

**SINGBEH KERKER and JAMES B. FLOMO, Defendants/Appellants, v. THE ST. PETER'S EPISCOPAL CHURCH OF GBARNGA CITY, represented by BENEDICT F. VANI, Priest-in-Charge, and SINGBEH JOHNSON, Plaintiffs/Appellees.**

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT, BONG COUNTY.

Heard May 16, 1988. Decided July 29, 1988.

1. A party to a cause of action may move to dismiss an appeal for failure of the appellant to comply with the statutory requirements governing appeals.
2. A bill of exceptions is a specification of the exceptions made to the judgment, decision, order, ruling, or other matter excepted to on the trial and relied upon for the appeal, together with a statement of the basis for the exceptions. the appellant must present a bill of exceptions within ten days after rendition of the judgment, and have the same filed with the clerk of the trial court within the said period of time.
3. The statute on appeals requires that every appellant shall give an appeal bond in an amount to be fixed by the trial court, with two 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.
4. An appeal bond, duly approved, shall be filed with the clerk of the trial court within sixty day of the rendition of judgment. notice of the filing shall be served on the opposing counsel. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal; provided, however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action.
5. An affidavit of sureties must accompany a bond where real property is used to secure the bond, and must state that (a) one of them is owner or that both combined are the owners of the real property offered as security; (b) give a description of the property, sufficiently identified to establish a lien of the bond; (c) state the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and (d) state the assessed value of each property offered.

6. A party seeking the benefit of a statute must plead facts to bring himself within the provision of such statute and secure the benefit thereunder.

The appellants, against whom judgment had been rendered in an action of eject in the Circuit Court for the Ninth Judicial Circuit, appealed to the Supreme Court for a review of the said judgment. When the case was called for hearing by the Supreme Court, the Court was informed that a motion to dismiss the appeal had been filed by the appellees.

In the motion to dismiss, the appellees alleged that the appellants had violated the statute on appeals in that (a) they had filed their bill of exceptions on the eleventh day after the rendition of judgment by the trial court, which was one day beyond the ten-day period allowed by statute; (b) the appeal bond and the notice of the completion of the appeal was filed and served one day beyond the sixth day period allowed by the statute; and (c) that of all of the sureties who had signed the appellants' appeal bond, only one of the appellants had put up property to secure the bond, which by law he could not do, as a defendant could not be his own surety the statutory requirements, the appellees argued, were mandatory and should have been complied with to give the Court jurisdiction over the case.

The Supreme Court agreed with the contentions stated in the motion to dismiss, holding that the appellants had failed to show facts contrary to the allegations contained in the motion in order to enjoy the benefit of the appeal statute. The Court concluded that mandatory requirements of the statute, relative to the bill of exceptions, the appeal bond, the affidavit of sureties, and the issuance and service of the notice of the completion of the appeal, not having been met, the appeal was dismissible. The Court therefore granted the motion and dismissed the appeal.

G. Bona Sagbeh appeared for appellants. Clarence. E. Harmon appeared for appellees.

MR. JUSTICE JUNIUS delivered the opinion of the Court.

At the call of this case for hearing before this Court, appellees gave notice of the filing of a motion to dismiss appellants' appeal. We quote the motion hereunder:

"1. Appellees/movants say that the document upon the filing of which the trial court loses jurisdiction, the approved bill of exceptions, is in violation of the statutes and therefore dismissible. Appellees/movants say that the statutes require that the bill of

exceptions must be filed within ten (10) days after the rendition of judgment, but appellants chose to file same on the eleventh (11) day instead. This is a mandatory requirement of the statutes which has been supported by numerous opinions of this Court, and can never be conceded as a technicality. The Supreme Court has already in the past differentiated between mandatory requirements of the statutes which must be complied with, and technical issues which should not be considered in determining issues raised. This Court is therefore compelled to uphold the statutes in such cases, or, in the alternative, petition the National Legislature to repeal all of the statutes relied upon herein, and to recall all cases now relied upon as stare decisis herein.

2. And also your appellees/movants say that the documents that give this Honourable Court jurisdiction over an appeal are the valid appeal bond, and the notice of completion of appeal. The statutes require that these documents must be prepared, approved (in case of the bond), filed and served within sixty (60) days after rendition of judgment. The judgment was entered on the 17<sup>th</sup> day of October, A. D. 1986, and the bond and notice of completion of appeal are mandatorily required to have been filed and served on or before December 16, A. D. 1986. However appellants chose to file out of statutory time, that is to say, on the 17<sup>th</sup> day of December, A. D. 1986, as more fully appears from exhibits "C" to "E", hereto attached.

3. A fatally defective bond is yet another ground for dismissal. The appeal bond in these proceedings is irreparably defective. Appellees say that a "bad" affidavit of sureties renders the appeal bond incurably defective. In this case, only Appellant Flomo offered real property as security; and he is incompetent to offer himself as surety when he is not in a representative capacity but is a party to the trial below, and bound by the judgment. There being no other property offered as security on the bond, rendering it irreparably defective, and the appeal dismissible; and appellees so pray.

4. Additionally, the bond is defective because of an Affidavit of Sureties that is faulty on its face. On the face of the bond, Appellant Flomo is listed as principal/defendant, whereas he alone, and not Appellant Singbeh Kerker, signed the affidavit of sureties as "one of sureties, deponent". Not being a surety to the bond, he (Flomo) could not sign the bond, and should not have signed the affidavit of sureties. And appellees ask Court to take judicial notice of the write-over of Appellant Kerker's name with that of James B. Flomo. For yet another item of proof of a fatally defective bond, the appeal must be dismissed, and appellees so pray.

5. Appellees say that the steps to be followed in perfecting an appeal are statutory and therefore mandatory. Failure to comply therewith denies the appellate court of the right to assume jurisdiction over the case. So when the statutes demand that the bill of exceptions and the appeal bond, together with the notice of completion of appeal, be filed within ten (10) and sixty (60) days respectively, failure to do so within the statutory limitation deprives this Court of jurisdiction over the appeal and the matter must be dismissed for want of jurisdiction. Appellees say that there are no exceptions to the rule, save that provided for the tolling of time, and which reads:

"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 the time for 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.

Any filing of either the bill of exceptions or the appeal bond out of strict compliance with the statutes is fatal and void ab initio in keeping with rulings of this Court, and dismissible.

6. Further to the defects in the appeal bond, appellees say that the statement of property valuation reads: ". . . This is to certify that the real estate of the above mentioned property, owned by Mr. James B. Flomo are registered and valued as shown above. The valuation of this property is offered to be used in favour of James B. Flomo and Sengbeh Kerher. . ." and dated 17/12/86, the date of the filing of the bond, which bond had been previously approved as of the date of December 15, 1986. It is clear, therefore, that there are no encumbrances shown, and the bond does not therefore meet the statutory requirements; hence, is dismissible.

7. Next, appellees ask Court to take judicial notice of the statement of property valuation wherein two (2) separate parcels of land are listed, each bearing a separate lot number N/N, and bearing a separate valuation. Recourse to the affidavit of sureties shows that only one (1) parcel is described. Appellees say that neither of the two parcels set out alone can validate the bond and satisfy the indemnification of the appellees. The bond that relies upon both these documents must therefore be dismissed for the fatal defects of the hereinabove named documents, and appellees so

pray. Both of the properties, taken separately, fall short of the required valuation to support the amount of seven thousand five hundred (\$7,500.00) dollars, for which the bond was approved.

8. Appellees say that the bond, being insufficiently stamped, is in violation of the Revenue Stamp Act. The Stamp Act requires that the bond be stamped with five (\$5.00) dollars stamp. Appellees ask Court to take judicial notice of the fact that the bond carries only four (\$4.00) dollars stamp instead. For this violation of the statute, the bond, and for that matter the entire appeal, must be dismissed.

9. Appellees say that issues not raised in the court below cannot be raised for the first time before this Honourable Court. And as will more fully appear from the appellants' answer in the court below, a copy of which is hereto attached and marked exhibit "F". With reference to the bill of exceptions, exhibit "B", the issue of appellees' failure to pay the Government of Liberia for 10.5 lots, even if the allegation were true, is being raised for the first time. This Court must refuse jurisdiction over this and any other issue not raised after the commencement of the ejectment suit on the 22nd day of October, A. D. 1984, and which constitutes the embodiment of the appeal.

10. Finally, the intent of the appellants' exercise, being that of delaying and protracting the time element to the disadvantage of appellees, and since jurisdictional issues may be raised at any time after the court acquires jurisdiction over the subject matter or the person, appellees respectfully pray that the motion to dismiss be disposed of during the present October Term, A. D. 1986."

In a ten count response, appellants resisted the motion to dismiss on the following grounds:

"1. That count one of movants' motion should be ignored and denied by this Honourable Court, in that plaintiffs/ appellees misconstrued the computation of time as provided in our statute. Final judgment of the within case was rendered on the 17th of October, A. D. 1986, the announcement of an appeal was made and granted, and the bill of exceptions was approved and filed within statutory time, which was the 28th of October, A. D. 1986, in complete harmony with the statute, as found in the Civil Procedure Law, Rev. Code 1: 1.7, the relevant portion which reads thus:

"In computing any period of time prescribed or allowed by statute, by order or rule of court, by rule or regulation, or by executive order, the day of the act, event, or

default after which the designated period of time begins to run is not to be included. the last day of the period so computed is to be included unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than ten days, intermediate Sundays and holidays shall be excluded from the computation. Count one should therefore be dismissed."

2. As to count two of the movants' motion which attacks defendants/appellants' notice of completion of appeal, appellants say that the appeal should not be disturbed, in that appellants filed their completion of appeal on the 17th of December 1986, one day earlier than the time of completion, that is to say, the statutory time of sixty days began on the 18th of October to the 18 th of December, 1986. Appellees having misconstrued the statute as to computation, count two should be denied.

3. As to count three of appellees' motion, same is not in agreement with the statute under legally qualified sureties, as found in the Civil Procedure Law, Rev. Code 1: 63.2, the relevant portion of which reads thus:

"A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic. . . " Appellant Flomo offer of real property which valuation is over and above the penalty of the bond has satisfied the requirement of the statute under bond and security. Count three should therefore be overruled.

4. Defendants/appellants traversing count four, say that the surety affidavit is mainly posted on the bond to succinctly describe the location of the property so offered to indemnify appellee should he or she come out victorious. Count four should be overruled.

5. As to count five, same is a misuse of the computation and has already been traversed in count one of this resistance. It should therefore be overruled.

6. As to counts six and seven, they have been traversed in counts three and four, that is to say, the purpose of a bond on an appeal is to indemnify the appellee from all costs and it can be covered by one sufficient real property. Counts six and seven should be overruled.

7. Defendants/appellants, resisting count eight of plaintiffs/appellees' motion, say

that said count is not one of the statutory grounds to dismiss an appeal. Count eight should also be overruled.

8. As to count nine defendants/appellants say that plaintiffs/appellees are suggesting to this Honourable Court that it goes into the merit of the case that they have motioned the Court to dismiss, in that the appellees/movants exhibited the answer and bill of exceptions and requested this Honourable Court to refuse jurisdiction over this and any other issue raised after the commencement of the ejectment suit on the 22nd day of October A. D. 1984 and which constitute the embodiment of the appeal. Appellants wonder what the appellees really want from this Honourable Court? If this Honourable Court is asked to hear a motion to dismiss an appeal and the appellees present an ambiguous and indistinct motion, there is nothing left to be done but to deny the motion because of its uncertainties. Count nine should crumble and fail.

9. As count ten did not portray any basis for the dismissal of the appeal of the appellants, same should be denied.

10. Defendants/appellants deny all and singular the allegations laid in the motion and not traversed in this resistance."

It is an established principle of law that a party to a cause of action may move to dismiss an appeal for failure of the appellant to comply with statutory requirements governing appeals. We must therefore consider the grounds on which the motion to dismiss has been filed before this Honourable Court.

Counsel for appellees, in arguing the motion to dismiss, contended that the bill of exceptions was not filed within statutory time. He argued that the judgment of the Circuit Court for the Ninth Judicial Circuit, Bong County, was rendered on October 17, 1986, and that the bill of exceptions was filed on the eleventh day, the 28th day of October, A. D. 1986, one day after the required statutory time for the filing of a bill of exceptions. This requirement, he said, is a mandatory requirement and must be filed within the statutory time. The Civil Procedure Law, Rev. Code 1: 51.7, relative to the filing of a bill of exceptions, reads:

"A bill of exceptions is a specification of the exceptions made to the judgment, decision, order, ruling, or other matter excepted to on the trial and relied upon for the appeal together with a statement of the basis of the exceptions. The appellant shall present a bill of the exceptions signed by him to the trial judge within ten days

after rendition of the judgment. The judge shall sign the bill of exceptions, noting thereon such reservations as he may wish to make. The signed bill of exceptions shall be filed with the clerk of the trial court."

Counsel of appellees also argued that the documents that give this Honourable Court jurisdiction over an appeal are the valid appeal bond and the notice of the completion of the appeal; that the statute requires that these documents must be approved and filed within sixty (60) days after rendition of judgment; that the judgment was entered on the 17<sup>th</sup> day of October, A. D. 1986, but that the appeal bond and notice of the completion of the appeal were not filed and served until the 17<sup>th</sup> day of December, A. D. 1986, one day beyond the required statutory time of sixty days. The requirement of sixty days for the filing and service of these documents, he said, is a mandatory requirement and must be adhered to. The Civil Procedure Law, Rev. Code 1: 51.8, states that:

"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. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal; provided, however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action."

Appellees' counts 3 and 4 refer to the defectiveness of the appeal bond, as follows: (a) that bad affidavit of sureties was bad, in that only one of the appellants offered real property to secure the bond and the other sureties did not, and that in fact the appellant who offered the property was incapable of serving as surety for himself; (b) that the sureties whose names appeared on the bond did not offer any property valuation or valuations. Our statutes relating to affidavit of sureties states as follows:

"Affidavit of sureties. The bond shall be accompanied by an affidavit of the sureties containing the following:

(a) A statement that one of them is the owner or that both combined are the owners of the real property offered as security;



(b) A description of the property, sufficiently identified to establish the lien of the bond;

(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and

(d) A statement of the assessed value of each property offered." Civil Procedure Law, Rev. Code 1: 63.2 (3).

We note that appellees counts five and six re-echoed what the previous counts had already echoed. Hence, we do not see the need to comment further on the said counts.

Even though appellants' counsel did argue the resistance, yet, when a party seeks the benefit of a statute, he must plead facts to bring himself within the provision of said statute in order to secure the benefit thereunder. His arguments had no validity for it is crystal clear from the documents presented before this Honourable Court that the appeal should be dismissed. Hence, same is hereby dismissed.

In view of the foregoing, the motion to dismiss the appeal is hereby granted. And it is hereby so ordered.

*Motion granted.*