SAMUEL MANAKEH AND KOU MANAKEH, Appellants/Respondents *v.* **DAVID M. TOWEH**, Appellee/Movant.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE EIGHTH JUDICIAL CIRCUIT, NIMBA COUNTY.

Heard: June 7, 1984. Decided: June 28, 1984.

1. A motion to dismiss an appeal does not preclude the appellate court from opening the trial records of the case on appeal. The appellate court, however, will not proceed to review the trial records and pass upon the merits of the case.

2. The mere opening a case file to ascertain whether an appeal bond has been duly filed does not amount to a settlement of the substantial facts of the case.

3. The appealing party should superintend the appeal and see that all legal requirements are completed. The court will not entertain a case legally deficient in its records. The omission of the bond in the records is in diminution of the records and therefore fatal to the appeal.

4. It is the duty of the appellant in an appeal to see that documents relating to same are duly transmitted to the appellate court. Where the records are incomplete, the court, upon application, will dismiss the appeal.

5. Where a defendant excepts to an advance judgment, prays an appeal, and files an approved bill of exceptions and a legal appeal bond, thus depriving the lower court of jurisdiction, but does not have the records sent to the appellate court, the said court will grant a petition by the successful party below to have the judgment of the lower court enforced.

6. Material errors or omissions in a record on appeal constitute grounds for dismissal of the appeal where the errors are due to the appellant's neglect.

7. Where the records show that an appellant has failed to comply with the rules of the Supreme Court and the statutory provisions prescribing the period of time within which the prerequisites for perfection of an appeal must be completed, the Supreme Court will order the trial court to resume jurisdiction and enforce the judgment appealed from.

8. That which is void *ab initio* is not cured by the passage of time.

Appellants appealed from the decision of the Eighth Judicial Circuit Court in an action of ejectment. The appellee filed a motion to dismiss the appeal contending that the appellants/ respondents had not perfected the appeal as required by law, in that they had failed to file an appeal bond and a notice of completion of the appeal. Therefore, the Supreme Court was without jurisdiction to hear the appeal. Appellants/respondents resisted the motion on grounds that the movant did not make profert of a certificate from the lower court to support the claim that the appeal had not been perfected. Instead, the movant had simply attached a certificate, dated September 2, 1983, from the clerk to verify that the records in the action of ejectment had not been transmitted from the lower court to the Supreme Court. However, the Supreme Court, upon an inspection of the records, found that there was a clerk's certificate stating that since the filing of the bill of exceptions on June 10, 1983, the appellants had not perfected the appeal up to the date of issuance of the certificate by the clerk in September 1983. The Court held therefore that the failure of the appellee to attach a copy of the clerk's certificate to the motion was insufficient to deny the motion, especially given the admission by counsel for appellants that he had inspected the file of the trial court and had found only the bill of exceptions. Hence, the motion to dismiss the appeal was *granted* and the appeal ordered *dismissed.*

David M. Toweh, appellee/movant, appeared for himself. *McDonald J. Krakue* appeared for the appellants/respondents.

MR. JUSTICE KOROMA delivered the opinion of the Court.

Upon assignment issued, served and returned served on the parties, this case was first called for hearing on May 1, 1984. The appellants/respondents appeared in person and informed the Court that Counsellor Patrick Biddle, who carried their interest and represented them in the trial court, was now engaged with the Constitutional Advisory Assembly and could not represent them at this time. Hence they requested the Court to grant them two months to secure the service of a legal counsel. This request was granted and the appellants were given up to the 4th of June at which time the case was reassigned for hearing.

On June 4th when the case was called for hearing, in keeping with the assignment issued out of this Court, served and returned served, Counsellor McDonald Krakue appeared and announced representation for the appellants and prayed the Court to allow him time to file a resistance to the motion to dismiss the appeal because he had just been retained by the appellants. The request was granted against the resistance of the appellee and the case was reassigned for hearing on June 5, 1984. At 3:00 p.m. June 5, 1984, when the case was called

for argument in keeping with the assignment, the motion and resistance were argued. For the purpose of this opinion, we herein below quote the motion and resistance thereto:

"APPELLEE'S MOTION TO DISMISS

And now comes David M. Toweh, appellee, in the above entitled cause who shows unto this Honourable Court sufficient legal reasons for the dismissal of appellants' unmeritorious appeal as follows to wit:

1. Because appellee says that the appeal is a fit subject for dismissal in that it does not meet the full statutory requirements of an appeal which should claim the attention of this Honourable Court. Appellee avers and maintains that the appellants having announced an exception to the verdict of the empaneled jury in the above entitled cause of action, and an appea1 to this Honourable Court, notwithstanding, the said appellants have woefully failed and neglected to perfect an appeal bond as well as the notice of completion of an appeal in keeping with practice and procedure and the statutory requirements in such cases made and provided.

2. And because therefore and in view of the above, this Honourable Court is left without jurisdiction to hear the said appeal even though a bill of exceptions was duly prepared and filed by the appellant. The appellee hereby attaches a photocopy of "Certificate" to form a cogent part of the appellee's motion.

WHEREFORE and in view of the foregoing legal and sufficient reasons, appellee prays for the dismissal of appellant's appeal, with a mandate from this Honorable Court to the trial court to resume jurisdiction and enforce its judgment made and entered in said case, with costs against the appellants.

Respectfully submitted:

_____

David M. Toweh... Appellee

for himself.

Dated in the City

of Monrovia this 28th

day of March A.D. 1984.

"$4.00 Revenue Stamp affixed on the original"

APPELLANT'S RESISTANCE TO MOTION

TO DISMISS

The above named appellant in resisting the motion to dismiss in this case says the following,

to wit:

1. Because appellants submit that movant has failed to buttress count one of his motion with a clerk's certificate from the Eighth Judicial Circuit, Nimba County to the effect that after having announced an appeal the aforesaid appellants have woefully failed and neglected to perfect an appeal bond as well as the notice of completion of appeal as the law requires, especially so when it is movant who has asked this Honourable Court not to open the record in this case but to have same dismissed on the ground mentioned *supra*. This not having been done, appellants pray Your Honours not to give credibility to this motion.

2. And also because appellants further contesting the motion say that the certificate attached to the motion which is the basis of movant's motion to dismiss the ejectment suit has no legal merit, in that an inspection and perusal of this document simply show that the records in this case of ejectment have not been transmitted from the Eighth Judicial Circuit Court to the office of the Clerk, People's Supreme Court, which under the law is no legal ground for dismissal of an appeal. Appellants ask Your Honours to take judicial notice of the certificate attached to the motion to dismiss.

Wherefore and in view of the foregoing, appellants pray Your Honours will deny the aforesaid motion to dismiss as to enable Your Honours to delve into the merits or demerits of the ejectment suit and to grant unto appellants such other and further relief as may seem just, legal and proper.

Respectfully submitted,
Samuel Menkakeh and Kou Menkakeh of Gompa City, Nimba County, Liberia....APPELLANTS,
by and through Counsel:

_____

McDonald Krakue
COUNSELLOR-AT-LAW
Dated at Monrovia
this 5th day of June A.D., 1984.
$4.00 Revenue Stamp affixed here.

The appellants/respondents have prayed this Court to deny the motion to dismiss because the movant/appellee has failed to profert the certificate from the clerk of the trial court to support the averments to the effect that no appeal bond had been filed and that no notice of completion of appeal had been filed and served. They have further contended that with the motion to dismiss, the movant is asking the Court not to open the record in the case, and

therefore failure to profert said certificate is a defect in the motion and, hence same should be denied. Countering this argument, the appellee/movant maintained that the appellants/ respondents having failed to see that the trial records were before the appellate court, they were not properly clothed to advance such argument. Further, appellee argued that there is no law which bars the appellate court from opening the trial records upon a motion to dismiss the appeal; rather, they pointed out that the law only precludes the appellate court from passing on the case on its merits.

In the settlement of these contentions, we hold that a motion to dismiss an appeal does not preclude the appellate court from opening the trial records of the case on appeal. The appellate court, however, will not proceed to review the trial records and pass upon the case on its merits. The fact of the existence or nonexistence of an appeal bond and notice of the completion of appeal in the file of a case on appeal does not extend to, nor include, the merit of such a case. The word merit, according to Black's Law Dictionary, refers to "the strict legal rights of the parties. In practice, merit is a matter of substance in law, as distinguished from matters of mere form. A 'defense upon the merits' is one which depends upon the inherent justice of the defendant's contention, as shown by the subtstantia1 facts of the case, as distinguished from one which rests upon technical objections or some collateral matter. Thus, there may be a good defense growing out of an error in the plaintiff's pleadings, but there is not a defense upon the merits unless the real nature of the transaction of the controversy shows the defendant to be in the right." BLACK'S LAW DICTIONARY 1140 (4th ed. 1951). Hence, the mere opening of a case file to ascertain if an appeal bond has been duly filed and is present therein does not amount to a settlement of the substantial facts of the case. The argument of the respondents/appellants in this respect is therefore overruled.

While the respondents/appellants have contended in their resistance that the motion to dismiss the appeal should be denied because the movant has failed and neglected to profert a certificate from the clerk of the trial court to buttress the motion, their counsel, during argument before this Court, admitted that he personally inspected the records of the trial court and found the approved bill of exceptions but no appeal bond nor notice of completion of appeal. The counsel also confirmed that a certificate issued by the clerk of the trial court in favor of the appellee to this effect was found in the file.

Following these admissions, what then appears to be the only contention of the respondents is that Counsellor Patrick Biddle, who represented the defendants in the court below, and who is supposed to have prepared and filed these documents, could not be reached to ascertain whether or not he did prepare and file them. This contention would have constituted a good defense for the respondents/appellants if this Court of terminal

adjudication was allowed or inclined to decide cases outside of the law, and only out of sympathy for a party's negligence. This, of course, not being the case, we fail to see where the respondent/appellants can gain the due judicial consideration of this Court by such argument. For on June 10, 1983, the trial court approved the defendants' bill of exceptions. Almost a year later on May 1, 1984, the case was called for hearing in this Court. Upon the request of the appellants for time to secure the services of a lawyer, the case was reassigned for June 4, 1984. It is our holding that the appellants had more than enough time to contact Counsellor Biddle and obtain whatever information or documents were needed to properly superintend and perfect their appeal to this Court. A party appealing should superintend the appeal and see that all legal requisites are completed. The Court will not entertain a case legally deficient in its records. "The omission of a copy of the bond in the records is a diminution of the records and is fatal to an appeal." *Johnson et al.* v. *Roberts*. 1 LLR 8 (1861). "It is the duty of the appellant in appeals to see that documents relating to same are duly transmitted to the appellate court. Where the records are incomplete, the court, upon application, will dismiss the appeal." *Ross* v. *Minus*, 1 LLR 208 (1887). "Where a defendant excepts to an adverse judgment, prays an appeal, and files an approved bill of exceptions and a legal appeal bond, thus depriving the lower court of jurisdiction, but does not have the records sent to the appellate court, the appellate court will grant a petition by the successful party below to have the judgment of the lower court enforced." *Baker* v. *Morris*, 10 LLR 187 (1949). "Material errors or omissions in a record on appeal constitute grounds for dismissal of the appeal where the errors are due to appellant's neglect." *Karnga* v. *Williams et. al.*, 11 LLR 299 (1952).

From these legal citations, the contentions of the respondents/ appellants in this case are: (1) that the court cannot open the records in this case, and (2) that it was mandatory for the movant/appellee to profert a certificate from the clerk of the trial court with his motion. These are not legally grounded contentions to warrant the denial of the motion. As a matter of law, it was the legal responsibility of the appellants to superintend and see that all documents relating to their appeal were duly transmitted to the appellate court. When such records are before the court, it has the right to determine its own jurisdiction upon an inspection of the records. It therefore follows that the court could not undertake this exercise without opening the records. "Where the record shows that an appellant has failed to comply with the rules of the Supreme Court and the statutory provisions prescribing the period of time within which the prerequisites for perfection of an appeal must be completed, the Supreme Court will order the trial court to resume jurisdiction and enforce the judgement appealed from." *Webster v. Freeman,* 16 LLR 44 (1964). Since the appellants, by and through their counsel, have admitted that no appeal bond and notice of completion of appeal were filed, nor found in the trial file of the case, we hold that the arguments advanced in the resistance are mere technicalities designed to delay, baffle, strangulate and defeat

transparent justice. The revelation of the non-filing of the appeal bond and notice of completion of appeal, as certified by the clerk of the trial court and admitted by the appellants, will remain the same fact even if the motion was denied and the appeal heard a year later. For that which is void at the beginning is not cured by the passage of time. After issuance of the certificate by the clerk of the trial court on September 2, 1983, the lapse of time could never have cured the legal defect of the appeal where the appellants had failed to perfect their appeal within statutory time.

Wherefore and in view of all the facts, legal citations and circumstances herein presented, it is our considered opinion that the motion to dismiss be, and the same is hereby granted. The appeal from the judgment of the trial court is hereby dismissed with cost against the appellants. The Clerk of this Court is ordered to send a mandate to the court of origin commanding the judge therein assigned to resume jurisdiction and enforce the judgment appealed from. And it is hereby so ordered.

Motion granted; Appeal dismissed.