RENNEY PENTEE, Appellant, v. GEORGE S. B. TULAY, Appellee.

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

Heard: October 23, 2000. Decided: December 21, 2000.

1. The clerk of the trial court, after the filing of an appeal bond by the appellant and on application by said appellant, shall issue a notice of the completion of the appeal, a copy of which shall be served by the appellant on the appellee and the original filed in the office of the clerk of court.

2. The duty to have a copy of the notice of the completion of the appeal served on the appellee is squarely placed on the appellant, not the sheriff of the trial court.

3. Where the statutory language is clear and unambiguous, it needs no interpretation or further comment.

4. Because the duty is imposed on the appellant to serve the notice of the completion of the appeal on the appellee, the returns of the service, previously required as to the service of the notice, has been replaced by the signature of the appellee on the face of the notice of completion of appeal.

5. The signature of the appellee on the face of the notice of completion of appeal confirms the appellee's knowledge of the completion of the appeal.

6. The appeal statute relating the time period for filing the notice of completion of appeal is clear and mandatory.

7. Where the appellant fails to raise an issue in his resistance to a motion to dismiss his appeal and in his brief filed before the Court, it is a violation of the law of evidence for him to raise the issue during the argument of the motion.

8. It is not sufficient to merely make an allegation; the allegation must be proved.

9. All admissions by a party or his agent, acting within the scope of his authority, will operate against the party.

10. A failure to comply with the requirements for the completion of an appeal within the time allowed by statute for such completion shall be ground for the dismissal of the appeal.

11. The failure of an appellant to file an approved appeal bond and to file and serve a notice of the completion of the appeal within the time allowed by statute deprives the appellate court of jurisdiction and is therefore cause for the dismissal of the appeal.

12. The filing of a notice of completion of the appeal beyond sixty days is a violation of the statute and a ground for the dismissal of an appeal, unless the last day for filing is on a Sunday or a national holiday, in which case the notice shall be filed on the next business day.

Following the rendition of a judgment against him by the judge presiding in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, the appellant appealed to the Supreme Court for a review of the case. Thereafter, the appellee filed a motion in the Supreme Court, praying for the dismissal of the appeal, and contending that the Supreme Court lacked jurisdiction over the case and the person of the appellee because (a) the notice of the completion of the appeal had been filed beyond the sixty day period prescribed by statute; (b) the notice of completion of appeal was defective, in that it failed to state the term of the Court to which the appeal was taken; (c) the notice of completion of appeal was served by an employee of the appellant's counsel instead of the sheriff of the trial court; and (d) the notice of the completion of the appeal was not returned by the sheriff of the trial court.

On the question of whether the sheriff of the trial court should have served the notice of the completion of the appeal and make returns thereto, the Court held that the new Civil Procedure Law requires that the appellant, rather than the sheriff, makes service of the notice on the appellee, and that accordingly the requirement for returns to be made by the sheriff as to the manner of service has been replaced by the signing on the face of the notice by the appellee confirming that he has knowledge of the completion of the appeal. The Court noted that the cases relied upon by the appellee in support of his contention have been superseded by the new Civil Procedure Law which now imposes the burden on the appellant rather than the sheriff, removing thereby the "middle-man bureaucracy". The Court therefore did not sustain the said contention advanced by the appellee.

The Court, however, sustained the contention that the notice of the completion of the appeal was filed on the sixty-third day, three days beyond the sixty days allowed by the statute for the service and filing of the notice. The Court noted that this was a violation of the statute and that the violation deprived it of jurisdiction over the case. The Court rejected the appellant's argument that the last day for filing of the notice was declared a public holiday and that under the statute he was allowed to file the notice on the next business day, noting that the appellant had failed to present any evidence of the alleged holiday and that in any event the notice was required to be filed before the date which the appellant claimed had been declared a holiday. The Court observed that the requirements of the appeal statute were mandatory and that a failure to comply therewith was ground for dismissal of the appeal. Accordingly, it ordered the appeal dismissed.

Flaawgaa Richard McFarland of the Flaawgaa Richard McFarland Legal Services appeared for the appellant. George S. B. Tulay appeared pro se, along with Forma Sheriff of the Tulay and Associates Law Firm for the appellee.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

This motion was filed by Appellee George S. B. Tulay praying the Supreme Court to dismiss an appeal taken by Appellant Renney Pentee from a final judgment rendered against said appellant on November 17, 1998 by the Civil Law Court, Sixth Judicial Circuit, Montserrado County, presided over by its resident circuit judge, His Honour Wynston O. Henries.

The motion contained nine (9) counts and raised three issues attacking the validity of the appeal. In counts 3 and 4, the appellee contended that the final judgment was rendered on

November 17, 1998 and the bill of exceptions filed on November 27, 1998 (i.e. within 10 days as required by law), but that the notice of completion of appeal was not filed until January 19, 1999, instead of January 17, 1999, as required by law. Therefore, appellee said, the Supreme Court lacked jurisdiction over his person.

In count five (5), the appellee contended that the notice of completion of the appeal was materially defective, in that it failed to state the term of the court to which the appeal was taken. Hence, he said, the appeal should be dismissed.

In count 6, the appellee contended that the notice of the completion of the appeal was served on him by an employee of the appellant's counsel, instead of the sheriff of the trial court. Accordingly, he asserted, the service was defective and war-ranted the dismissal of the appeal.

Finally, the appellee contended in count 7 of the motion that the notice of the completion of the appeal was not returned by the sheriff of the trial court and, hence, the appellate court had not acquired jurisdiction over the case and the parties to the case.

In his response and counter-argument, the appellant prayed the Court to deny the motion and to hear the appeal on its merits because, appellant said, he had complied with the appeal statute, especially section 51.4. The appellant did not controvert or deny the appellee's contention that the appellant's notice of the completion of the appeal was not filed until January 19, 1999. In fact, the appellant admitted in count four of the resistance the appellee’s claim as to the date of the filing and service of the notice of the completion of the appeal, but made no further comment on the issue.

On the question of the notice of completion of appeal not stating the term of the Supreme Court to which the appeal was taken, the appellant contended in count 6 of the resistance that the only function of the notice of the completion of the appeal was to inform the appellee that the appeal had been completed. The appellee asserted also that at the time of rendition of the final judgment in the Civil Law Court, the counsel deputized by the court to take the said judgment for the appellant, excepted to the judgment and announced an appeal to the Supreme Court, sitting in its March, A. D. 1999 Term. As such, he said, the announcement by the counsel was sufficient notice to the court and the appellee as to the venue and term of the appellate court to which the appeal was taken.

Appellant further contended that the two cases cited and relied on by the appellee, i.e. Tuan and Tuan v. Republic, 13 LLR 3 (1957), and Norwhere v. Korkor, 13 LLR 8 (1957), respectively, were decided by this Court in 1957, prior to the enactment of the New Civil Procedure Law in 1973. Hence, he said, the statute takes precedence.

In count 7 of the resistance, the appellant admitted that the notice of the completion of the appeal was indeed served on the appellee by an employee of the appellant's counsel but con-tended that such service was in keeping with the appeal statute which provides that a copy of the notice of the completion of the appeal shall be served by the appellant on the appellee and the original filed in the office of the clerk of the trial court. The appellant asserted that the cases cited and relied on by the appellee did not relate to the case at bar and were decided by the Supreme Court before the New Civil Procedure Law was enacted in 1973. Hence, he noted, the statute takes precedence.

The appellant, in his brief, submitted only one basic issue to be decided by this Court. That issue is "whether or not the appellee's motion to dismiss is in accord with section 51.4 of the Liberian Civil Procedure Law, enacted in 1973. If the motion is supported by the appeal statute, then the motion must be granted; if the motion is not supported by the appeal statute, then the motion must be dismissed."

The appellant argued that this motion was not supported by the appeal statute and must therefore be dismissed. On the other hand, the appellee essentially challenged the jurisdiction of the Supreme Court over the case and the parties, firstly, because the sheriff did not serve the notice of the completion of the appeal on the appellee and thereafter make returns as to the manner of service, and secondly, because the notice of the completion of appeal was served beyond the statutory period of 60 days.

The Court shall first consider whether or not the statute requires that the sheriff of the trial court must, as a matter of necessity, serve the notice of the completion of appeal on the appellee and make returns as to such service. The relevant provision of the statute states that "after the filing of the appeal bond, as required by sections 51.7 and 51.8, the clerk of the trial court, on the application of the appellant, shall issue a notice of 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." Civil Procedure Law, Rev. Code 1:51.9.

From the language of the statute quoted above, it is clear that the duty to have a copy of the notice of completion of the appeal served on the appellee is squarely placed on the appellant. The language is clear and unambiguous, and needs no interpretation or further comment. The cases cited and relied on by the appellee were decided in 1957, which was 16 years before the enactment and publication of the new Civil Procedure Law in 1973.

Moreover, the statute, having been enacted subsequent to the cited cases, even if the reverse or converse were true, would still take precedence or be accorded preference over the cited cases because case law is always subordinated to statutory enactments. In addition, even though the Supreme Court held in the cited cases that the duty to serve the notice of completion of appeal and make returns thereto was that of the sheriff, the statute provides that a copy of the notice of the completion of the appeal shall be served on appellee by the appellant. Because that decision is in conflict with the present statute, the conflict must be resolved giving credence to the statutory mandate, and we hold to that effect.

Obviously, any service by a ministerial officer requires that returns be made in confirmation or certification of the service. But the present statute does not require that service of the notice of completion of appeal be made by a ministerial officer. The Court is therefore in agreement with appellant's contention that the service of the notice of the completion of the appeal by an employee of the counsel for the appellant was in harmony with the requirements of section 51.9, cited supra, and that such service constituted no error for which the appeal should be dismissed.

It should be noted that in the past, when the previous Civil Procedure Law was in effect, the sheriff was required to serve and make returns to the notice of the completion of the appeal, and therefore there was no specific duty imposed on the appellant to have the said notice served and returned served. Yet, the Supreme Court held at the time that it was the responsibility of the appellant to superintend the service of and the making of the returns to

notice, and the failure or reluctance of the appellant to compel or ensure the service of and filing of returns to the notice by the sheriff warranted the dismissal of the appellant's appeal.

The Legislature in their wisdom decided to remove the "middle-man bureaucracy" and place the responsibility directly on the appellant to locate the appellee and to ensure that the actual performance of the service of the notice on the appellee was done by the appellant, so that if there was any neglect or failure, the appellant would have no one to blame but himself. Under the old law, wherein the sheriff was the one to effect the service, the appellant usually argued that he could not be held responsible for a ministerial function not imposed on him, but this was rejected by the Supreme Court which thought and held otherwise.

That is why, because the duty to effect service of the notice of completion of the appeal is now imposed on the appellant, the returns of the sheriff as to the service has now been replaced by the signature of the appellee on the face of the notice of completion of the appeal. The signature of the appellee confirms appellee's knowledge of the completion of the appeal.

The next issue, which is equally or even more important, relates to appellee's contention that the notice of completion of appeal was served 63 days after the rendition of final judgment by the trial court, contrary to the statutory requirement of 60 days. The Court observes that in the resistance, the appellant admitted that he served the notice of completion of appeal on the appellee on January 19, 1999. Although in his brief the appellant did not address that issue, his counsel in his argument before the Court asserted that January 18, 1999, the day on which appellant should have filed his notice of completion of appeal, was spontaneously declared a national holiday by the President of Liberia, thereby preventing him from filing his notice of completion of appeal. The counsel argued therefore that because the last day for filing the notice of completion of appeal was declared a national holiday, his time to file the said notice was extended to the next business day, which the appellant fulfilled by the service and filing of the notice.

In counter argument, the appellee contended that the appellant's admission that the notice of the completion of the appeal was filed on January 19,1999 and not on January 17, 1999, operated against him. Appellee argued further that the assertion by the appellant that January 17, 1999 was declared a holiday by the government was not supported by any evidence and should therefore not be given credence.

Finally, appellee argued that the appellant was not acting in good faith and was attempting to mislead the Court, in that the notice of the completion of the appeal was dated January 15, 1999 and that as the said notice of completion of appeal was ready prior to the last day that the appellant had to file the same, he should have simply filed it on the said January 15, 1999, the day on which it was signed by the clerk of the trial court. He asserted further that the notice of the completion of the appeal, being dated January 15, 1999 and not filed until January 19, 1999, leaves the rational mind with two thoughts: (a) that it was indeed ready and signed on January 15, 1999, but through neglect it was not filed; or (b) that the date of January 15, 1999 was merely typed on the document but that it was actually prepared and signed by the Clerk on a later date, more likely on January 19, 1999 when it was really filed. If the first option is true, he said, then one wonders why the appellant did not simply file it with the clerk that same day and then locate appellee and have him served? The appellee therefore concluded that the foregoing showed an attempt to confuse and mislead the Court.

Appellant argued, on the other hand, that January 18, 1999 was his last day to file his notice of completion of appeal and that since the day was declared a holiday, his time to serve it was thereby extended to the next working day. There are two parts to this contention. First, is it true that January 18, 1999 was the last day for the appellant to file and serve his notice of completion of appeal? The final judgment was rendered on November 17, 1998 and sixty (60) calendar days from that date, as per the statute, would have been January 16, 1999, calculated as follows:

No. of days in month of final judgment (November) ...30

Less date of final rendition November ....17.

No. of counted days in November ....13.

No. of days in next whole month (December)................31

Total No. of counted days in 1998 44

Remaining No. of days to complete statutory period...16 (January 16, 1999).

No. of days in statutory period 60

Therefore, appellant's contention that his last day should have been January 18, 1999 is mathematically unfounded. Our appeal statute is clear and mandatory. See Civil Procedure Law, Rev. Code 1:51.7 and 51.9.

Assuming arguendo that January 18, 1999 would have been the 60th day, hence the last day for the appellant to have filed and served his notice of completion of appeal on appellee, he has not establish that said January 18, 1999 was in fact declared a national holiday by the government. Firstly, the appellant did not raise the matter in his resistance to the motion to dismiss or in his written brief; rather, the claim was made only during the oral arguments, which act violated the law of evidence. Moreover, it was not sufficient to merely make an allegation; the person making the allegation is required to prove it. See Civil Procedure Law, Rev. Code 1:25.5 and 25.6, Burden of Poof and Best Evidence, 1 LCLR 198.

Lastly, on this issue, the appellee pointed out that the appellant had clearly admitted in the resistance and oral argument that the notice of the completion of the appeal was not served and filed until January 19, 1999. There is no more comment to be made on this as our law is clear that all admissions by a party or his agent, acting within the scope of his authority, will operate against him. See Civil Procedure Law, Rev. Code 1:51. 1 LCLR 200.

Our appeal statute is mandatory and inflexible. It states: “Failure to comply with any of these requirements within the time allowed by statute shall be ground for dismissal of the appeal."See Civil Procedure Law, Rev. Code 51.4., Requirements for Completion of Appeal. 1 LCLR 249.

This Court has held that the failure of an appellant to file an approved appeal bond and to serve and file a notice of com-pletion of appeal deprives the appellate court of jurisdiction and is cause for dismissal of the appeal. See Marh v. Sinoe, [1978] LRSC 58; 27 LLR 320 (1978), Syl. 1, text at 324-326.

The Court, having established that the notice of completion of appeal should have been filed and served by the appellant on the appellee on or before January 16, 1999 (i.e. 60 days after final judgment), but that said notice of completion of appeal was not filed until January 19, 1999 (i.e. 63 days after judgment), which is contrary to the statute, it is accordingly left with no other alternative but to dismiss the appeal, and we so hold. In dismissing the appeal, we note that the motion finds support in the appeal statute as well as opinions of this Honourable Court. See ADC Airlines v. Sannoh, [1999] LRSC 11; 39 LLR 431 (1999) decided January 22, 1999, October Term 1998. Also, Dutch Bank (Ducor Trading and Commercial Bank) v. Mathies, Sethi et al.[1999] LRSC 28; , 39 LLR 606 (1999), decided May 12, 1999, during the March Term, 1999.

Wherefore, and in view of the foregoing laws, facts and circumstances, it is the ruling of this Court that the appellee's motion being supported by law, the same is hereby granted, and the appellant's appeal, not having been perfected and completed within the time allowed by law, is hereby dis-missed for lack of jurisdiction in the Supreme Court. The trial court's judgment is ordered enforced. Accordingly, the Clerk of this Court is hereby ordered to send a mandate to the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, commanding the judge presiding therein to resume jurisdiction over the case and enforce that court's final judgment rendered on November 17, 1998. Costs are ruled against the appellant. And it is hereby so ordered.

Motion granted; appeal dismissed.