in the performance of his duties; and that the appellants had no control over his actions, which, given all the surrounding circumstances, were fraudulent in nature.

The Court, citing a line of cases decided by it in the past, opined that the failure to serve the notice of completion of appeal was due to the acts of the clerk, and that where, as in the instant case, the clerk acted in a manner which suggested suspicion, corruption and fraud, the appeal will be allowed. The Court therefore *denied* the motion to dismiss, *ordered* the appeal *heard,* and fine the clerk of the trial court $150.00.

Abraham James and *M. Fahnbulleh Jones* appeared for the respondents/appellants. *Toye C. Barnard* appeared for the petitioners/appellees.

MR. JUSTICE NYEPLU delivered the opinion of the Court.

This motion grows out of an appeal from a judgment on a petition for declaratory judgment, entered in the Civil Law Court, Sixth Judicial Circuit, Montserrado County, on October 21, 1983, in favor of the petitioners/appellees against the respondents/appellants. The respondents/appellants claimed to have excepted to the judgment, announced an appeal to this Court, and perfected the appeal by the filing of an approved bill of exceptions, an approved appeal bond, and allegedly a notice of completion of appeal, with the clerk of the trial court.

It is against this background, that is to say, the alleged announcement of the appeal and its perfection thereof, that petitioners/appellees have filed this motion to dismiss the appeal. The motion contained the following counts, hereunder quoted verbatim:

1. "Because appellees say that the trial judge rendered final judgment on the 21st day of October, A. D. 1983, to which ruling counsel for respondents/appellants ex-cepted and gave notice that he would "take advantage of the statute controlling in such matters". A copy of the court's ruling and record of defendants/appellants' counsel made after said ruling are hereto attached and marked exhibit "A" to form a part of appellees' motion.
2. That the failure of respondents/appellants' counsel to announce the taking of an appeal from the court's ruling (final judgment) is in violation of the appeal statute which makes it mandatory for the appealing party to announce the taking of an appeal. The respondents/ appellants having failed to take this first jurisdictional step renders their appeal dismissible. The petitioners/ appellees therefore pray the dismissal of appellants' appeal.
3. That even though appellants did not announce the taking of an appeal, yet they filed a bill of exceptions which was approved by court. But the said appellants-failed to file an approved appeal bond and their notice of completion of appeal within statutory time. In that, the court's final judgment was rendered on the 21st day of October 1983, but up to the 26th day of January, 1984, which is 97 days after final judgment, the appellants/respondents had not filed an appeal bond or notice of completion of appeal

as can be seen from a copy of the certificate issued by the clerk of the People's Civil Law Court for the Sixth Judicial Circuit, attached and marked exhibit "B" to form part of appellees' motion.

4. And also because appellees say further that the appel-lants served their notice of completion of appeal on the appellees on the 20th day of February, A. D. 1984, 122 days after final judgment which is far beyond the period allowed by statute for the completion of an appeal. Under the law, the respondents/appellants should have filed and served their notice of completion of appeal within 60 days after final judgment. Appellants having violated this basis statutory requirement, renders their appeal dismissible and same should be dismissed. A copy of the notice of completion of appeal with the sheriff's returns on the back thereof is hereto attached and marked exhibit "C" to form a part of appellees' motion.

Petitioners/appellees' counsel strongly argued that respondents/appellants having failed to announce the taking of an appeal, coupled with not filing an appeal bond and the notice of completion of appeal, they are *estopped* from prosecuting their appeal.

Respondents/appellants did not file a resistance to the motion to dismiss the appeal. However, upon the call of the case, appellants sought and were granted permission by the Court to spread their resistance on the minutes of the Court. In their resistance, appellants strongly argued against the motion, placing emphasis on count three (3) thereof. They argued that the clerk's certificate was fraudulent, noting that they (appellants) had filed their bill of exceptions on October 20, 1983, and an approved appeal bond on December 2, 1983. Appellants contended that they had filed an approved appeal bond which was certified by the very clerk of court, Mr. Robert B. Anthony, who later issued a certificate to petitioners/ appellees, stating that respondents/appellants had not filed an approved appeal bond and notice of completion of appeal. Appellants accused the clerk of court of falsehood, characterizing his act as being fraudulent. Appellants therefore prayed that the motion to dismiss the appeal be denied. In addition, appellants asserted from the tenor of the clerk's certificate, it was clear that there must have existed some collusion between the clerk and petitioners/appellees for the clerk to issue such a certificate, the design of which was to attempt to defeat the intent and purpose of appellants' appeal. Further, appellants' counsel strongly argued that they did announce an appeal following the rendition of the final judgment by the trial judge, and that they did file a notice of completion of appeal. They accused the clerk of court of mutilating the announcement of the appeal and the notice of the completion of appeal, noting that they were never cited by the clerk of court to tax the record, which would have

afforded them the opportunity to diligently inspect the transcribed records forwarded to this Court by the clerk of the Civil Law Court.

Whilst it is true that it is the service of the notice of completion of appeal upon the appellee by the appellant that brings the appellee under the jurisdiction of the appellate court, we cannot blind our eyes and sit aloof and allow officers of our courts to persevere in their errors, especially when the act complained of against an official of any court is criminal in nature and has the design and purpose of defeating the ends of justice, to the detriment and prejudice of party-litigants.

A verdict had been brought by the trial jury against the appellants in this case. That verdict was upheld by the trial judge who rendered the final judgment. The judgment was excepted to by the appellants who thereafter tendered a bill of exceptions on October 20, 1983. The bill of exceptions was approved by the trial judge and placed in the hands of the clerk of court for filing. On December 2, 1983, quite forty-three days thereafter, the appellants tendered their appeal bond to the judge for approval. The judge, upon being satisfied, and in accordance with the statute, approved the appeal bond and placed same in the hands of the clerk of court for filing. The bond was authenticated by the clerk when he placed the filing date on the bond as December 2, 1983. Immediately, following the approval of the appeal bond by the judge, it became mandatorily incumbent upon the clerk of court under the law to have issued the notice of completion of appeal and place same in the hands of the sheriff for service on the appellee. The clerk of court having been negligent and blatantly derelict in his required duties under the law, he cannot escape punishment for nonfeasance. The law provides that "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 said court". *Adai et. al., v. Jackson et. al.*, 2LLR 171 (1914).

The trial judge having approved the appeal bond, it was the duty of the clerk of court to issue the notice of completion of appeal and have the ministerial officer of the Civil Law Court (the sheriff) serve same. It must be observed that judges and other officers of court are not NOMINALS; rather, they are bound by law to execute the respective duties for which they are called to serve. Any departure from their moral obligation to the citizens is the violation of their oath of office. We now proceed to discuss the culpable laxity exemplified by the clerk, which the appellants contended was compounded and actuated by fraud.

The appellants, in resisting the appellee's motion to dismiss the appeal, argued that immediately following the approval of the appeal bond, they prepared and handed the clerk of court a notice of completion of appeal to be issued and placed in the hands of the sheriff for service on appellees. However, the clerk never issued the notice of summons on the appellees but mutilated same on the records. Moreover, in furtherance of such fraudulent act, he elected to issue a certificate to the appellees, stating that the appellants had failed to file an appeal bond and a notice of completion of appeal. Appellants there-fore contended that the loss or mutilation of the notice of completion of appeal was not attributable to them, as this was the act of the clerk of court. Hence, they say, the deficiency should not warrant the dismissal of their appeal.

The Court says, in response to the contention advanced by the appellants, that in the case *Lowrie. v. Crusoe Brother and Company,* 1 LLR 123 (1879), decided January Term, A. D. 1879, it held that: "The admission of secondary evidence when the best cannot be produced is established and for obvious principles of reason and justice a stronger foundation could not have been laid for the introduction of this class of evidence.

Where a writ or other writing is alleged to be lost, it is error to reject evidence to prove this fact; a party cannot be held responsible for the loss of a writ or other process over which he did not have custody." Further, in the case *Williams v. Republic*, this Court held that "where an appellant's failure to have notice of appeal served on the appellee was caused by an error of the clerk of the trial court under exceptional circum-stances over which the appellant had no possibility of control, a judgment dismissing the appeal may be reversed by the Supreme Court on re-argument". 14 LLR 602 (1961).

The petitioners/appellees, in count three of their motion to dismiss the appeal, alleged that respondents/appellants did not file an approved appeal bond and notice of completion of appeal. This allegation is contingent upon the certificate issued by the clerk who happened to be the very one who filed the approved appeal bond in the case, and who the appellants accused of mutilating the announcement of the taking of appeal and the notice of completion of appeal. Having inspected the records submitted to us from the court below, wherein it was discovered that the very clerk filed the approved appeal bond on December 2, 1983, we cannot but conclude that the clerk of court acted fraudulently in mutilating the relevant documents, including the notice of completion of appeal and the announcement of

the taking of appeal.

This Court, in expounding further on the law with regards to the behavior of the clerk of court, says that in the case of *Larmouth v. Republic of Liberia*, decided on June 14, 1957, it held that "when the records of a judgment below has been omitted from the papers submitted an appeal, and such record has been lost through the negligence of the clerk of the court below, the clerk will be disciplined by the Supreme Court, and the case will be remanded for new trial." 13 LLR 23, 26 (1957).

In the instant case, the clerk of court did not misplace the notice of completion of appeal, but neglected for some reason best known to himself, to issue the notice as was incumbent upon him by law to do. This act of the clerk besides being deliberate, was intended to impugn the standards set by the judiciary for the dispensing of justice. It must be noted also that this Court does not allow judicial officers to indulge in any imprudent acts which tend to adversely affect party-litigants and which relegate the judiciary to an unwholesome attitude or give the impression of unprofessionalism and untold dubious means by the judiciary. Indeed, it is against that background that this Court held in the case *Tubman v. Tubman* that "Where it appears that officers of the court below have acted in a manner suggesting suspicion, corruption or fraud, the case will be remanded for an investigation and a new trial ordered." 4 LLR 243, 248 (1931).

Considering all that we have said in this case, coupled with the issuance of a clerk's certificate in favor of the appellees, when in fact an appeal bond had already been filed by the very clerk prior to the issuance of the aforesaid clerk's certificate, it is the holding of this Court that a reprehensible act was committed by the clerk of court, Robert B. Anthony, which warrants the denial of the motion to dismiss the appeal. Consequently, and in view of the fact that this Court cannot condone the act of the clerk of court, the said clerk of court is hereby fined the amount of $150.00 (One Hundred Fifty Dollars), to be paid within the period of sixty (60) days into the government revenue and a flag receipt therefor submitted to the Marshal of the Supreme Court. Concomitantly, and viewing the glaring circumstances which savor fraud, it is the conviction of this Court that the motion to dismiss the appeal be, and same is hereby denied and the appeal ordered heard. Cost to abide final determination. And it is so ordered.

Motion denied.