

THE MANAGEMENT OF O.K. DRY CLEANING, Appellant, v. **JAMES COOPER**, Appellee.

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

Heard March 28, 1988. Decided July 29, 1988.

1. 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, and by the appellate court after filing of the bill of exceptions for failure of the appellant on the hearing of the appeal, to file an appeal bond, or to serve a notice of completion of the appeal as required by statute. However, the mere absence of a bill of exceptions and an appeal bond from the records certified to the Supreme Court is not in and of itself a ground for the dismissal of an appeal.
2. The practice in this jurisdiction is that where an appellant fails to file his bill of exceptions and appeal bond, or to serve a notice of completion of the appeal, the appellee obtains a certificate from the clerk of the trial court and not from the Clerk of the Supreme Court.
3. The remedy available to a party who observes the omission of any documents in the records certified to the Supreme Court, such as a bill of exceptions or an appeal bond, is a motion for diminution of records and not a motion to dismiss.
4. Errors such as the omission from the records certified to the Supreme Court of the bill of exceptions or the approved appeal bond, are generally cured by an application to the appellate court by the party affected to have the error corrected, and not to seek the dismissal of the appeal.

The appellant, against whom an action of unfair labour practice had been filed in the Ministry of Labour, was adjudged liable to the appellee. On appeal to the Board of General Appeals and the Circuit Court for the Sixth Judicial Circuit, Montserrat County, the decision of the hearing officer was confirmed. An appeal was then announced and pursued to the Supreme Court.

When the case was called for hearing, the Supreme Court was informed that the appellee had filed a motion to dismiss the appeal. The two grounds stated in the motion were (a) that the Court did not have jurisdiction over the person of the

appellee since the bill of exceptions and the appeal bond were not contained in the records, and (b) that the trial court had lost jurisdiction over the case since the records had been transmitted to the Supreme Court. In support of his contention, the appellee attached two certificates from the Clerk of the Supreme Court.

In its judgment, the Supreme Court rejected the contentions asserted in the motion to dismiss. The Court, after reciting the requirements for the completion of an appeal, noted that the mere absence of the bill of exceptions and the appeal bond from the records did not of themselves provide a basis for the dismissal of an appeal, especially where the contention was not that the documents were not filed, but only that the documents were not in the records certified to the Supreme Court.

The Court observed that in such a case, the correct course to pursue was not the filing of a motion to dismiss, but a motion for diminution of records. Moreover, the Court said, the certificates exhibited by the appellee in support of the motion should have been issued by the clerk of the court from whence the appeal was taken and not by the Clerk of the Supreme Court, as was done by the appellee. The certificates could therefore not be the basis to substantiate the contentions stated in the motion.

The Court then concluded that as the appellant had met the statutory requirements for the completion of the appeal, the motion to dismiss should be *denied*.

J. Emmanuel R. Berry appeared for appellant. *Roland Barnes* of the Johnson and Barnes Law Firm appeared for appellee.

MR. JUSTICE ICE. KPOMAKPOR delivered the opinion of the Court.

This case emanated from the Labour Ministry where it was first heard by a hearing officer who ruled in favour of complainant, now appellee. That ruling was subsequently affirmed by the Board of General Appeals of the Ministry of Labour. From the ruling of the Board of General Appeals, petitioner, now appellant, petitioned the Civil Law Court, Sixth Judicial Circuit, for judicial review. Following a judgment by that court on July 29, 1985, against the appellant, it appealed to this Court for a review of the ruling.

When the case was called for review, the appellee-brought to the attention of this Court that he had filed a motion to dismiss the appeal. Appellee's two-count motion is quoted verbatim because of its importance in determining this case.

"1. Because appellee says that this Court has no jurisdiction over his person, in that the bill of exceptions is wanting in this case; it has never been made a part of the records and therefore there is no action before the Court. A copy of the certificate of the Supreme Court is hereto attached to form a part of this motion.

2. Additionally, the records of the court below having been transmitted to the Supreme Court of Liberia, the trial court is without jurisdiction to hear and determined said case. Further, according to the records transmitted to this Honourable Court, appellant filed his notice of completion of appeal but failed to have superintended his appeal by not including the bill of exceptions and an approved appeal bond."

Appellee attached to his motion two certificates, not from the clerk of the Civil Law Court, the trial court, but from the Clerk of the Supreme Court of Liberia to show (1) that no bill of exceptions has been filed and (2) that no appeal bond was included in to the records transmitted from the court below to this Court. Counsel for appellant, on the other hand, contended in a two-count resistance, as follows:

"1. That in keeping with law, this Court acquires jurisdiction over the parties and subject matter when the following statutory grounds are complied with within the statutory time: (a) Announcement of an appeal; (b) filing of a bill of exceptions; (c) filing of an appeal bond; and (d) service and filing of a notice of completion of appeal. Appellant submits that all of the foregoing requirements having been met, the motion is obviously filed in bad faith and should therefore be denied, and appellant so prays;

2. That in keeping with law, the omission of any documents from the transcribed records transmitted to this Court is no legal ground for dismissal of the appeal if said documents are filed within statutory time, and that the party observing the omission of any document may file a motion for diminution of records and not a motion to dismiss as has been erroneously done by the appellee. Hence, the motion should be denied."

We have considered the merits of both the motion and the resistance to it, and listened to the arguments on both sides. The essence of appellee's motion to dismiss is that we should refuse jurisdiction on the ground that although the trial court has transmitted the trial records to this Court, the appellant has failed or neglected to take some of the important jurisdictional steps in perfecting his appeal, which include the filing of a bill of exceptions and an approved appeal bond.

The Court finds appellee's contentions. For example, he stated in count one of his motion "that this Court has no jurisdiction over his person, in that the bill of exceptions is wanting in this case; . . ." In the second count of the motion he maintained that because the trial court has transmitted the records in the case to this Court, that court also has no jurisdiction over said case. What if we agree with the learned counsel that both this Court and the trial court lack jurisdiction over the case, how could he obtain the remedy he seeks?

Indeed, the position of appellee's counsel is rather strange because the motion, and the arguments advanced in support of it, is neither in harmony with the Civil Procedure Law nor the practice. The Civil Procedure Law provides, as regards the requirements for completion of an appeal, the following steps:

- "(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;

Failure to comply with any of these requirements within the time allowed by statute shall be ground for dismissal of the appeal." Civil Procedure Law, Rev. Code 1: 51.4.

Of the four requirements (a, b, c and d) prescribed by the Civil Procedure Law, appellee's contention is that "b" and "c" were not complied with by appellant.

As we sated earlier in this opinion, appellee attached to his motion two certificates from the Clerk of this Court. The first said that "no bill of exceptions has been filed in this office," meaning the office of the Clerk of the Supreme Court. The second reads: "No appeal bond is attached to said record." The appellant's counsel argued that he did in fact comply with the relevant sections regarding perfecting an appeal, and he cited us to sections 51.6, 51.7, 51.5, and 51.9 of the Civil Procedure Law in support of his contention. These sections deal with the issue of appellant's announcement or taking of an appeal, filing of the bill of exceptions, filing of an approved appeal bond, and the serving of the notice of completion of the appeal, respectively.

Our statute also provides for the dismissal of an appeal where the appellant fails to proceed. It states: "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, and by the appellate court after filing of the bill if exceptions for failure of the appellant to appear on the hearing of the appeal, to file an appeal bond, or to serve notice of the completion of the appeal as required by statute." Civil Procedure Law, Rev. Code 1: 51.16.

The practice observed over the years in this jurisdiction has been that where the appellant fails to file his bill of exceptions and an appeal bond, or to serve the notice of completion of appeal, the appellee obtains a certificate from the clerk of the trial court and not from the Clerk of this Court as appellee's counsel has done in the instant case. The reason for the practice is obvious.

After arguing that appellant's counsel had failed to superintend his appeal by not including in the records the bill of exceptions and the approved appeal bond as required by law, the following interesting dialogue took place between the counsel and the Justices:

"Chief Justice Gbalazeh: Counsellor Barnes, where there is no bill of exceptions and no approved appeal bond, in which of the courts do you have to go and get a clerk's certificate to that effect?"

Counsellor Barnes: Your Honours, it is from the appellate, from the trial court.

Chief Justice Gbalazeh: But the certificates you attached to your motion are from the appellate court, can you justify that?

Counsellor Barnes: Yes, Your Honours. It is from the appellate court. It was at the time when the whole records in the case got missing and I had to make copies of same, and pay for the records to be transmitted to this Court instead of the appellant.

Chief Justice Gbalazeh: Did you tax the record in this case?

Counsellor Barnes: Yes, Your Honours, I taxed the records which the clerk of the court below sent for me.

Chief Justice Gbalazeh: Do you have a copy of the records that you taxed?

Counsellor Barnes: Yes, Your Honours, but I transmitted it to this Honourable Court.

Justice Junius: Counsellor Barnes, we are asking whether you receive any copy of the records that you taxed that day?

Counsellor Barnes: I cannot remember, Your Honours.

Justice Kpomakpor: Counsellor Barnes, what is the procedure followed when you tax the records in the court below?

Counsellor Barnes: Generally, the clerk will show that Your Honours."

The contention of the appellee that this Court has no jurisdiction over both his person and the appeal is not sustained. We are therefore in accord with the appellant's position that in view of the evidence from the lower court, appellant met all the necessary requirements in taking the jurisdictional steps in perfecting his appeal, and that the remedy available to the party who observes the omission of any documents in the appellate court is a motion for diminution of records and not a motion to dismiss. Under the Civil Procedure Law, Rev. Code 1:61.12, the type of errors complained of by the appellee is generally cured by an application of the party affected, in this case, appellee, to the appellate court to have the error corrected. See Civil Procedure Law, Rev. Code 1: 1.12.

Reverting to our contention that appellee's counsel adopted a strange and unusual practice in this case, we are reminded of the warning which he once sounded to practicing lawyers, when speaking for the Court in the case *Marb v. Sinoe*, 27 LLR 320 (1978). He said: "There is a long line of cases handed down by this Court dealing with the ground for dismissal of an appeal. But in spite of these decisions, lawyers persistently continue to recklessly and carelessly handle matters intrusted to them, thus seriously affecting the legal interest of their clients. There seems to be an absolute disregard on the part of certain lawyers, with respect to the injury they cause their clients, when they display such ineptness in prosecuting cases before the courts of this nation."

During the argument of this case before us, Counsellor Barnes strenuously contended that his motion to dismiss the appeal was not filed in bad faith. The Court was convinced by this argument of our former colleague. However, we were and still are equally convinced that he was negligent in the filing of this motion.

In view of the facts and the controlling laws cited, we hold that the motion, being unmeritorious, ought to be and the same is hereby denied, with costs against appellee.

The Clerk of this Court is hereby ordered to docket the appeal for the ensuing October Term of this Court. And it is hereby so ordered.

Motion denied.